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ORIGINAL ARTICLE

Justifying and practising effective participation in the Court of Protection: an empirical study*

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ABSTRACT

Under the Mental Capacity Act 2005 in England and Wales (MCA), the participation of persons in making decisions that affect their lives is embedded within the legislation and has also been addressed directly in Court of Protection (CoP) rules and guidelines. Nonetheless, various studies and reports have indicated a potential gap between practice on the ground and the participatory aspirations of the MCA. This article presents an analysis of semi-structured interviews with 56 legal professionals (lawyers and retired judges) specializing in mental capacity law to examine how they envisage the substantive meaning and function of the effective participation of individuals who are found to lack decision-making capacity (P). The study reveals deeper legal and ethical justifications behind why P's participation matters and also suggests that interpersonal barriers, relating to communicating and engaging with P, can hinder its realization in practice.

1 | INTRODUCTION

The Court of Protection (CoP) within English law has historically been a specialist court devoted to making determinations related to mental capacity and best interests for individuals with potential impairments of the mind.[1] The Mental Capacity Act 2005 in England and Wales (MCA) established the current formulation of the CoP, as well as formalizing through Section 4 the requirement to facilitate the participation of individuals who are deemed to lack capacity to make the relevant decisions at the time that they need to be made. Individuals who are found to lack decision- and context-specific capacity (P) are subject to best interests decision making, in accordance with considerations outlined in Section 4 of the MCA. This section stipulates that the best interests decision maker must, 'so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him'.[2] The MCA thus establishes the significance of persons participating (where possible) in decisions, which extends to legal proceedings when cases come before the CoP and, according to the MCA *Code of Practice*, there is a duty to 'maximise' the decision-making participation of individuals.[3]

These participatory imperatives have particular relevance within socio-legal research that has highlighted the importance of accommodations, special measures, and ground rules hearings to ensure that individuals and witnesses who are deemed vulnerable are able to participate effectively and meaningfully in court, and thereby secure the fairness and legitimacy of the legal process.[4] Historically, however, the participation of P in the CoP has been uncertain in practice. While judicial meetings with P (and P's attendance at hearings) were not unusual within the 'old' CoP,[5] these features were not established or prioritized in the 'new' Court that took its place. Series and colleagues note that the consultation around the Draft Court Rules in 2006 referenced little beyond the model of children's involvement in family proceedings, with no discussion of whether, or how, judicial meetings with P ought to take place or be practically facilitated.[6] Developments to accommodate greater participation in the CoP evolved only as responses to human rights cases that stressed the 'rule of personal presence',[7] where 'judges adopting decisions with serious consequences for a person's private life, such as those entailed by divesting someone of legal capacity, should in principle also have personal contact with those persons'.[8] The lack of attention given

[1] J. Weston, 'Managing Mental Incapacity in the 20th Century: A History of the Court of Protection of England & Wales' (2020) 68 *International J. of Law and Psychiatry* 101524.

[2] MCA, s. 4(4).

[3] MCA *Code of Practice*, s. 1.2, at <https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice>.

[4] P. Cooper and M. Mattison, 'Intermediaries, Vulnerable People and the Quality of Evidence: An International Comparison of Three Versions of the English Intermediary Model' (2017) 21 *International J. of Evidence & Proof* 351; J. Easton, *Death in Custody: Inquests, Family Participation and State Accountability* (2020); J. Jacobson and P. Cooper (eds), *Participation in Courts and Tribunals: Concepts, Realities and Aspirations* (2020); A. Ruck Keene et al., '"Special Measures" in the Court of Protection' (2016) 6 *Elder Law J.* 62.

[5] As one retired judge with experience in the 'old' CoP highlighted in our study, this provision for judicial visits was within the Lunacy Regulation Act 1853. In his words, 'it was just a way of seeing the person, introducing myself, and making them feel less anxious. We used to sit around a table rather than have a formal court stage-setting. Again, this is something that's happened since the MCA's come in, which is in a way a shame' (RJ1).

[6] L. Series et al., *The Participation of P in Welfare Cases in the Court of Protection* (2017).

[7] *Lashin* v. *Russia* (Application No. 33117/02) [2012] ECHR 63, para. 82.

[8] *X and Y* v. *Croatia* [2011] ECHR 1835, para. 84.

to policy and practice on P's participation may also reflect the reality that the bulk of decisions made for and about P and their participation occur *outside* the CoP, by health and social care professionals.

Nonetheless, P's participation within the confines of the CoP warrants closer inspection, not least due to a historical genealogy that attests to its present-day problematic accommodation through ambiguous guidance provided for lawyers and judges. Though P has formal legal representation in court through an accredited legal representative (ALR) or the Official Solicitor (thus, legal representatives will often have met with P and ascertained their views), their participation is also explored in supplementary guidelines. In 2015, amendments to the 2007 CoP Rules included 'the opportunity [for P] to address (directly or indirectly) the judge determining the application, and if so directed, the circumstances in which that should occur'.[9] Clarity about the role of P's participation was supplemented by new CoP Rules in 2017, which identify practical circumstances in court proceedings in which P's participation should be enabled,[10] and *Practice Direction 1A: Participation of P*, also published in 2017.[11] In addition, non-statutory guidance has been produced. Guidelines issued by Charles J in 2016 laid out very practical steps for involving P in court proceedings and, for the first time, these guidelines included specific information about the judge meeting P.[12] The 2016 guidelines were supplemented in 2022 by Hayden J, with an explicit focus on judicial visits to P, following a statement of the legal requirements associated with these visits identified in the Court of Appeal case *Re AH*.[13] In this judgment, the Court reasoned that Hayden J's decision may have relied on illegitimate evidence gathering based on a visit with P:

> First, it is strongly arguable that the Judge was not equipped properly to gain any insight into AH's wishes and feelings from his visit. Her complex medical situation meant that he was not qualified to make any such assessment. If the visit was used by the Judge for this purpose, the validity of that assessment might well require further evidence or, at least, further submissions. Secondly, to ensure procedural fairness, the parties needed to be informed about this and given an opportunity to make submissions.[14]

This ruling once again brings to the fore critical questions about the legal function and purpose of P's participation, particularly enacted through the prism of judicial meetings. Though the Court of Appeal and the 2022 Guidance clarify that judges should not be gathering evidence in such meetings,[15] this is at odds with the direction of travel in the human rights context, where the European Court of Human Rights (ECtHR) has specified the 'rule of personal presence' as

[9] Court of Protection (Amendment) Rules 2015, No. 548 (L.6), 3A(1)(d), at <https://www.legislation.gov.uk/uksi/2015/548/article/5/made>.

[10] Court of Protection Rules 2017, No. 1035 (L. 16), 1.2, at <https://www.legislation.gov.uk/uksi/2017/1035/article/1.2/made>.

[11] *Practice Direction 1A: Participation of P* (2017), at <https://www.judiciary.uk/wp-content/uploads/2022/09/pd-1a-participation-of-p.pdf>.

[12] Charles J, *Facilitating Participation of 'P' and Vulnerable Persons in Court of Protection Proceedings* (2016), at <https://courtofprotectionhandbook.files.wordpress.com/2016/11/practice_guidance_vulnerable_persons.pdf>.

[13] *Re AH* [2021] EWCA Civ 1768.

[14] Id., paras 71–72.

