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Public Finance Scrutiny Unit

Mental Capacity Bill: Deprivation of Liberty Assessment Costs

Paper 3 of 5

To facilitate Assembly consideration of the costs arising from the Mental Capacity Bill (the Bill), this Briefing Paper is the third in a five-part series produced by RaISe's Public Finance Scrutiny Unit (PFSU). It examines costs that the Department of Health Social Services and Public Safety estimates for the 'Deprivation of Liberty' assessments proposed under the Bill.

Introduction

The Mental Capacity Bill (the Bill) proposes measures to enable assessment of existing populations within care homes or other supported settings (such as residential homes) in accordance with the Bill's 'Deprivation of Liberty' (DoL) provisions.¹ The Department of Health, Social Services and Public Safety (DHSSPS) describes these costs as DoL 'pre-implementation costs'.² This Briefing Paper seeks to facilitate the Assembly's scrutiny of those estimated costs, examining their reliability and robustness. It is Paper 3 in a five-part series produced by RaISe's Public Finance Scrutiny Unit (PFSU).

The Paper is structured in the following way:

- Section 1 presents analysis of the DHSSPS's estimated DoL assessment costs and related assumptions;
- Section 2 provides relevant comparative information; and,
- Section 3 provides concluding remarks.

Scrutiny points are noted throughout.

¹ As introduced by the DHSSPS on 8 June 2015, the Bill fuses together mental health and mental capacity law. It introduces a single statutory framework governing all situations where a decision needs to be made in relation to the care, treatment, or personal welfare of persons aged 16 or over who lack capacity to make such decisions for themselves. The Bill removes the ability of those persons to be treated for a mental health condition against their wishes, if they retain the capacity to refuse treatment. This means that those with a mental health illness will be treated equally to those with physical illnesses. See RaISe paper [NIAR 292-15](#) for more information

²Letter from DHSSPS to RaISe, 3 June 2015.

1. DHSSPS's estimated DoL costs and related assumptions

As noted in the introduction, the Bill proposes measures to enable assessment of existing populations within care homes or other supported settings (such as residential homes) in accordance with the Bill's 'Deprivation of Liberty' (DoL) provisions. RaISe paper NIAR 360-15 explains the mechanics of DoL assessments. This Paper is concerned only with the costs arising from DoL assessments.

At the outset, it is important to note that *all* cost estimates are based on some degree of assumption. The following sub-sections set out the DHSSPS estimate and the assumptions upon which these are based.

1.1. Estimated DoL costs

The Bill's Explanatory and Financial Memorandum (EFM) states:

Based on current estimates, the total estimated financial implications to DHSSPS and DOJ are in the range of £75.8m [million] to £129.2m for year one implementation costs; and £68m to £102.7m for recurrent costs.³

The EFM states that year 1 'pre-implementation costs' would be between £75.8m to £129.2m.⁴ Included in this range are the DoL costs, itemised below in Table 1, relying on data provided by the DHSSPS to the PFSU.

However, as highlighted in Paper 2 of this series (NIAR 488-15) in relation to training, it appears that elements of the total costs should not be viewed as a range. Instead it seems that the DHSSPS presented two scenarios. This two scenario presentation has been adopted here for DoL assessment costs:

- The first DHSSPS estimate is based on three visits, i.e. staff achieving three assessments per day, amounting to £4.88m. The PFSU calculates that this translates into £302 per assessment; and,
- The second DHSSPS estimate is based on four visits, i.e. staff achieving four assessments per day, amounting to £3.71m. The PFSU calculates that this translates into £230 per assessment.

Table 1 overleaf presents projected costs under these two scenarios.

³<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)

⁴<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)

Table 1: Year 1 DoL costs⁵

	Resident Numbers	Cost of DoLs (3 visits)	Cost of DoLs (4 visits)
Nursing Homes	11,705	£2.89m	£2.19m
Residential Homes	4,436	£1.12m	£0.86m
Supported living	0	£0.40m	£0.30m
Administration Cost	-	£0.47m	£0.37m
TOTAL	16,141	£4.88m	£3.71m
Cost per assessment	-	£302	£230

It is clear from Table 1 that the estimated costs are highly sensitive to the number of visits that would be conducted per day. (Such assumptions are examined in sub-section 1.2.1.) It can be seen that the projected cost per assessment rises by £72 (over 30%), with a reduction from four visits per day to three. The obvious implication is that the more productive staff can be, the lower the cost.

1.2. Assumptions underpinning the estimate

To probe the strength of the DHSSPS's estimate, the PFSU examined assumptions underpinning it. These assumptions concern:

- The number of assessments to be undertaken *per day*, and,
- The *total* number of assessments to be undertaken.

