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Mental Capacity Bill: Assessing the Costs

Paper 1 of 5

On 8 June 2015 the Mental Capacity Bill (the Bill) was introduced in the Assembly. To facilitate Assembly consideration of the costs arising from the Bill, this Briefing Paper is the first in a five-part series produced by RaISe's Public Finance Scrutiny Unit (PFSU). The Paper provides a framework to orientate financial scrutiny of the Bill.

Introduction

On 8 June 2015, the Mental Capacity Bill (the Bill) was introduced in the Assembly by the Minister of Health, Social Services and Public Safety – the lead department for the Bill. The Bill contains 295 Clauses, creating **97 enabling powers** for either the Department of Health, Social Services and Public Safety (DHSSPS) or the Department of Justice (DoJ), to introduce subordinate legislation. Current departmental financial information sets out the Bill's estimated costs, including both those costs that the departments describe as required for the Bill's implementation, as well as some that will arise *following* implementation.¹

This Paper provides a framework to orientate the Assembly's financial scrutiny of the Bill. First it discusses fundamental challenges to assessing departmental estimated costs regarding this Bill. Thereafter it highlights those estimated costs, including those relating to subordinate legislation that is intended to follow this Bill. Scrutiny points are noted throughout.

The Paper is presented as follows:

- Section 1 explains the general scope of the proposed enabling powers and the nature of the subordinate legislation that is to follow.
- Section 2 highlights the significance of Assembly procedure in the context of considering the Bill's financial impact;
- Section 3 addresses the currently available departmental financial information regarding the Bill, which include some estimated costs resulting from the subordinate legislation;
- Section 4 provides examples of the Bill's enabling powers for the purposes of illustration and discussion about potential financial implications; and,
- Section 5 provides concluding remarks.

As noted earlier, this Paper is the first in a series of five. Papers 2-5 will address the individual cost areas in more detail. They will focus on specific elements of the Bill's provisions and comment on 'cost drivers'² related to those provisions, which have been identified by departments. They will address:

- Paper 2 - Staff Training;
- Paper 3 - Deprivation of Liberty Assessments;
- Paper 4 – Miscellaneous Recurrent Costs that will arise annually following initial implementation, such as the costs of providing independent advocates; and,
- Paper 5 - the proposed Office of the Public Guardian, the Review Tribunal and anticipated Judicial Reviews.

¹Letter from DHSSPS to RaISe, 3 June 2015

² 'Cost drivers' are simply those factors that cause costs to occur, CIPFA (2003) 'Financial and Performance Reporting'

1. The Bill's proposed enabling powers for secondary legislation

The 97 proposed enabling powers in the Bill will empower either the DHSSPS or the DoJ to make subordinate legislation. Generally speaking, most of the enabling powers will empower the relevant department to introduce regulations that will specify:

- what things must/should be done – for example, the process for assessing whether an individual has or does not have capacity;
- the persons who must do certain things – for example, provide a report;
- how such things should be done – for example, what information must be provided in that report and to whom;
- when certain things must be done – for example, how often an individual must be visited; and or,
- where certain things must be done – for example, to list places where an individual may be taken for their own safety.

In addition, other enabling powers are much broader in scope. For example, Clause 288 of the Bill empowers the relevant department “*to make transitional and other regulations that are relevant.*”³ Indeed, the Bill as introduced in the Assembly provides that such regulation “*includes provision which amends or modifies any statutory provision (including this Act).*”

The DHSSPS and the DoJ have compiled schedules listing the enabling powers under each part of the Bill.⁴ (For reference, these schedules are provided as a separate document to this Paper.) The schedules reveal that the vast majority (up to 87%) of the proposed enabling powers will need to be exercised, and secondary legislation enacted, if the Bill is to fully implement the new mental capacity regime.

The schedules also show where an enabling power is discretionary, and may be used at a later date - see Table 1 below:

Table 1: Secondary legislation to be made under the Bill⁵

Required for implementation?		
Yes	No	Yes/No
81 (84%)	13 (13%)	3 (3%)

As can be seen, the DHSSPS and the DoJ have identified the vast majority of secondary legislation as necessary for implementation of the new regime, with three powers classified as ‘yes/no’ where there currently is departmental uncertainty.

³DHSSPS Table of Regulations, row 34

⁴Letters to RaSle from DoJ, 18 August 2015 and from DHSSPS, 3 June 2015

⁵ Source: PFSU calculations based on DHSSPS and DoJ Tables of Regulations

Scrutiny points:

- 1. Why did the DHSSPS and the DoJ decide to frame the Bill in a manner that requires the vast majority of it to be implemented through subordinate legislation?**
- 2. When will the DHSSPS and the DoJ bring forward drafts of the proposed secondary legislation to the Assembly?**

2. Significance of Assembly procedure

As noted above, the detail to implement the proposed mental capacity regime is to be done *via* secondary legislation, following the enactment of this Bill.