[15] Hayden J, *P, Official Judicial Visits to (Guidance)* [2022] EWCOP 5.

including the 'evidential principle' in proceedings around legal capacity and deprivation of liberty.[16] Furthermore, despite this history of legislative imperatives, rules, and guidance, research has highlighted a gap between practice on the ground and the participatory aspirations of the MCA. For example, Series and colleagues have identified that significant barriers to P's participation persist due to lack of access and reasonable accommodations, both procedurally and substantively.[17] Moreover, Lindsey's empirical study of the CoP highlighted potential attitudinal barriers (that is, paternalistic orientations based on the presumption of P's putative vulnerability) that prevent P's full participation in line with existing guidance.[18]

The gap between the guidance and CoP practice suggests the need for greater clarity regarding the participation of P from the perspective of legal practitioners and judges. As part of a larger empirical study examining CoP values, the *Judging Values and Participation in Mental Capacity Law* project undertook research to explore how legal practitioners and retired judges specializing in mental capacity law understand the *substantive meaning* and *function* of P's effective participation. Interestingly, and as will be detailed, a consensus among legal practitioners and retired judges emerges, as they generally coalesce around a common ethical rationale for why participation matters in the CoP – namely, the imperative towards 'putting P at the centre of proceedings'. In so doing, our findings provide new insight into the more implicit, interpersonal barriers to participation, such as failures in establishing a connection and communicating effectively with P.

Section 2 outlines the study design and methodology. Section 3 presents core themes from the data, where CoP practitioners and retired judges share some common views regarding the *normative justification* for P's effective participation, the *constituent features of* such participation, and the *barriers* to its enactment. The significance and limitations of these findings are discussed in Section 4. The article concludes with directions for future research.

2 | METHODOLOGY

Semi-structured qualitative interviews were conducted with legal professionals across England and Wales.[19] Of the total of 56 participants, 44 were legal practitioners, including barristers, solicitors, and other relevant practitioners. The other 12 participants were retired judges. We sampled purposively to ensure that the legal practitioners selected for interview possessed a recognized specialism, or had significant experience, in mental capacity law. Our original intention was to interview both sitting and retired judges. However, we submitted to the Judicial Office a proposal

[16] Evidence gathering is an important aspect of access to justice from a human rights perspective: see E. Flynn, *Disabled Justice? Access to Justice and the UN Convention on the Rights of Persons* (2016). Modelling participatory practice for P around that of children in the Family Court has led to a problematically contrary ethos to that of empowerment and P-centricity, which purportedly guides the CoP: see P. Case, 'When the Judge Met P: The Rules of Engagement in the Court of Protection and the Parallel Universe of Children Meeting Judges in the Family Court' (2019) 39 *Legal Studies* 302. There are also analogous debates surrounding the lack of evidential and legal weight attached to the participation of children in the Family Court, despite children often stating their wish to be influential in decisions regarding their best interests and the outcome of proceedings: A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018).

[17] L. Series et al., op. cit., n. 6.

[18] J. Lindsey, 'Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection' (2018) 28 *Social & Legal Studies* 450.

[19] The collective term 'legal professionals' or 'professionals' is used to denote a group of participants that includes both legal practitioners and retired judges. When attributing quotations, 'legal practitioner' is abbreviated to 'LP' and 'retired judge' to 'RJ'.

with a narrowly defined focus on participation, which was turned down due to the fact that this focus was situated within a broader study about values. Hence, our sample only included retired judges. We identified those judges who had extensive experience of adjudicating mental capacity disputes, either through their role as judges in the CoP or as judges who had overseen mental capacity cases in the High Court or the appeal courts.[20]

Our recruitment strategy involved, first, compiling an initial list of the barristers and solicitors across chambers and firms whose listings detailed their specialism in this area of law. Second, given that the relatively small number of practitioners who specialize in CoP practice are well known to each other, we shared this list with two barristers working alongside the research team to ascertain whether there were any obvious errors or omissions. Furthermore, to ensure a representative sample, participants were chosen to ensure extensive geographical reach (throughout England and Wales), representation of specialization (that is, health and welfare and/or medical treatment and/or property and affairs), and representation of different parties in a CoP case (that is, P, family members, and public and commissioning bodies). We also identified a list of all retired judges who met our inclusion criteria above from details provided in published judgments. Again, we shared this list with the same two barristers supporting the project to identify any obvious errors or omissions. We obtained individuals' contact details from team members, our advising barristers, and advisory board, and sent them initial information about the study to ascertain if they would be interested in participating. We continued to recruit further participants across both groups until data saturation was reached.[21]

At all stages of data collection, we sought to ensure that the sample was broadly representative of age, experience, gender, ethnicity, and court setting. The topic guide for legal practitioner interviews was finalized after an initial piloting phase with two practitioners. A similar but separate interview topic guide was prepared for retired judges on the basis of the uniqueness of their role of deciding mental capacity cases. In our final analysis, practitioner and judicial groups have been treated as two components of a comprehensive data set, as our iterative analysis did not reveal notable thematic differences in their respective accounts, despite amendments to the interview schedule to accommodate their divergent legal functions. However, in the presentation of data below, we commonly distinguish between the insights obtained from these two groups due to the distinctive perspectives that they offered from their particular standpoints.

An inductive method of thematic analysis was adopted, deploying three distinctive, but progressive phases, modifying slightly the step-wise approach that has been documented for this analytic approach.[22] (1) Inductive, line-by-line coding of transcripts generated initial codes. The data corpus for each phase of interviews was coded in its entirety, with no limits set in relation to the number of initial codes. (2) Multidisciplinary analysis of initial codes searched for emerging themes by adopting the methods of memo writing and the production of graphical representations within a thematic map. (3) Themes were reviewed, defined, and named through a comparative analysis of relevant codes under each theme. Themes and sub-themes were re-sorted, and further memos were prepared to provide a coherent summary of how coded data within all of the themes provided unique analytic insight. Analysis in each phase was aided by the CAQDAS

[20] We defined non-CoP retired judges with sufficient experience of mental capacity law cases as those who had heard at least three published cases in this area of law.

[21] B. Saunders et al., 'Saturation in Qualitative Research: Exploring Its Conceptualization and Operationalization' (2018) 52 *Quality & Quantity* 1893.

[22] V. Braun and V. Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77; M. E. Kiger and L. Varpio, 'Thematic Analysis of Qualitative Data: AMEE Guide No. 131' (2020) 42 *Medical Teacher* 846.

programme ATLAS.ti. To develop our thematic understanding, we selected participants and analysed data iteratively, enabling refinements to be made to our recruitment strategy and the interview topic guide in light of emerging analytic insights from previous phases. At the conclusion of the final iterative stage, the research team unanimously agreed that data saturation had been reached.

Questions about the effective participation of P – its value, meaning, and practices – were part of a more extensive interview topic guide that explored the role of values in CoP decision making and practice, but formed their own discrete section which subsequently generated standalone empirical insights.[23] Data collection occurred between June 2019 and December 2020, thus prior to the *Re AH* Court of Appeal decision and subsequent guidance by Hayden J, as well as concluding just as remote hearings were starting to be used as common practice due to the COVID-19 pandemic. Though practice may have changed in light of these developments, interviews generated salient overarching thematic insights that have given structure to Section 3 below.

3 | FINDINGS

The overarching theme that emerged from data analysis captures the multiple ways in which respondents interpreted effective participation as interwoven into the ethos and practices of *putting the person at the centre* of CoP proceedings. This can be further broken down into three overlapping sub-themes surrounding the (1) *justification* (ethical and legal grounding) for, (2) *enactment* of, and (3) *barriers* to effective participation.