1.2.1 Number of assessments per day

At the outset it is important to note that the DHSSPS produced its figures in consultation with the Health and Social Care (HSC) Trusts. In its letter to the PFSU, the DHSSPS stated that the four-assessments-per-day costs are shown for illustration:

During engagement with Trusts the maximum number of visits per day for assessments was considered to be 3. To show the cost differentiation, costs for 4 visits per day were also included.⁶

Despite the DHSSPS's intention to offer the four assessment scenario for illustrative purposes, it should be noted that the DHSSPS relied on this scenario when calculating its pre-implementation costs and stating its estimate in the EFM.

It therefore seems reasonable to conclude that the Assembly **should not rely on the lower estimate**. In other words, it is more prudent to assume costs are likely to be at the higher end of this scale (i.e. three assessments per day) because of the illustrative nature of the four assessment scenario.

⁵Costs provided to RaISe by DHSSPS, 3 June 2015. Cost per assessment calculated by RaISe.

⁶Letter to RaISe from DHSSPS, 29 June 2015

Notwithstanding the above, this sub-section examines the assumptions underpinning the DHSSPS estimate for assessments. It appears that the DHSSPS assumes **each assessment** would be expected to generate costs that include:⁷

- Full hourly resource cost for a psychiatrist for one hour;
- Full hourly resource cost for a social worker for one hour;
- Round trip travel at approximately 30 miles, for both a psychiatrist and a social worker, at the rate of 45p per mile, per person;
- Subsistence for both a psychiatrist and a social worker, at £4.25 per day, per person; and,
- For administrative support provided by two support staff for the duration of the assessment process.

But it is unclear from currently available information as to whether other reasonably foreseeable factors in relation to the assessment process are included. For example:

- Time for both the psychiatrist and the social worker both to secure and to review relevant information in order to prepare for the assessment;
- Time for both to conduct their relevant parts of the assessment;
- Time for both to analyse and 'write up' their assessment notes and findings and to complete all necessary paperwork; or,
- Allowance for both the psychiatrist and the social worker to travel separately to and from the assessments.

These potential shortcomings were noted by Professor Ajit Shah, co-author of a 2011 article in the *British Journal of Psychiatry*, which addressed legislative proposals prescribing DoL assessments in England and Wales. When he corresponded in July 2015 with the PFSU, he queried the DHSSPS estimate, stating:

1. *One hour is attributed for assessment by psychiatrist and social work individually. The time each professional will spend at the care home will depend on which components will be assessed by them. In England and Wales, psychiatrists either do mental health or that and mental capacity assessment, whereas the approved health care professional does the other three assessments (plus confirmation of deprivation of liberty) or these three and assessment of capacity. Costs will vary.*
2. *Both psychiatrists and Social Workers will need time to read the initial information and, where appropriate, contact other professionals involved with the patient, to secure clinical information. This should be included.*
3. *Will the psychiatrist and social worker travel together or separately? The costing must be clear on this.*
4. *After the assessment, the psychiatrist and social workers will need time to make notes and time to complete paper work, time to talk to each other, and sometimes*

⁷Letter from DHSSPS to RalSe, 29 June 2015

time to talk to others (like care home manager in particular if DoLs is not confirmed.) This additional time needs to be estimated and costed for both.⁸

Moreover, the PFSU recognises that the DoL cost estimates are based on averages, allowing for the fact that there could be some days when one fewer or one more assessment could be achieved. It may be, however, questionable as to whether more than two assessments could be conducted in a day given, for example, the Health and Social Care (HSC) specialists' ongoing, other duties and commitments. But it is questionable as to whether more than two assessments could be successfully undertaken and completed in a day, given – for example – a psychiatrist's on-going other duties and responsibilities.

Professor Shah cautioned the PFSU that:

The fact that Trusts said they could do three cases per visit does not mean they will. For example, realistically with travel and an hour per assessment, at best two can be done in a morning (or afternoon). The psychiatrist may need to go and do a ward round or a clinic or attend a management meeting in the afternoon. So there may be times when three cases may not be done in a day.⁹

- 1. Scrutiny Points: Is the DHSSPS confident that one hour is sufficient to conduct an assessment?**
- 2. Does the DHSSPS believe its estimate accurately reflects the costs arising from staff preparing for and completing the assessment, in addition to writing up findings, as well as attending to their other duties?**
- 3. Does the DHSSPS estimate assume separate travel for the psychiatrist and social worker?**

1.2.2 Total number of assessments to undertaken

This sub-section examines costs associated with the total number of assessments to be undertaken across Northern Ireland.

First, the Assembly may wish to note again the DHSSPS's estimated costs of £4.88m for three assessments per day, and £3.71m for four assessments per day. These figures assume that **all the existing population** within care homes or other supported settings (such as residential homes) are to be assessed under the provisions of the Bill, as DHSSPS stated in correspondence dated 3 June 2015 to the PFSU.¹⁰

⁸Correspondence from Professor Shah, 3 July 2015

⁹Correspondence from Professor Shah, 3 July 2015

¹⁰Letter to RalSe by DHSSPS, 3 June 2015.

