Northern Ireland Assembly

Research and Information Service Briefing Paper

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Public Finance Scrutiny Unit

Mental Capacity Bill: DHSSPS's Recurring Costs

Paper 4 of 5

To facilitate Assembly consideration of the costs arising from the Mental Capacity Bill, this Briefing Paper is the fourth in a five-part series produced by RaISe's Public Finance Scrutiny Unit (PFSU). The Paper examines the estimates that the Department of Health Social Services and Public Safety (DHSSPS) produced for its ongoing or 'recurring' costs under the Bill.

Introduction

The Mental Capacity Bill (the Bill) proposes measures to introduce 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.[1]

Paper 1 in this series examined the difficulties involved in assessing the costs of the proposed Mental Capacity regime in totality. Papers 2 and 3 examined the DHSSPS's estimates of one-off pre-introductory training and Deprivation of Liberty Assessment costs. This Paper examines ongoing or recurring costs that are expected to arise from the Bill. It seeks to facilitate the Assembly's scrutiny of the Bill by examining the reliability and robustness of the Department of Health, Social Services and Public Safety's (DHSSPS) estimates.

The Paper is structured in the following way:

- Section 1 presents the DHSSPS's estimated recurring costs;
- Section 2 examines the assumptions underpinning the estimates; and,
- Section 3 highlights the importance of a sensitivity analysis when considering the estimates; and,
- Section 4 provides concluding remarks.

Scrutiny points are raised throughout.

Please note: This Paper does not address estimated recurring costs arising from the Bill for the Department of Justice (DoJ). Among other things, these costs concern:

1. Legal Aid;
2. The Office of the Public Guardian;
3. The proposed Review Tribunal; and,
4. Anticipated Judicial Reviews.

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

[1] As introduced by the DHSSPS on 8 June 2015, the Mental Capacity Bill (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 420-14 for more information

1. DHSSPS's estimated recurring 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 to £129.2m for year one implementation costs; and £68m to £102.7m for recurrent costs.*[2]

As stated, those costs fall on both the DHSSPS and the DoJ.

In June 2015, the DHSSPS stated in a letter to the PFSU that recurring costs (also known as 'additional ongoing costs') are:

> *…estimated at £91.7m per annum. However if further assumptions are applied […] costs are £64m.*[3]

These estimates include a variety of recurring costs that the DHSSPS expects to arise under the Bill from the following types of action:

- Supporting a person to make a decision. For example, this process may include bringing in an experienced member of staff to communicate with a person with learning difficulties in order to explain the possible consequences of a particular health intervention;
- Routine intervention. For example, this includes interventions relating to care, treatment and related expenditure which seek to meet the basic life and care needs of the person lacking mental capacity. The interventions include carer interventions associated with everyday needs and also routine interventions by GPs and other healthcare professionals;[4]
- Serious intervention. For example, this includes an intervention which involves surgery, causes serious pain or affects seriously the options available to the person in the future;[5] and,
- Very serious interventions. For example, this includes an intervention involving compulsory treatment of an individual who has been detained in hospital.[6]

Table 1 overleaf shows the DHSSPS's upper and lower[7] estimates of recurring costs for actions falling within these four types of intervention. Estimated costs are based on two fundamental factors, i.e.: (i) the number of interventions likely to be undertaken; and, (ii) the staff resource (number of staff, grade and the amount of time they will need) to undertake the intervention.