3.1 | Justification for effective participation

3.1.1 | The ethical grounding

Study participants commonly presented their rationales for effective participation as part of the importance of situating P at the centre of proceedings. This emphasis was often expressed through the presumption of legal professionals that one's practice ought to reflect a P-centric orientation, leading to interconnected *intrinsic* and *instrumental* ethical rationales for P's participation. The difference between these two justificatory strategies was subtle; the intrinsic justification understood participation as *constitutive* of P-centric professional and ethical orientation, while the instrumental justification operationalized participation as a *means towards* that P-centric aim (that is, as a mechanism towards better or more optimal outcomes for P). Often, however,

[23] The section on participation in the topic guide comprised semi-structured prompts, designed to allow for follow-up questions based on responses:

1. What do you think it means for P to participate effectively?
2. What are your experiences of judges meeting with P? For judges: Please tell me about your experience of meeting P directly. What was it like and why was it significant/insignificant? For judges who had not met with P: What are your views about judges meeting P?
3. What is the legal practitioner's/judge's role in supporting the effective participation of P?
4. What, if anything, inhibits the participation of P? What supports could be used to foster the effective participation of P?

participants moved between both forms of justification because of their purported grounding in P-centricity.

Intrinsic justifications express the view that the legal process is *for* and not just *about* P, such that P's participation is seen as a component part of a more general professional and ethical orientation that places the person at the centre of proceedings. One participant captured a common perspective:

> Generally, [effective participation is] just about making sure that they are actually part of the process. This is not a thing that is done to them. This is their case about them, and they have to be at the absolute centre of everything that's done. (LP17)

This was echoed by a retired judge in his view that 'it should be presumed that P is in the centre of things and P always, always, has a place at the table, in the court' (RJ1). Though most participants understood this to be a core requirement of the MCA, they also spoke of a deeper ethical justification around what is owed to P – commonly discussed as an inchoate duty to adopt a more 'human' viewpoint – which was encapsulated in one participant's approach to managing P's finances:

> [W]e'd be breaching the Mental Capacity Act if we didn't allow them to participate. But then the legal side [. . .] as well – you've got to look at it from a human perspective and think 'What is the point in managing somebody's finances if there's not a person at the centre of it?' (LP32)

For respondents, the ethical case for P's participation was closely bound up with a duty to highlight P's individuality, such that the court engages with P not as a detached object of concern but as a *meaningful human subject* in proceedings. This mode of engagement led to an emphasis on tailoring the meaning of effective participation to the needs of individuals rather than what a few participants characterized as a preoccupation with 'procedure', 'process', or a 'tick-boxing' exercise of tasks to fulfil (LP15). Indeed, one legal practitioner made an interesting juxtaposition between the respective value of process- and person-driven CoP proceedings, suggesting that getting to know P in a deeper sense was connected to their effective participation because 'it just feels that it's more about a person, rather than just a process. And I think it has to be that, for it to have any kind of real value as a process' (LP20). Another legal practitioner drew a further distinction between the outcome associated with P's participation and the intrinsic value of meeting P; the CoP as a 'human jurisdiction' makes it 'about a human being, and meeting that human being is never going to do anything but be beneficial. It may not change [the judge's] decision, but it makes it person-centred' (LP39). Participants thus perceived such engagement with P to encourage a more holistic understanding of P that would subsequently establish a constant reference point for those involved in proceedings.

The participation of P was thought to help legal practitioners and judges to become alive to the strength of P's convictions, wishes, and feelings. Indeed, for many, this process of deepening knowledge of them as a person was viewed as coextensive with showing respect for the individual and, in turn, putting their wishes and values at the centre:

> I think [effective participation] means, in whatever way possible, that P's voice comes through in the proceedings. So, even if they can't physically be there or meet with the judge, it is just making sure that they are at the centre of it, and it is their wishes and

> their values that are really at the front and centre of everything that everyone is doing. (LP20)

For some participants, this would manifest itself when interactions with P ground decision making in important ways, particularly in confronting judges with the weight of their role as ultimate decision maker and the impact of that on another human being:

> I think what really is important is how [...] persuasive individuals can [sometimes] be even though they lack capacity and it's really important to see the strength of their conviction. Because it then draws it back to the central premise, which is that you're making a decision on behalf of another human being. And I think when you see somebody in person or virtually and preferably in person, which historically hasn't tended to happen that much, though that's another matter entirely, but when you see somebody, it then brings home on a human level what you're doing as a judge. (LP38)

The instrumental justification for P's participation, by contrast, was presented as revolving around its potential impact on the outcome or decision-making process. These responses overlapped with intrinsic forms of justification, particularly in the view that by showing deliberative respect to P – by involving them in the process and discussing the reasoning of one's decision making – the outcome, and particularly P's receptivity to this outcome, might improve. In other words, the intrinsic value of respecting P was viewed as overlapping with the instrumental value of creating a better outcome for P:

> Enabling P to buy into the decision making is valuable in itself, both for P in reducing feelings of being ignored, and for the court in informing a best interests decision. Again, it is important to manage expectations. 'I can't promise to do what you want but I do want to be clear about what it is that you do want ...' Even where the final decision is not initially attractive to P, the effort of trying to involve P is likely to be illuminating and is often (it would seem) generally appreciated. (RJ10)

Other respondents highlighted ways in which P's participation and involvement in the process could make the outcome more palatable or understandable to P, even if it ran contrary to their wishes. One legal practitioner stated:

> I think with a lot of Ps it helps to meet the person who is making this decision. Someone is making a really important decision about your life, and, whether you agree with that or not, having met that person, I think it inevitably helps process the outcome of that decision. (LP39)

This view was echoed by a retired judge, who stated how his practice to always meet and speak with P was 'helpful because even if I made a decision which was not what they wanted, the feedback that I got often was "Well, that's not what I wanted, but I understand why"' (RJ11). Another legal practitioner illustrated this overlap clearly with an example where the judge arranged to see P at the court and explained what they had decided. At the meeting, P was highly dismissive:

> [The judge responded] 'Well, it may be, but that's my decision. And I've come to see you and to explain that to you.' And that was a positive experience for her. Because although she didn't agree with the decision, and she hotly disputed it, she accepted

> it on another level because she had an explanation from the decision maker. Which I think is another means of participation, if you like. (LP30)

Equally, some responses were more overtly instrumental in their understanding as to why the participation of P mattered, particularly its value in terms of generating substantive outcomes – that is, placing greater emphasis on P's wishes and feelings. First, P's participation was thought to improve the decision-making process, as a deeper understanding of P – their level of functioning, wishes, feelings, and values beyond the paper evidence – could help to influence the substantive outcome of proceedings. One legal practitioner noted an example of how seeing P in person could help to challenge the paper evidence and alter the final decision of the judge:

> I was representing her – on paper, the way the local authority made her sound was as if she was a reckless, foolish, stupid girl. It came across strongly that she should not be allowed to go out and do this. She wanted to meet the judge, and I think that, before he met her, he had read [the paper evidence] [. . .] He had formed a view that she did need the restrictions in the DoLS [Deprivation of Liberty Safeguards] at the level that were be proposed. I think after he met her, as often is the case when you meet somebody in real life, your view can rapidly change. I think that he did, that she was a lot more high functioning and, therefore, [the judge] placed more emphasis on her wishes and feelings because she seemed closer to the line of capacity than not. (LP34)