However, the DHSSPS qualified this EFM statement in correspondence dated 29 June 2015 to the PFSU, explaining that entire existing populations would **not** necessarily require assessments. Rather, the DHSSPS wrote:

*There are approximately 16,000 residential care and nursing home places registered in Northern Ireland of which approximately 3,800 are elderly mentally infirm (EMI) care and nursing home places. According to trust information most persons in an EMI place would likely lack capacity and be deprived of their liberty and most persons not in an EMI place would either have capacity or not be deprived. **The number of persons who require a formal capacity assessment for the purpose of a DoL authorisation application at the commencement of the Bill can be assumed to be more than 3,800 but less than 16,000.***¹¹ [emphasis added]

The above passage resonates with the view of Professor Shah, when he stated:

*Not everyone in an EMI home will lack capacity (small number will have capacity). Similarly, not everyone in other homes will have capacity. A sizeable number of people in non EMI homes in England have dementia and many of them will lack capacity. The same probably is the case in NI. Using the assumption used that EMI=lack of capacity and non EMI=capacity may lead to a distorted and inaccurate estimate of costs and may also allow non EMI homes not to consider DoLs.*¹²

In effect, it appears that the cost estimate provided by the DHSSPS in the Bill's EFM fails to reflect the relevant distinctions noted in its later correspondence to the PFSU. If this is the case, then the element of the costs in relation to pre-implementation DoL assessments is based on an overall total number of assessments that is **potentially four times higher than would be required**.

Scrutiny point:

1. When will the DHSSPS revisit the estimated costs included in the EFM, given that the number of DoL assessments may be significantly lower than the figure it relied on when estimating costs for this Bill?

¹¹Letter to RalSe from DHSSPS, 29 June 2015

¹²Correspondence from Professor Shah, 3 July 2015

2. Comparative context

This section seeks to provide comparative information that may further facilitate Assembly consideration of the costs discussed in section 1 of this Paper. It concerns the Mental Capacity Act 2005¹³ in England and Wales, which introduced so-called DoL safeguards for individuals who are detained to receive care or treatment.

The DHSSPS advised RalSe that the application process for an assessment in England and Wales is “*significantly different*” from that proposed in the Bill.¹⁴ Nonetheless the DHSSPS stated that:

*The assessment structure and content will be further refined under the regulations. The costings were premised on the requirement that each individual would require to be assessed by two professional staff as detailed in the English regulations (used in lieu of NI regulations not being written).*¹⁵

With the above in mind, it may be worth noting that Professor Shah *et al*'s investigation of the DoL costs in England and Wales estimated at £1277 each. This is **more than double** the Whitehall Department of Health's estimate of £600 each.¹⁶

The estimate put forward by the DHSSPS of either £230 to £302 per assessment in Northern Ireland, as shown in Table 1 above, should be considered against Shah *et al*'s estimate of the costs in England and Wales. The PFSU acknowledges the DHSSPS's point that the assessment processes are to be different in Northern Ireland.

But the extent of such difference remains largely unknown due to limitations in presently available information: in particular because **the assessment structure in Northern Ireland is only to be defined by regulation following the enactment of the Bill**. It therefore may be useful to consider Shah *et al*'s estimate for England and Wales, as such benchmarking may serve to constructively inform the DHSSPS's estimate¹⁷

Scrutiny point:

1. How will the DHSSPS seek to ensure that the assessment structure –to be prescribed in future regulations will protect against significant variations from its estimated cost?

¹³<http://www.legislation.gov.uk/ukpga/2005/9/contents>

¹⁴Letter to RalSe from DHSSPS, 29 June 2015

¹⁵Letter from DHSSPS to RalSe

¹⁶Shah, A et al (2011) 'Deprivation of Liberty Safeguards in England: implementation costs' available online at:

<http://bjp.rcpsych.org/content/199/3/232.full-text.pdf+html>

¹⁷Costs provided to RalSe by DHSSPS, 3 June 2015

3. Concluding remarks

The DHSSPS may need to revisit its estimate for DoL costs, given uncertainties explained in this Paper about:

- The number of DoL visits for assessment to be undertaken per day; and,
- The total number of assessments to be undertaken in Northern Ireland, i.e. the proportion of the current population within care homes or other supported settings requiring DoL assessments.

In addition, to a lesser degree, other relevant factors that may merit reconsideration by the DHSSPS include:

- The estimated overall costs may be sensitive to the manner in which future regulations prescribe DoL assessments; and,
- The availability of staff to conduct assessments given other on-going duties and responsibilities.

The Assembly may wish to address these issues with the DHSSPS, to facilitate its consideration of the Bill's financial implications.