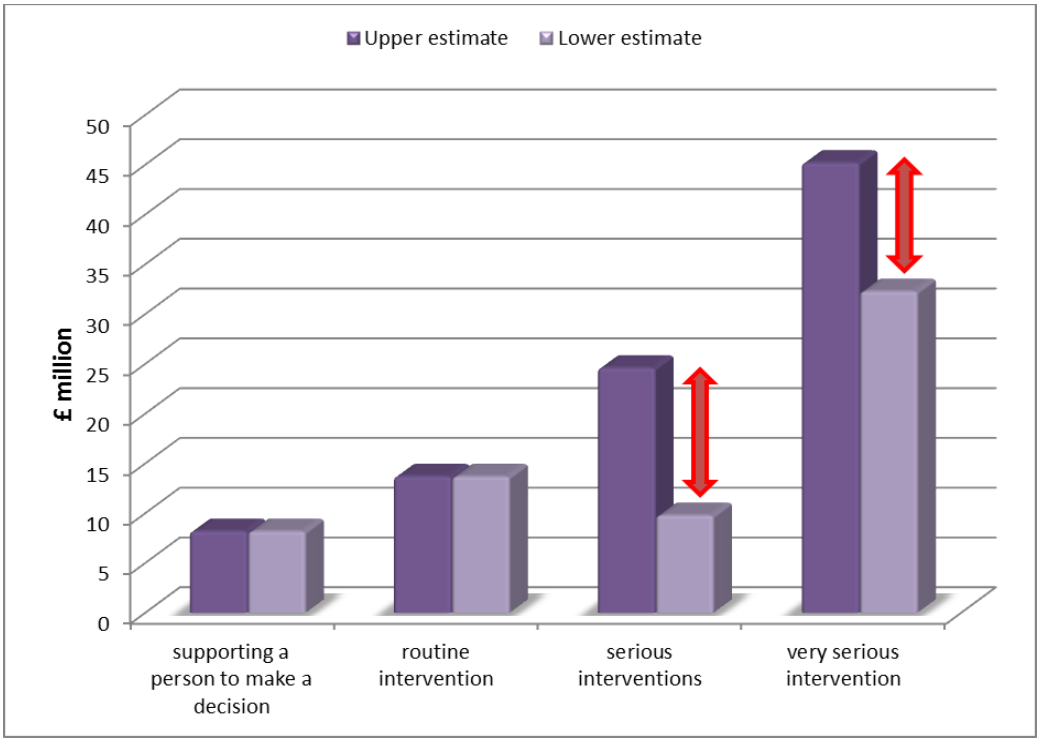
[2] http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf (page 82)
[3] Letter from DHSSPS to RalSe, 3 June 2015
[4] http://www.dhsspsni.gov.uk/equality-impact-assessment-for-new-mental-capacity-legislation.pdf (page 11)
[5] http://www.dhsspsni.gov.uk/mental_capacity_bill_consultation_paper.pdf (page 17)
[6] Letter from DHSSPS to RalSe, 3 June 2015 (annex 1)
[7] The DHSSPS letter describes these upper and lower estimates as 'original' and 'v2'

Table 1: DHSSPS's upper and lower estimates of recurring costs[8]

Type of intervention	Upper estimate	Lower estimate
	£million	
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**	**64.0**

The difference between the DHSSPS's upper and lower estimates is highlighted in Figure1 below:

Figure 1: DHSSPS's upper and lower estimates of recurring costs



It is notable from Figure 1 that for the first two types of intervention – 'supporting a person to make a decision' and 'routine intervention' – there is no difference between the upper and lower estimates. However, for the latter two – 'serious intervention' and 'very serious intervention' - each red arrow highlights a variation between the upper and lower estimates. Each variation can be attributed to the DHSSPS's underlying assumptions for the given intervention, as explained in the next section of this Paper.

[8] Letter from DHSSPS to RalSe, 1 September 2015 (annex 1)

2. Assumptions underpinning the DHSSPS's estimates

To test the value of the DHSSPS's upper and lower estimates, this section examines the assumptions on which the DHSSPS relies. As far as possible, this is intended to facilitate the Assembly's financial scrutiny of the Bill, given presently available information. It is important to note that much of Assembly scrutiny regarding the detail of the new Mental Capacity regime will be done when relevant subordinate legislation is introduced into the Assembly – as discussed in Paper 1 of this series.[9]

As noted above, estimated costs are based on two fundamental factors, i.e.: (i) the number of interventions likely to be undertaken; and, the staff resource (number of staff, grade and the amount of time they will need) to undertake the intervention. This means a number of assumptions are critical to the estimation of costs of:

- The projected number of interventions;
- The staff and time required to undertake each type of intervention; and,
- The full resource cost per hour of those staff.

Many of the calculations underpinning the estimates rely on existing historic data for Northern Ireland. For example, the estimated number of individuals who would be assessed for under the Bill treatments with serious consequences is based on "*current levels of requests for formal assessments of capacity from psychiatrists by those undertaking physical health interventions*."[10]

The PFSU does not focus on these estimates or their underlying assumptions. It is reasonable to presume that the nature of the population and its treatment needs would continue, despite the Bill. They therefore are not considered in this Paper.