Another legal practitioner saw such a meeting as a tactical decision, to potentially help to sway the judge's best interests decision making in favour of P's wishes and feelings:

> I would always see if we could bring the person to court, because it makes the judge's decision much harder when you are there in front of the judge, who's thinking 'Shall I go against what they want?' [. . .] So, not just tactically, but I think in reality – well, actually, I suppose it works both ways. It depends which way your best interests decision is going. [Laughter] It can either make the case beautiful if they're there, because you can give them what they want. If that's to go home, then they'll be delighted and everyone goes home happy, whereas if the best interests decision is swaying against their wishes and feelings, then it makes it a much harder decision when you're confronted with the person on whose behalf a decision is being taken. So, I think it makes it much more authentic, but also it probably improves the quality [. . .] of the judicial best interests decision, because it's the reality. It's like 'There's Bill sat at the back of court. He wants to go home. Are you really going to keep him in this care home against his will?' [. . .] [I]t's much easier to disrespect someone on paper than in person. (LP35)

Retired judges further confirmed the ways in which a meeting with P might change the material outcome of the decision. One judge stated that

> those are the cases where I always like to see P because if there was uncertainty, I sometimes find it really helpful to go and see P and see what the position was. There was certainly one case [. . .] where my view about what was in P's best interests completely changed from when I'd been to see him. (RJ11)

Another judge cited an example of how his general impression of P had led to requests for further evidence:

> One such lady [. . .] insisted on driving herself to court, managed to park, and simply walked into the appointment and stayed throughout – (even though she had been diagnosed with [cognitive disability] some three years before). I remember being sufficiently surprised by my conversation with her that I made urgent directions about the medical evidence, and – at a further hearing of multiple applications by P's [family members] – I recorded that all parties [. . .] had accepted this further medical report. So I declared [. . .] that P had the capacity to decide where she might live, with whom she had contact and whether she wished to institute divorce proceedings; I therefore further declared that the court had no jurisdiction to make determinations in relation to such matters. (RJ10)

3.1.2 | The legal grounding

While the data indicated a strong consensus among participants regarding the ethical justification for P's participation, more interesting to note was its more contentious *legal grounding* – specifically around appropriate interpretation of the jurisdictional division between Sections 1 and 4 of the MCA and the formal evidential function of judicial visits with P, the latter of which is particularly salient in light of *Re AH*.

One retired judge explicitly questioned the legal grounding of P-centric justifications for effective participation through his interpretation of the MCA, where rightfully supporting P to make a capacitous decision[24] was understood to be clearly distinct from making a best interests decision on behalf of P:[25]

> It's that distinction which I think gets lost in the mantra 'P is at the centre of the decision making, P must participate'. But you're standing back and you're saying 'Why is P participating?' 'P's wishes and feelings must be elicited . . .' It all goes back to the reasoning process. Why are you actually doing this? You're not doing it to help P make a decision themselves, which is completely different – you're past that. If you're helping P make a decision themselves, you've got to talk to them. You can't do it any other way, can you, if you're supporting P to make the decision. If you're not and you're making the decision for P, you're doing something completely different. (RJ2)

This retired judge also expressed concerns about how this justification could inadvertently create unrealistic expectations in P, giving them the impression that they are the ultimate decision maker or that it is the judge's role to accede to P's wishes:

> When you've actually got to the stage where you have someone with a lack of mental capacity to make the decision and who is very vulnerable and can get very excitable, an approach that puts pressure on them in respect of the decision in a way that makes them or implies that they're decision maker is counter-productive [. . .] When the Court of Protection is actually engaged with P and is not deciding capacity, by definition P cannot make the decision themselves and is not the decision maker. (RJ2)

[24] MCA, s. 1(3).

[25] Id., s. 4.

Interestingly, a legal practitioner expressed similar concerns about representatives using judicial meetings to arrogate responsibility to P:

> Well, I think it should be an honest discussion, so there should be a legitimate purpose in that meeting taking place, whatever that might be. I don't think this is entirely fair, but I sometimes think that those representing P use this as a 'Well, if you tell the judge what you want, then …' It somehow takes some of the responsibility off them in the case. 'Earlier, you saw the judge […] but [now] there's nothing more we need.' (LP25)

Judicial caution regarding the legal justification for P's participation, particularly in best interests decision making, was reiterated in a barrister's response, highlighting the longstanding confusion regarding the evidential function of P's participation through meetings with the judge. Despite holding the view that judges meeting with P in capacity or borderline disputes was 'essential' due to limitations of expert evidence and the fact of the judge being the 'final arbiter', the legal practitioner stated:

> It tends not happen for that reason […] [I]n cases where it is borderline, judges don't tend to see P simply to get more evidence because I think they feel more potentially open to challenge perhaps if they rely on that, which is unfortunate. (LP38)

Here, the practitioner presciently notes that judicial decisions that rely on P's information from a face-to-face meeting are perceived to be vulnerable to appeal due to the contentious nature of the evidential and indeed, legal, justification for such a meeting.

By contrast, other respondents seemed to suggest that the legal requirement to make a decision on behalf of P, in fact, exposed the limitations of more traditional forms of paper evidence:

> I think when the judges meet P, they […] get to see […] how well some of them actually function, because I think sometimes the evidence almost does them a disservice in terms of the local authority's approach to […] trying to justify why P needs to be in a particular place. To meet them, it puts a completely different spin on things. (LP24)

For many participants, a judge's direct meeting with P was thought to be an invaluable source of information for a better outcome. In particular, it was stressed that a meeting can (1) resolve uncertainty about what P's position actually is; (2) assist the judge in borderline capacity cases; (3) when attending P's placement, help the judge to understand what is happening on the ground and better identify with and grasp P's feelings about that placement; and (4) assist the judge to understand P's *reaction* to a particular outcome (this reaction being a 'circumstance' to consider in best interests decision making) by actually witnessing the strength of P's wishes and feelings in person.

3.2 | Enactment of effective participation

Legal practitioners and retired judges highlighted different dimensions of ways in which P's effective participation might be enacted, extending the practical requirements that they identified as following from the ethical justifications outlined above. Two sub-themes were prominent here:

(1) meaningful interpersonal engagement with P, and (2) practical and creative strategies to realize effective participation.

3.2.1 | Meaningful interpersonal engagement with P

This dimension of enacting effective participation was viewed as an extension of the ethical imperative to treat P as a meaningful human subject, where participants thought that face-to-face contact between P, legal representatives, and/or judges was an important way of enacting P's effective participation. More specifically, a greater sense of deliberative respect[26] towards P was thought to be an inchoate effect of seeing and encountering P face to face. It was in this sense that participants suggested that the enactment of effective participation could be independent of the decision-making outcome. One legal practitioner stated:

> I think it's really valuable that they both see the whites of each other's eyes. The really good conversations that I see between judges and P are when the judge says 'Well, I've got to decide where you're going to live, and different people are telling me different things. It's my decision – not your social worker's, not your mum's, not yours. It's mine, and it's a very serious decision that I have to make on your behalf, so what would you like to tell me?' I think that's very simple and empowering, and stripping it right back to what it is. I think that's very valuable. (LP26)

Participants provided examples of various other practical strategies that they thought could meet this overarching ethical goal, such as P sitting in proceedings, meeting their representatives at court, P meeting with the judge (alone or in front of some or all of the other parties), and the judge meeting P at their placement.