This secondary legislation will be subject to either:

- ‘Negative resolution’, meaning a proposed statutory rule is made by the relevant department and comes into operation automatically, unless annulled by the Assembly within a statutory period.⁶

Although there is a degree of Assembly scrutiny of secondary legislation made under this procedure, it is of a completely different order of magnitude from the scrutiny that is possible during the Assembly stages of a Bill.⁷

or,

- ‘Draft affirmative resolution’, meaning a proposed statutory rule cannot be made before it is approved in draft by resolution of the Assembly.⁸

In other words, the law cannot come into operation until the Assembly has expressly voted to say that it can. This means that the level of Assembly scrutiny may be greater than under the negative resolution procedure.

Even so *Deconstructing Legislation* explains that:

*A debate on a draft affirmative motion is significantly less effective as a method of scrutiny than consideration of the provisions of a Bill.*⁹

The below Table 2 highlights that the vast majority (78%) of the secondary legislation to be proposed under the Bill would go by negative resolution as opposed to draft affirmative resolution:

Table 2: Assembly procedure for secondary legislation to be made under the Bill⁹

Draft Affirmative	Negative resolution	Draft Affirmative / Negative
17 (18%)	76 (78%)	4 (4%)

For this reason, it is important to note the significance of Assembly procedure in the context of assessing the financial implications of this Bill. It is clearly foreseeable that procedure will constrain the extent or degree to which the Assembly scrutinises subsequent subordinate legislation.

⁶see <http://www.legislation.gov.uk/apni/1954/33/section/41>

⁷ Committees in Westminster in particular have complained that negative resolution provides only minimal opportunity for scrutiny. See <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/109/10913.htm> (para 19)

⁸See Greenberg, D ‘Deconstructing legislation: a practical guide to legislative scrutiny’ (page 19)

<http://www.legislation.gov.uk/apni/1954/33/section/41>

⁹ Source: PFSU calculations based on DHSSPS and DoJ Tables of Regulations

Given this, as well as the apparent limitations in the currently available departmental financial information about the Bill, it is imperative that the Assembly further engages the departments about the Bill's full financial impact during the Bill's passage: it should not defer costing queries until secondary legislation is brought forward.

Scrutiny points:

- 1. How did the DHSSPS and the DoJ decide the appropriate Assembly procedure for each enabling power contained in the Bill?**
- 2. Because so much of the secondary legislation is to be enacted under negative resolution procedure, how will the DHSSPS and the DoJ assure the Assembly that costs will not escalate to the point that they outweigh the policy benefits to be introduced by the Bill?**

3. Departmental Estimated Costs

To establish a baseline, this section sets out currently available financial information about the Bill, relying on a number of departmental sources. These include the Bill's Explanatory and Financial Memorandum (EFM) and recent communications between RaISe from DHSSPS/DoJ. The final sub-section further highlights apparent gaps in the departmental estimated costs.

3.1. The Explanatory and Financial Memorandum

The EFM states that:

...the total estimated financial implications to DHSSPS and DOJ are in the range of £75.8m to £129.2m for year one implementation costs; and £68m to £102.7m for recurrent costs.¹⁰

It goes on to explain that these costs include the following:

- The costs of training the entire health and social care (HSC) workforce;
- The additional staffing costs associated with the various interventions envisaged by the Bill;
- Legal Aid for cases brought under the legislation; and,
- Costs associated with establishing and operating the Review Tribunal, the Office of the Public Guardian, and anticipated judicial reviews.¹¹

It also should be noted that the EFM states that **the departmental estimates are not final**:

DHSSPS and DoJ will further refine the estimated costs through, for example, changing existing practices, getting better value from resources already deployed and reallocating current priorities. Crucially, commencement of the Bill can be delayed or phased, pending the resolution of the financial issues.¹²

¹⁰ <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf> (page 82)

¹¹ <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf> (page 82)

¹² <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf> (page 83)

Scrutiny points:

- 1. When will the DHSSPS and the DoJ provide the Assembly with their plans to delay or phase the Bill's commencement?**
- 2. What is the anticipated impact of delayed or phased commencement on the currently available departmental estimated costs?**
- 3. When will the DHSSPS and the DoJ provide the Assembly with further refined estimated costs?**

3.2. Supplementary departmental financial information

To support the Assembly's scrutiny of the EFM's high-level estimated costs, the PFSU sought and obtained additional financial information from both the DHSSPS and the DoJ. This information concerns both 'pre-implementation costs' and 'additional on-going costs', which are briefly explained in the below sub-sections and will be examined more closely in subsequent papers (Papers 2-5 of this series).