Instead, the PFSU considers it more important to focus scrutiny on those DHSSPS estimates that are derived from proxy data. In other words, where the DHSSPS used substitute data – such as Scottish data, for example – to estimate intervention levels under the Bill. The following sub-sections address these.

2.1. The projected number of interventions

This sub-section examines the DHSSPS's assumptions – including, for example, its reliance on Scottish data – to extrapolate the number of individuals who under the Bill would require support to make decisions, or to make routine, serious or very serious interventions.

2.1.1. Supporting a person to make a decision

As shown above in Table 1, both of the DHSSPS's upper and lower estimates include £8.2 million for the cost of 'Supporting a person to make a decision'. This cost is based

[9] NIAR 487-15 *Mental Capacity Bill: Assessing the Costs*
[10] Letter from DHSSPS to RalSe, 1 September 2015 (annex 5)

on an assumed proportion of the Northern Ireland population as a whole which would require such support, i.e. "*5% of NI population of over 16s (2% Learning Disability, 2% - Dementia, rest for mental health issues and brain injury)*."[11]

Recent research was undertaken by RaISe in support of the Committee for Employment and Learning's Inquiry into *Post Special Educational Need Provision in Education, Employment and Training for those with Learning Disabilities.* That research concluded that there are multiple sources of data on the prevalence of learning disabilities in Northern Ireland, but none of them could be considered definitive.[12]

RaISe also noted research carried out by Queen's University, Belfast. That research found that there continues to be a lack of appropriate data in this area for Northern Ireland, stating:

> *Data collected needs to be disaggregated by age, gender, type of disability, place of residence, and cultural background.*[13]

RaISe further noted that many of the data sources on learning difficulties offered snapshots of activity at specific institutions (such as the Higher Education Institutions) or participation on programmes (such as training programmes). But these sources are not necessarily reflective of the population as a whole.[14]

Given the above, the DHSSPS's reliance on the 5% figure for its estimate may be misplaced. This introduces a level of doubt about the robustness of the £8.2 million cost shown in Table 1.

Scrutiny point:

1. The Assembly may wish to ask the DHSSPS to detail why it relied on the 5% figure?

2.1.2. Very serious interventions – compulsory treatment

In order to produce its estimates for 'very serious interventions' in Table 1, the DHSSPS in part relied on Scottish data. For example, the DHSSPS relied on Scottish data when assuming 75% of "*current levels of Compulsory Admissions within mental health and learning disability of Article 12 admissions*" would require compulsory treatment, and;[15] 25% of such admissions would result in an attendance requirement.[16]

[11] Letter from DHSSPS to RaISe, 1 September 2015 (annex 5)
[12] http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/employment_learning/5014.pdf (page 12)
[13] Queen's University Belfast, Disability policies and programmes: How does Northern Ireland measure up? http://www.equalityni.org/ECNI/media/ECNI/Presentations/Expert-Seminar-ppt-21-Feb-14-QUB.pptx
[14] http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/employment_learning/5014.pdf (page 13)
[15] Letter from DHSSPS to RaISe, 3 June 2015 (Annex 5, note 5)
[16] Letter from DHSSPS to RaISe, 3 June 2015 (Annex 5, note 6)

The DHSSPS's rationale for relying on Scottish data in this context is not clearly outlined in the presently available information. This challenges the PFSU's ability to assess whether such reliance introduced a degree of error into the DHSSPS's calculations.

For example, it may have been inappropriate to rely on Scottish data because:

- The prevailing legislative framework for the care of individuals is not the same in Scotland as that proposed here in the Bill. It therefore raises a query as to whether such reliance provides a like-for-like comparison; and/or,
- The populations in Northern Ireland and Scotland are different, and the incidence of mental ill health and its related impact in each jurisdiction is unclear in the currently available information from the DHSSPS. For example, differences in public mental health may be present due to the legacy of conflict – a factor for Northern Ireland but not for Scotland.

Scrutiny point:

1. The Assembly may wish to ask the DHSSPS to detail why it relied on Scottish data when estimating the financial impact of the Bill in relation to Northern Ireland?