However, responses also provided nuanced explanations as to how the *quality* of the interaction, as opposed to meetings in and of themselves, facilitate P's participation, where legal practitioners emphasized the need for genuine engagement with P rather than it merely being a 'tick-box' exercise. One practitioner stated:

> [T]he quality is more important than the quantity. There was loads of quantity. I think everybody patted themselves on the back and said 'Well, she's always in court, she's always seeing the judge, she's had every opportunity to say what she feels' but I just feel, actually, the quality of the interaction, in reality, was quite poor. (LP25)

[26] The concept of 'deliberative respect' stems from philosophical debates around the substantive versus non-substantive conditions of liberalism and deliberative democracy: see M. J. Sandel, 'Review of *Political Liberalism* by John Rawls' (1994) 107 *Harvard Law Rev*. 1765. We remain agnostic towards these larger debates but loosely adopt Sandel's definition, which captures a sentiment and orientation that underlies many participant responses – namely, the expression of respect towards persons through engaging with, attending to, and learning from their convictions, even if this does not lead to agreement or consensus. Sandel writes: 'To the extent that our moral and religious disagreements reflect the ultimate plurality of human goods, a deliberative mode of respect will better enable us to appreciate the distinctive goods our different lives express' (id., p. 1794). The theoretical prism of deliberative democracy has been invoked in jurisprudential analyses of judicial review: see for example C. F. Zurn, 'Deliberative Democracy and Constitutional Review' (2002) 21 *Law and Philosophy* 467.

Another drew attention to the potential harm that could be caused if quantity becomes the focus:

> I think this is linked to participation: being interviewed and asked by professionals again and again and again, not always about the decision, but sometimes 'We want some further information, so we need another medical report on this, and we need another medical report on that. Now, we need an OT [occupational therapy] assessment.' I've certainly done a case where I've just thought 'I feel like this is now abusive'. (LP29)

Importantly, the meaning of 'quality', meaningful, or genuine engagement remained vague. For one legal practitioner, it was bound up with a kind of responsiveness to P, an ability 'to react to what the person is saying [. . .] which at least has to guide the approach [legal professionals] take in the case' (LP31). For other participants, genuine engagement could be expressed through a range of inchoate 'soft skills' not typically associated with the legal profession. Examples of these include sensitivity to P's well-being, emotional distress, and psychological triggers, and the ability to build rapport and trust with P. The view was that, to facilitate P's participation in accordance with its ethical justification, legal practitioners and judges need to make themselves real to P; in other words, developing the human connection is not only to humanize P to legal professionals, but also to *humanize legal professionals to P*.

Interestingly, the importance of more implicitly valued interpersonal skills was often illustrated by examples in which they were absent. Two quotations by legal practitioners are notable in this regard:

> I'm afraid there are too many examples with judges who don't take the time to engage with the person of P [. . .] [I]f you've seen and got to know P, you think that the way the judge is approaching the case would just be so different if only the judge just stopped and took half an hour to sit and talk about inconsequential things with P, just to build a bit of rapport and then started to understand something different. Perhaps the problem is that the skillsets that we value as lawyers don't necessarily include that type of social work soft skills. (LP36)

> There are one or two [judges] who are lovely, but on the whole, if I'm being honest, I find them too remote. They're too arm's length, generally, from P. They use far too complicated language [. . .] They seem, on the whole, incredibly unreal to P [. . .] Not like real people. They're almost like caricatures. Yes, I'm not impressed with the majority of them, if I'm really honest – there are very few who are just OK [. . .] I wish they'd just act bloody normal, instead of sitting there saying 'I've got to make a decision about where you reside'. (LP34)

Participants further understood sensitivity to P's needs as including awareness of the possibility of P not being involved in the court process or not meeting with the judge due to the distress that it might cause, particularly as the courtroom setting was recognized to be intimidating and overwhelming for many individuals. In other words, operationalizing these soft skills might mean recognizing that further involving P in the hearing may actually be harmful to their well-being:

> You know, you definitely have to be really mindful of the fact that because he is more engaged, whenever there is a hearing coming up, his anxiety levels go up, his

> challenging behaviour goes up. He is really nervous, so the incidents where perhaps his need to be restrained increase. They are all really negative things that you have to be really mindful of on balance, but yes, it's a really important case about him. (LP17)

> [A] lot of Ps feel that the judges are going to make the decision right there and then based on speaking to them and they get frustrated and this is another extreme where someone presented with challenging behaviour and then they had a really bad episode afterwards, after seeing the judge. The judge was mortified obviously. (LP38)

Many other participants readily presumed that judicial meetings with P – though not necessarily equivalent to, or wholly constitutive of, effective participation – could nonetheless be a powerful way of expressing the deliberative respect owed to P in judicial decision making as well as the duty to treat P as a meaningful human subject in CoP proceedings. A face-to-face encounter with P could have a reciprocal impact, benefitting both P and the judge as ultimate decision maker. Since a physical encounter with P was thought to be profoundly different from reading about them on paper, such meetings were seen to offer valid ways of fostering human connection and foregrounding the individuality of P in the decision-making process:

> [Y]ou learn about P. You learn more about that person and how they are, and you hopefully build a rapport with them and [you] are able to connect with them on a human level. I think that just helps. It can't do anything other than improve your knowledge and understanding of the person that you are making a decision about. (LP39)

Importantly, participants thought that this rapport or connection with P needed to be framed within a broader ethical and legal purpose to be properly 'meaningful'. Absent of this broader purpose, interactions with P – no matter how affable – could revert to being a 'tick-box' procedure:

> [W]hen we took [XX] to court, I don't think it was a particularly useful meeting. It didn't go badly, but I don't think the judge was asking her the right sorts of questions. He was just being chummy with her. He was seeing it, I think, probably, as a bit of a tick box, as a 'I've met P', but I don't think he got anything from that. (LP15)

While many presumed that meetings with P were key to fostering meaningful engagement, a few participants were sceptical that judicial meetings with P were effective, particularly as this way of involving P could inadvertently lose sight of the individual and the purpose at hand:

> P has met the judge; therefore, P has participated. I think that's too easy to then focus on the procedure of it rather than actually thinking about 'For this specific person, in this specific case, with all these other people around them, how can they effectively participate?' (LP15)

3.2.2 | Practical strategies

For legal practitioners and retired judges, this normative emphasis on P's participation as a means of getting to know P in a holistic sense, particularly through direct contact and

meetings, highlighted the importance of a range of diverse strategies that demonstrated attunement to the emotional, psychological, and communicative needs of the individual. Several participants emphasized that, because the substantive meaning of effective participation was person specific, the strategies to enact P's participation should also be tailored to the individual. This adaptiveness extends to practical matters (such as how information is provided to P to ensure that they remain informed throughout the process), but also to creative strategies about the best ways of generating a holistic picture of P and helping them to express their views. Two core practical strategies revolved around *communication* and the *location of the meeting*.