3.2.1. Initial Costs: Pre-implementation

On 3 June 2015, DHSSPS advised the PFSU that:

Initial Costs are £26.5m, if training can be subsumed into existing provision costs are £7.8m.¹³

The above two figures are initial costs that are expected to occur pre-implementation of the Bill. They concern:

1. estimated training costs; and,
2. assessment of "the existing population within supported settings" when considering an individual's Deprivation of Liberty Status.¹⁴

Each of the above is based on different assumptions, which will be more closely examined in forthcoming Papers 2 and 3 of this series.

3.2.2. Additional on-going costs: DHSSPS

In its 3 June letter, the DHSSPS also stated that additional on-going costs (also known as 'recurring costs' because they will recur annually) are:

...estimated at £91.7m per annum. However if further assumptions are applied [...] costs are £64m.¹⁵

¹³Letter from DHSSPS to RalSe, 3 June 2015

¹⁴Letter from DHSSPS to RalSe, 3 June 2015

¹⁵Letter from DHSSPS to RalSe, 3 June 2015

These estimates include a variety of recurring costs, as set out in the below Table 3, which was compiled by the DHSSPS:

Table 3: Summary of recurring costs¹⁶

	Original	v2
	£M	£M
Supporting a person to make a decision	8.2	8.2
Routine Intervention	13.7	13.7
Serious Interventions	24.6	9.8
Very Serious Interventions	45.2	32.3
Total	91.7	64

These recurring costs are examined in Paper 4 of this series.

3.2.3. DoJ's costs

In its 3 June letter, the DHSSPS (the lead department for the Bill) provided DoJ's cost estimates. They are between £4m and £11m for Year 1, and for each year thereafter. The estimate includes costs relating to:

- Legal Aid;
- The Office of the Public Guardian;
- The Review Tribunal; and,
- Anticipated Judicial Reviews.

These recurring costs are examined in Paper 5 of this series.

¹⁶Letter from DHSSPS to RaISe, 1 September 2015

4. Potential financial implications of the enabling powers

To illustrate and reinforce the points made above about the departments' heavy reliance on enabling powers for purposes of the Bill, as well as the significance of Assembly procedure when there is such heavy reliance, this section discusses some examples of the Bill's enabling powers. The examples highlight how secondary legislation **could** in some cases give rise to implementation or recurrent costs,¹⁷ which may not be immediately apparent "on the face" of the Bill. This section identifies some potential cost drivers, to illustrate the point that more information is needed from the departments if the Assembly is to properly assess the costs here.

For ease of reference, the enabling powers given to the DHSSPS are discussed first, followed by those given to the DoJ.

4.1. DHSSPS

Some of the enabling powers that may be exercised by the DHSSPS are, on the face of it, relatively uncomplicated. For example, Clause 39(2) of the Bill (as introduced) concerns extension reports, allowing the form of a report to be specified as well as its contents.

The cost of providing such a report is likely to be driven by the time required from the relevant person to research, compile, draft and finalise the report. Impacting on this will be the accessibility, complexity and breadth of information to be reviewed and included. Assumptions regarding each is also a determinative factor when costing a proposal, for example, the information is readily accessible to the person making the report, meaning available and easily retrievable; and, the quantity of that information is not overwhelming.

Having said this, there are other enabling powers in the Bill which, on the face of it, seems more likely to give rise to additional costs. For example, Clause 55(1) (as introduced) states:

...regulations may make provision requiring a prescribed person to give prescribed information to prescribed persons-

a) where after an authorisation has been granted under Schedule 1 or 2, a prescribed event occurs...¹⁸

This provision is problematic for a number of reasons: it is hard to determine who is intended to do what, for whom, and in what circumstances. These are all left to the

¹⁷ This discussion is hypothetical by necessity because DHSSPS has repeatedly stated in evidence to the Committee that the regulations have not yet been drafted. See for example these Official Reports:

<http://data.niassembly.gov.uk/HansardXml/committee-14281.pdf> (page 12)

<http://data.niassembly.gov.uk/HansardXml/committee-14017.pdf> (page 3) and

<http://data.niassembly.gov.uk/HansardXml/committee-14017.pdf> (page 9)

¹⁸ <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity---as-introduced.pdf> (page 30)

secondary legislation. Although cost-related consequences are foreseeable, the absence of detail makes it difficult to assess costs. For example, the frequency with which the prescribed person will have to provide relevant information to the specified person will be determined by what the DHSSPS decides is a “*prescribed event*”.