2.1.3. Very serious interventions – Detention amounting to Deprivation of Liberty

In the DHSSPS's upper and lower estimates, costs are identified as arising from 'Detention amounting to Deprivation of Liberty' (DoL). These represent a very significant element of the total recurring costs - £33.45m and £22.0m respectively.[17]

In a letter to the PFSU, the DHSSPS states that: "*Volume estimate based on estimated DoLs applications after Supreme Court hearing.*"[18] The letter also suggests that these figures come from predicted DoLs in England and Wales, and are pro-rated down to the Northern Ireland population.[19]

If this is the case, it still remains unclear why there is such a wide variation (in excess of £11m) in the estimated cost. It may be that this is because there is uncertainty in the projections relating to England and Wales.

Scrutiny point:

1. The Assembly may wish to ask the DHSSPS to explain the wide variation in estimated costs it attributes to 'Detention amounting to Deprivation of Liberty.'

2.1.4. Demographics

[17]Letter from DHSSPS to RalSe, 3 June 2015 (Annexes 1 and 2)
[18]Letter from DHSSPS to RalSe, 3 June 2015 (Annex 5, note 9)
[19]Letter from DHSSPS to RalSe, 3 June 2015 (Annex 4)

In a letter to the PFSU, the DHSSPS stated that demography (i.e. the varying structure of populations) was not been accounted for in its costing exercise:

> *Projected [population] figures vary from Trust to Trust e.g. projected figures up to 2020 for [Southern HSC Trust] 85 + pop. estimated at 77% rise as compared to Belfast at 27% rise. This has not been accounted for in this exercise.*[20]

The DHSSPS's rationale for excluding as it did is not clearly outlined in the presently available information. This challenges the PFSU's ability to assess costs here. It seems demographics are important in this context, as a significant cost driver would appear to be demand for mental capacity assessment where dementia is concerned. Dementia is typically associated with old age. Arguably it follows that an older population would place greater demands on the Health and Social Care (HSC) Trusts than younger populations.

Scrutiny point:

1. The Assembly may wish to ask the DHSSPS to detail why it excluded demographics as a relevant consideration in its estimate calculations?

2.2. The staff and time required to undertake each kind of intervention

This sub-section examines the DHSSPS's assumptions relating to the staff and time required to undertake each intervention type.

2.2.1. Average hours, by specialism

For the DHSSPS's upper and lower estimates, it assumed the average number of hours that each type of intervention would require from various grades HSC staff. For example, it states that serious interventions would, on average, take two hours of a consultant's time and two hours of a psychologist's time. But for very serious interventions, it states that four hours would, on average, be required from both specialists.[21]

In its letter to RaISe, the DHSSPS stated that the HSC Trusts were asked how much time would be needed from specialists for each intervention process prescribed by the Bill. From these responses the DHSSPS calculated an average time.[22]

However, in its letter to RaISe, the DHSSPS also stated:

> *[Belfast] HSC [Trust] excluded as hours submitted were significantly different than the rest of Trusts.* [23]

[20]Letter from DHSSPS to RaISe, 3 June 2015 (Annex 5, note 17)
[21]Letter from DHSSPS to RaISe, 3 June 2015 (Annex 3)
[22]Letter from DHSSPS to RaISe, 3 June 2015

The DHSSPS's rationale for excluding the Belfast Trust's figures is not clearly articulated in the presently available information. This challenges the PFSU's ability to assess costs here. It is possible, for example, that the inclusion of the Belfast Trust figures would have skewed the estimate, and they therefore were excluded appropriately.

Scrutiny point:

1. The Assembly may wish to ask the DHSSPS to detail why it excluded Belfast Trust figures from its estimate?

2.2.2. Second opinions

In the DHSSPS's upper estimate, it included costs for second opinions. Various interventions under the new Mental Capacity regime would require a second opinion before any action is permitted, such as electro-convulsive therapy.

In its letter to RaISe, the DHSSPS states that to derive its lower estimate:

> *Second opinion hours were excluded as [the South Eastern] HSC Trust was the only Trust to include this.*

The DHSSPS's rationale for excluding second opinion hours is not fully explained in the currently available information. This challenges the PFSU's ability to assess costs here. It seems that the requirement for second opinions would be one of the crucial safeguards prescribed in the Bill.