First, respondents thought that creativity in terms of communication was vital to ensure that P was given space and opportunity to express their own views. One retired judge spoke at length about the need to 'think outside the box' and 'be inventive' beyond verbal communication (RJ11). For example, in having to decide whether P should reside independently in a supported living placement or return to live at home with his parents, the judge asked P to draw a picture of where he would like to live and P drew himself in a house with his parents outside it. When the judge used this drawing to explore P's views, P was able to explain that his parents were not in the house as they would only be visiting him. The judge subsequently concluded that it was in P's best interests to reside in independent supported living accommodation. One legal practitioner also stated that doing an activity with P might be a creative way of facilitating P's communication:

> I think, if the judges are willing to, you can also try to be a bit more creative and think about whether they'll have a better conversation if they're doing something together, rather than just sat down in a courtroom, trying to have a discussion. (LP15)

Second, flexibility about the location of meetings with P was another commonly cited practical strategy. One retired judge believed that 'judges should be absolutely prepared to go [to P's placements], in all humility, to make the human contact' (RJ9). According to one legal practitioner, direct meetings may be better supported, more comfortable, and more meaningful for P if they take place within P's own surroundings:

> If it's possible for the judge to see the person in the placement, then that's great because they'll probably be more comfortable meeting the judge there. The judge gets to see what's going on. It tends to be much more informal, and the quality, if you like, or the conditions of the conversation are probably optimal. (LP35)

Participants noted that the additional benefit of being in P's usual environment was that it would help to put P in context, providing intuitive impressions that might otherwise remain overlooked and 'build[ing] a picture for the judge' (LP37):

> I think, just by going to see her and picking up how she is in her current placement has been very, very useful for him, even though she's not that communicative. He can form an impression. Sometimes you can get … I don't want to use the word, which is a little bit nebulous, but 'vibe' – the vibe of how it was, rather than reading on paper 'She hates it. She's not happy there. He's a horrible son.' (LP34)

3.3 | Barriers to effective participation

While practical strategies for effective participation were numerous, respondents also mentioned certain practical, logistical, and procedural barriers to P's effective participation that parallel those discussed elsewhere[27] and include limitations such as court proximity and time pressures. In addition, the formality, theatre, and physical context of court proceedings were also seen to be substantive barriers. One legal practitioner recounted this experience:

> I recall [P] who came to court […] [I]t was all a rather boring room and she was very tired – she'd been waiting a bit because the journey was longer for them. And she was really frightened […] She put her hand up and said 'Am I going to prison?' […] [H]er association of courts was prison, no matter how many people had told [her otherwise]. And I said 'What on earth has led to a scenario in which this lady has been brought out of the comfort of her day-to-day existence to here and for some artificial construct of what we think [P's] participation should be?' (LP13)

Beyond the putative impact of P's background expectations of the legal process, three analytic ideas emerged as being particularly prominent in further understanding barriers to effective participation: (1) *judicial refusal to meet with P*; (2) *interpersonal and communicative barriers*; and (3) *lack of clarity and transparency*. The barriers that were identified were consistent with participants' normative emphasis on P-centricity and meaningful engagement with P as both justification for and constitutive of participation, with personal contact with P viewed as one of the primary mechanisms for enacting participation understood as such.

For many legal practitioners, judicial refusal to meet posed clear barriers to P's participation. One practitioner suggested that this barrier stemmed from disagreement regarding the legal justification for P's participation, where judicial reservations revolved around a lack of clarity regarding the evidential function of such a meeting (as discussed above):

> I mean, I have had some judges where they have refused to meet with P, and they are really difficult to overcome, actually, because you sort of have an argument with the judge, or they don't like meeting with P privately because they think that that meeting goes against the principle of it all being open and then rehearing everything. (LP37)

Notwithstanding the contentious legal function of the meeting, judges' refusals were perceived by some participants as violating what they saw as the broader normative ethos of effective participation in terms of P-centricity and deliberative respect in CoP proceedings:

> The judge, he was kind of getting at: 'I haven't made up my mind yet, obviously, because we're waiting for the final hearing, but I don't …' Essentially saying 'Why would I spend time coming out and seeing this person when we all know what's going to happen at the end of the day?' and struggling to explain that. OK, first of all, you've made up your mind without meeting him. [Laughter] Secondly, even if it doesn't change your mind, there's a value still in this: him feeling involved in being

[27] Series et al., op. cit., n. 6, pp. 56–136.

> able to meet the person who's making a decision about his life, whereas I think other judges are much more open to that. (LP15)

Legal practitioners also suggested that P's participation could be prevented through interpersonal and communicative barriers, even in instances when practitioners and judges do meet with P. Indeed, practitioners' and judges' personal anxieties or their lack of experience/confidence contributed to interpersonal barriers between themselves and P. One legal practitioner explained how judges' anxieties about meeting P could negatively impact P's participation as well as hinder good decision making:

> If you're a judge, you know you've got to deal with all sorts of things going on, so you've got to deal with people storming out of court, and you've got to deal with bursting into tears, and you've got to deal with calling you rude names, and you've got to deal with litigative [people], and they are I think trained in how to deal with all that sort of stuff. So, they must get training in that. I'm not aware of [whether they get, but] they certainly should get, training in how to deal with people with mental health problems. So that they feel 'This is somebody I'm happy to have in my court'. Rather than 'This is somebody I would quite like to think of a reason to exclude from the court, and I'm really happy to agree that it's in their best interests they don't come to court. They have come to court, I am now slightly anxious, so I'm sitting through all the proceedings, just slightly anxious, because they're there.' None of those are things that are going to help that judge make a good decision or send out the right message. (LP11)

Respondents also spoke of a lack of soft skills – that is, open communication as well as attunement and sensitivity towards P's verbal and non-verbal cues. These skills, combined with a personalized approach to communication, were seen as particularly important to address P's anxieties and confusion around the court process. The absence of these skills could exacerbate distress or anxiety. One legal practitioner gave an example of how they had to interrupt a judge who was not 'pausing for breath' as they were aware that their client would become quickly overwhelmed (LP34). A common theme was the complete lack of formal specialist training for both legal practitioners and judges that could help them to develop the communicative skills necessary to facilitate P's effective participation.[28] One practitioner had arranged 'ad hoc training' at their firm, but said:

> [A]s standard, there is nothing [. . .] [T]here is not this basic level of training you have to have. We all just kind of make it up as we go along. You read a bit and you speak to different people, and you try and do your best, but I definitely think that training would definitely help. (LP17)

The lack of specialist training for judges was also notable:

> [J]ust before our meeting started, I did go onto the Judicial College website, to see if there is any particular training for Court of Protection judges. I was rather surprised to

[28] This issue is not confined to the CoP. A recent study of employment tribunals revealed almost no evidence of legal practitioner training on interviewing witnesses to prepare witness statements: M. Mattison and P. Cooper, 'Witness Statements for Employment Tribunals in England and Wales: What Are the "Issues?"' (2021) 25 *International J. of Evidence & Proof* 286.