If such an event is likely to be a once-a-decade occurrence, then the costs would presumably be negligible. On the other hand, if such an event is likely to happen every day, then it seems likely that the costs associated with such information provision would be increased.

Another instructive example is Clause 33 (as introduced), which concerns *duties in relation to people subject to community residence requirements*. This Clause provides the DHSSPS with broad power to make secondary legislation:

- a) for imposing on HSC trusts such duties as the Department considers appropriate in the interests of people who are subject to community residence requirements;*
- b) requiring people subject to community residence requirements to be visited on prescribed occasions or at prescribed intervals.*

It seems clearly foreseeable that there are at least two drivers of potential costs here, which relate to staffing:

- The specific duties that the DHSSPS considers appropriate to impose on HSC trusts. Where more duties are imposed, the higher the likely costs; and/or,
- Requirements on visitors to visit the individual. Where a greater number of visits are required, the higher the likely costs.

Clause 16 (as introduced) concerns the need for a *second opinion in certain treatment*. It requires a second opinion to be provided when certain treatments of a specified serious nature are to be administered to an individual (known in the Bill as ‘P’).

Essentially, the more second opinions are required, the higher the additional cost of this protection for P is likely to be. But the demand for second opinions under the legislation will be driven by the specification of treatments under this Clause.

Scrutiny points:

- 1. The Assembly may wish to ask the DHSSPS to provide further information in its Table of Regulations about its assessment of the enabling powers that may give rise to significant ‘one-off’ or recurrent financial costs.**
- 2. The Assembly also may want to ask the DHSSPS for a full explanation when the DHSSPS does not foresee an enabling power giving rise to financial costs?**

4.2. DoJ

As above, upon reading a Bill, it often is challenging to anticipate whether an enabling power would give rise to significant costs when subsequent secondary legislation is enacted. For example, a number of the powers allow the DoJ to: vary definitions; add certain items of information to a list; or, specify persons who must carry out a particular action. Examples of these are discussed in the following paragraphs.

Clause 158 (as introduced) defines “*place of safety*” as a hospital or police station. On the face of it, changing the definition of a “place of safety” under Clause 158(2) to include another location seems unlikely to drive significant additional costs. Perhaps a third option might be introduced, such as a health centre, in addition to a hospital. Given that a health centre is likely to have persons who are familiar with the needs of those who lack capacity, any additional cost associated with such an amendment may well be negligible.

But again, further enabling powers could give rise to more significant additional costs, depending on how the powers are exercised and the content of the relevant regulations. It also would depend on whether the regulations are new and introduced by the Bill, or if they are replacing existing provisions elsewhere.

For example, Clause 205(8) (as introduced) concerns *powers to deal with person unfit to be tried or not guilty by reason of insanity*. It states that DoJ “*must make regulations about supervision and treatment orders*”.¹⁹ It certainly seems at least possible that the content of the secondary legislation could give rise to varying levels of cost, depending on the content.

Scrutiny points:

1. The Assembly may wish to ask the DoJ to provide further information in its Table of Regulations so that the DoJ assessment of the enabling powers more effectively identifies those that may give rise to significant one-off or recurring financial costs.

2. The Assembly also may wish to have the DoJ provide a full explanation when the DoJ does not believe a proposed enabling power will give rise to financial costs.

¹⁹<http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity---as-introduced.pdf> (page 111)

5. Concluding remarks

Departmental information relating to the Bill is limited, largely due to the fact that much of the detail regarding the implementation of the proposed mental capacity regime will be achieved through the enactment of secondary legislation. At this stage it is unclear as to what exactly that legislation will say.

Another factor to consider is the extent to which much of this secondary legislation is expected to go by negative resolution in the Assembly, when the opportunity to scrutinise subordinate legislation is comparatively more constrained than the time available to consider the (current) Bill. As noted in the Politics Plus publication entitled *Deconstructing Legislation: a practical guide to legislative scrutiny*:

...it should be remembered that if the opportunity is not taken at the time of passing the Bill to scrutinise policy effectively, it may be difficult or impossible to take that opportunity later.²⁰

Now is the time for the Assembly to fully engage with the DHSSPS and the DoJ, to assure itself that it has robust, relevant information to assess the financial impact of the Bill. This Paper, including its scrutiny points, should assist in that regard.

²⁰Greenberg, D 'Deconstructing legislation: a practical guide to legislative scrutiny' (page 19)