> find that there is none, and there was none when I became a [CoP] judge. Somebody just simply said to me 'Would you mind sitting in the [CoP] in [Place]?' [...] So there was no specific training. I just had to learn the process on the hoof, as it were, applying the normal standards of judging that I was doing elsewhere [...] I think it would have assisted me enormously to have had the normal kind of induction training that I had for being a criminal judge, family judge, and a civil judge, and also ongoing training too – what we call refresher courses. (RJ7)

The prospective harm to P resulting from the absence of focused training on specialist communication tools was also noted:

> I'd really like some training from a good SALT [speech and language therapist] about how to speak to people [...] Makaton and using other kind of communication aids – it would be really great if we were able to do that a bit. Or just very clearly understand what our limitations are, so that we don't file an attendance note with the court saying 'I met them and I think this'. Even if you can say 'We need to get an expert SALT involved', or 'We need to get a Section 49 report for a SALT', or something, then [...] there's value in that as well. Yes, and I just worry about whether we're ever damaging [P] by sending people who are not trained to talk about these issues [...] especially in cases where they're really upsetting issues [...] I wouldn't expect to sit down with somebody with capacity and ask them about the most traumatic, deepest, personal things in their life, and take a note of it and then tell people about it. Yet somehow we do with people where that communication is even more difficult and needs to be done even more sensitively. (LP15)

The failure of legal practitioners to make communication person specific and adopt creative strategies was thought by a few participants to lead to difficulties in eliciting and ascertaining P's views as required by the MCA. One interviewee stated:

> I think it's really overlooked a lot in our work, actually: the value of speech and language therapy and various aids – pictorial, visual [...] [T]here's a whole raft of tools and means by which one can elicit more information than we are doing [...] I think we are missing such a lot in what people's values are, what their wishes and feelings are. All of that comes through communication. Also, lots and lots of people are really not sophisticated in their approach to people, for example, with autism, which is much more prevalent than people realize. That's a very significant barrier, sometimes, to open communication. (LP34)

Finally, participants spoke of how a lack of clarity and transparency – particularly about the function of meetings and what to expect from legal proceedings – was also a barrier to P's effective participation. Lack of transparency was illustrated in numerous examples: the failure to have honest and transparent conversations with P about the purpose of the proceedings and their role, as well as the role of the legal practitioner/judge; the failure to manage expectations and keep P informed about the progress of a case; and the failure to provide P with all of the right information as well as the necessary structural supports to ensure their understanding.

4 | DISCUSSION

The data presented show how, for legal practitioners and retired judges, the meaning and enactment of effective participation in the CoP is closely bound up with a normative commitment to P-centric practices. Whether P-centricity is realized in practice is separate to the aspiration that professionals themselves articulate in these accounts, and a different methodology would be required to test it in practice. However, it is important to note that this ethical rationale for effective participation – which stresses the need to ensure that P is engaged with as a meaningful subject and treated with appropriate respect – by and large extends the more constrained legal justification concerning fair and due process as expressed in *Re AH*.

Enacting this ethical rationale also brings to the fore what legal professionals saw as the significance and power of the face-to-face encounter with P, where it was thought to have a reciprocal impact insofar as legal professionals would experience the 'weightiness' of their role and/or decision, and P would be shown due respect as an individual. These data are highly resonant of the 'dignity principle', which justifies the rule of 'personal presence' in the ECtHR and the common law tradition. As Series and colleagues discuss, according to this rationale, the consequences of the decision for the person warrant their participation within proceedings as well as their meeting with the judge.[29] Respecting the dignity of the person through effective participation likewise has a long genealogy under the common law, where the Supreme Court in *Osborn* v. *The Parole Board*[30] cited the eighteenth-century *Dr Bentley's case*, which drew an analogy between a prisoner's right to an oral hearing and the biblical account of Adam having a hearing with God.[31] As a result,

> [t]he principled basis of the rule of natural justice conferring the right to be heard is the dignity of the individual and the potential impact of the decision on individual rights, not the improvement of the quality of the decision.[32]

We see a similar rationale in our data, particularly in relation to intrinsic justifications for P's effective participation in CoP proceedings.

It is interesting to note that CoP policy appears to confirm aspects of our data but also moves in a direction that seems contrary to this long common law and human rights tradition that links the dignity of participation with positively impacting the outcome of decisions. In the 2022 Guidance, there is a strong emphasis on the ethical dimension of P's participation, suggesting that it is in 'rare instances' that 'a judicial visit may simply be driven by respect for P's dignity' and '[s]ometimes, it will be neither more nor less than a signal of respect'.[33] Yet *Re AH* and the Guidance both caution against such participation disproportionately impacting on the outcome. Our data suggest that this ethical justification is already at the forefront for many legal professionals and could arguably carry even greater weight in the post-*Re AH* landscape, especially given the decidedly limited legal function of such judicial visits as outlined in the Guidance, reflected in the prohibition on

[29] Series et al., op. cit., n. 6, p. 51.

[30] *Osborn* v. *The Parole Board* [2013] UKSC 61.

[31] *Dr Bentley's case* (1723).

[32] Series et al., op. cit., n. 6, p. 52.

[33] Hayden, op. cit., n. 15, para. 5.

evidence gathering and any implicit discretionary influence on judicial decision making that may result from such visits.

The procedural safeguards that are stressed in the *Re AH* judgment possess a double-edged quality.[34] On the one hand, the emphasis on adherence to procedural mechanisms may be perceived to be both welcome and necessary – not least to mitigate the lack of transparency, which our study participants identified as a potential barrier to P's effective participation, as well as accusations of unjustifiable discretion on the part of judges. Explicit prohibitions on judges treating meetings with P as opportunities to gather evidence may very well be crucial safeguards against judicial reliance on intuitions, based on comparatively superficial and short face-to-face encounters.[35]

On the other hand, our data also underline prospective dangers in veering too far in the opposite direction; with no legal status attached to P's information provided in judicial meetings, P's participation through such meetings risks becoming tokenistic at best. While there is no denying the importance of procedural safeguards, *Re AH* and the 2022 Guidance may inadvertently privilege the professional evidence and knowledge that, as empirical work shows, may itself stem from the impressionistic intuitions of health and social care practitioners who know little of or have barely met with P.[36] This is not to defend poorly evidenced conclusions or decisions based on cursory meetings, but merely highlights that regardless of *who* is meeting with P, information that is provided in those meetings – like all evidence – must be treated holistically and carefully substantiated in light of submissions from family members and others who do know P. In this sense, the requirement for additional submissions if new insights are gleaned through judicial meetings is vital. As we discuss below, it also makes training of judges and legal practitioners critical.

While there is clearly a strong legal heritage and rationale to the commitment to 'personal presence', emphasis on the 'quality' of engagement with P seems to push the formal boundaries of legal professionalism, where interpersonal, putatively extra-legal soft skills were seen to be constitutive features of realizing the effective participation of P such that, without them, participation might be impeded substantively. This point suggests that respondents were alive to and reflexive about certain distinctive features of the CoP – notably, the fact that P might have special sensitivities and communication needs, and that the CoP processes themselves can be disempowering, alienating, and frightening, particularly in the absence of these skills.

The emphasis on soft skills is significant for two reasons in this regard. First, it highlights a slight contradiction between the legal and extra-legal boundary at the heart of effective participation in the CoP – one that, we would argue, remains unresolved with *Re AH* and the 2022 Guidance. The importance of extra-legal skills and the expression of the humanizing imperative that lies behind the ethical rationale of effective participation could be seen as attempts to compensate for a legal context and process that can sometimes be dehumanizing and contrary to this ethos. As we see in the unresolved disagreement in our data regarding the formal evidential basis of meetings with P, the legal status of P's participation can have an uneasy relationship to what our participants thought was entailed in engaging with P in a substantive, non-trivial manner. The lack of clarity about the evidential and legal function of meeting P can also have an impact in terms of providing transparent, clear information to P and helping to manage expectations about the court process. It might be that these issues around the specific *legal* function of judicial meetings with P will find clearer resolution given recent legal developments. However, our data

[34] *Re AH*, op. cit., n. 13, paras 78–79.

[35] Thanks to one of the reviewers for pushing us on this point.

[36] See C. Kong et al., 'The "Human Element" in the Social Space of the Courtroom: Framing and Shaping the Deliberative Process in Mental Capacity Law' (2022) *Legal Studies* 1.

nonetheless pose the difficult question of whether the ethical imperative behind the participation of individuals is sustainable, or becomes impoverished, in the face of little or no formal legal weight being attached to such meetings.

The porous boundary between ethical and legal functions of effective participation echoes recent socio-legal findings in other courts. For example, Jacobson and colleagues note a similar ambiguity in criminal and family courts and employment, immigration, and asylum tribunals.[37] The legal professionals in their study likewise spoke of a normative commitment to ensuring that court users could participate and were treated with 'courtesy, respect and kindness'.[38] However, as Jacobson writes, 'observations also shed light on the profound limits to participation by individuals whose powerlessness and disadvantages are laid bare in the courtroom'.[39] Judicial proceedings did not simply entail the *telling* of the court users' stories, but also their *translation* into legal questions and legal answers – and [. . .] this was a process which often had the effect of silencing and marginalising court users.[40]

Observational work in the CoP highlights similar limitations in CoP procedures, where the legal status of P's evidence has clear tensions with the ethical imperative to secure P's effective participation,[41] despite the core principles espoused by the MCA and our own participants' depiction of the CoP as an intrinsically 'human jurisdiction'. While we would suggest that further work would need to support the claim that this amounts to forms of epistemic injustice (as per Lindsey),[42] such tensions highlight the fluid and contestable boundary between the legal and extra-legal obligations that are bound up with ensuring P's participation in the CoP and are potentially exacerbated through the explicit prohibition on evidence gathering in judicial visits in *Re AH* and the 2022 Guidance.

Second, and more specifically, the emphasis on soft skills reveals the crucial preparatory and attitudinal groundwork that is vital *prior* to actual meetings with P, enabling professionals to be prepared, comfortable, and reflective about their own barriers or anxieties. Absent of these abilities, meetings with P may in fact be a barrier to their effective participation. Work on effective participation thus far has tended to focus on explicit legal rules, requirements, and adjustments,[43] looking within the law to invoke legal processes that are more inclusive to vulnerable individuals. Yet, our findings indicate how professionals themselves view the realization of effective participation as bound up with qualities *beyond* the formal constraints of the law or legal procedure – with the cultivation of less formalized abilities that show their own 'human side' and exhibit attunement to the needs and sensitivities of P through vital communication skills and tools. This

[37] Jacobson and Cooper (eds), op. cit., n. 4.

[38] J. Jacobson, 'Introduction' in id., p. 1, at p. 2.

[39] Id.

[40] J. Jacobson, 'Observed Realities of Participation' in Jacobson and Cooper (eds), op. cit., n. 4, p. 103, at pp. 103–104, emphasis in original.

[41] Lindsey, op. cit., n. 18.

[42] Id. Lindsey utilizes Fricker's framework of epistemic injustice as the analytical lens for her empirical study, but we ourselves do not analyse our data through this theoretical prism.

[43] See for example P. Cooper and J. Grace, 'Vulnerable Patients Going to Court: A Psychiatrist's Guide to Special Measures' (2016) 40 *BJPsych Bull*. 220; F. Gerry and P. Cooper, 'Effective Participation of Vulnerable Accused Persons: Case Management, Court Adaptation and Rethinking Criminal Responsibility' (2017) 26 *J. of Judicial Administration* 265; G. Hunter, 'Policy and Practice Supporting Lay Participation' in Jacobson and Cooper (eds), op. cit., n. 4, p. 19; A. Owusu-Bempah, 'The Interpretation and Application of the Right to Effective Participation' (2018) 22 *International J. of Evidence & Proof* 321.

research reiterates the view that a more rounded training and education programme for lawyers is vital for effective professional practice; scholarship on legal education has argued that equal importance should be afforded to the teaching of emotional intelligence as to the teaching of skills of legal argumentation and analysis.[44] It is especially notable, for example, that lawyers or judges working in the CoP are provided with no formal professional training about learning disabilities, autism, or other cognitive impairments, or the crucial communication skills that might be required to facilitate the participation of P, such as SALT tools, despite their need being widely acknowledged among our participants.[45] The inchoate nature of these soft skills, however, does raise critical questions as to the extent to which they might be taught, given that other dimensions of our study indicate that some prior grounding in specific motivational, evaluative, and characterological orientations may be necessary.[46]

Our study has three limitations. First, it focused on the perspectives of legal professionals and the account presented here reflects a picture of effective participation through this prism accordingly. It may be that the P-centric aspiration embedded in effective participation falls short in practice. Nonetheless, that legal practitioners and retired judges referred to a normative vision of effective participation is valuable insofar as it brings to the fore more implicit attitudinal and orientational constituents of effective participation, thus representing a contribution to the socio-legal work on the CoP and effective participation in the law more generally. However, the absence of observational work and the perspectives of Ps themselves reflects an inevitable limitation to the study and highlights the need for future research to explore how Ps and their family members experience CoP processes. Triangulation with observational work would further enrich our understanding of participation in the CoP to illuminate prospective gaps between the normative vision of P's effective participation and real-life practice. Second, the absence of sitting judges from the sample is another limitation. The perspectives of sitting CoP judges will be important to advance work in this area, though significant practical governance constraints may hamper this line of inquiry. Third, our data collection was just concluding as remote hearings were becoming the norm due to COVID-19, and the pandemic has now made meeting persons virtually in their placements standard practice, potentially mitigating issues around court proximity. Future research would need to explore the impact of remote hearings on P's participation – specifically the ways in which technology may be changing the normative conception of effective participation within the CoP and the benefits and disbenefits associated with these changes. It would be particularly interesting to consider whether the perceptions of legal professionals have changed, given their emphasis in our study on the importance of physically seeing P face to face.

5 | CONCLUSION

As Cooper notes, common barriers to participation for most court users arise from the complexity of the law and the language of the courtroom; the emotional price of being in a hearing about

[44] J. E. Montgomery, 'Incorporating Emotional Intelligence Concepts into Legal Education: Strengthening the Professionalism of Law Students' (2007) 39 *University of Toledo Law Rev*. 323.

[45] CoP practitioners can however turn to online resources such as training films and communication toolkits for advocates: see for example Birkbeck, University of London, 'Communication and Participation in the Court of Protection' (2021) *YouTube*, at <https://youtu.be/WuEtw2rnqBw>; *The Advocate's Gateway* (2012–2022), at <www.theadvocatesgateway.org/toolkits>.

[46] Kong et al., op. cit., n. 36.

conflict, loss and disadvantage; and the often wide social, cultural and educational disparities between most court practitioners and most court users as individuals.[47]

In the CoP, there is the additional perception that when judges deny P a meeting, this negatively impacts P's effective participation. It is possible to speculate about the justification for refusal of a meeting with P; it may be motivated by concerns that a meeting might do harm to P, may be of no purpose because of P's lack of capacity, may be of ambiguous evidential status, and so on. However, surely the more fundamental issue is what value a meeting and other forms of P's participation has, and for whom. Cooper rightly notes that research involving court users in general is much needed[48] – and the CoP is no exception, where further study must seek to understand how P and their family members experience participation. The limitations of this study signpost the direction for future investigations; such research should prioritize the inclusion of the perspectives of P, their family members, and practising judges, as well as observations of the participation-enhancing/-diminishing skills deployed by judges and legal practitioners in practice.

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[47] P. Cooper, 'Looking Ahead' in Jacobson and Cooper (eds), op. cit., n. 4, p. 141, at p. 168.

[48] Id.