In this context therefore, **it is worth noting that the exclusion of second opinion hours reduces the estimated recurring costs by more than £7 million.**

Scrutiny points:

1. The Assembly may wish to ask the DHSSPS detail why it excluded the second opinion hours from its estimate?

2. The Assembly may wish to ask the DHSSPS to explain the impact of excluding the Belfast Trust figures from its calculation of average hours?

3. How does this translate in terms of cost?

2.3. The full staff resource cost per hour

The DHSSPS explained to the PFSU that the hourly staff cost for each process was included in the upper and lower estimates, as shown in Table 2 below:[24]

[23] Letter from DHSSPS to RaISe, 3 June 2015
[24] Letter from DHSSPS to RaISe, 3 June 2015

Table 2: Staff cost per hour

Professional	Cost per hour (full cost) £	Source
Consultant	70	BHSCT
Psychologist	70	BHSCT
Psychiatrist	70	BHSCT
Professional & Technical Staff (Band 7)	28	BHSCT
Band 7 Nurse	28	BHSCT
Panel Cost	800	MHRT Session Fees
RQIA Cost	200	RQIA Doctors fees
Approved Social Worker	34	BHSCT
Independent Advocate	50	GB figures
Band 4	16	BHSCT

The DHSSPS explains that these hourly costs are taken from *Agenda for Change* national pay scales, with extra included to reflect employer costs, such as pension and National Insurance Contributions. The DHSSPS further stated that it applied a uniform percentage uplift to take some account of office costs, such as floor space, energy usage and travel.

The DHSSPS also noted challenges when assessing consultants' remuneration due to complex and variable factors arising from, for example, their hours, shift allowances, and overtime. It stated that a simplistic calculation based on basic salary would have been misleading.[25]

[25]PFSU meeting with DHSSPS, 1 September 2015

3. Sensitivity analysis

This section highlights the importance of a sensitivity analysis when considering the DHSSPS's estimates. The purpose of such an analysis would be to examine the effect on the main cost estimate of varying the numbers on which the estimate is based, i.e. if the underlying assumptions were not to hold true.

As noted in Paper 1 of this series, many cost drivers associated with the Bill could be affected by the future enactment of secondary legislation or introduction of codes of practice. In the absence of these, more specifically what they would or would not prescribe, it seems reasonable to query the DHSSPS's certainty about the estimates.

Good practice suggests that cost estimates should be subjected to sensitivity analysis.[26] 'Sensitivity analysis' is defined by the Department of Finance and Personnel as:

> *Analysis of the effects on an appraisal outcome of varying the projected values of important variables.*[27]

Scrutiny points:

1. The Assembly may wish to ask the DHSSPS for the sensitivity analysis it undertook for these estimates. Such information would enable assessment of how sensitive the overall estimated costs are to changes in the time taken and/or specialisms needed for the prescribed processes.

2. The Assembly may wish to obtain the views of the HSC Trusts on the robustness of the DHSSPS's overall estimate for recurring costs arising from this Bill.

[26] Step 8 of DFP's 10 step approach to economic appraisal includes 'assess uncertainty', which states: Sensitivity analysis is the key technique for this purpose and it is fundamental to appraisal. http://www.dfpni.gov.uk/index/finance/eag/eag-step-by-step/eag-step-8/eag_assess_uncertainties.htm

[27] http://www.dfpni.gov.uk/ced-public-expenditure-terminology.pdf (page 62)

4. Concluding remarks

On 17 June 2015, the significance of recurring costs under the Mental Capacity Act 2005 in England and Wales was emphasised in a Westminster Parliamentary debate:

> *Between 1 April 2014 and the end of January 2015, Stockport received 612 applications. It now has about 230 cases that have not yet been processed. All cases agreed will be reassessed automatically in 12 months' time. Stockport council is now spending almost £1.2 million a year on DOLS assessments and employing six new social workers, a special DOLS co-ordinator and a part-time solicitor. The council has also had to draft in a private agency, because each average assessment takes about nine to 12 hours. That is a lot of time and money when social care budgets are being squeezed.*[28]

When the Whitehall Department of Health estimated the costs of DoLs assessments in 2005, it assumed such costs would amount to around £600. As discussed in Paper 3 in this series, it seems that the actual cost may have been much higher.

The above highlights how underestimations can lead to staffing and budgetary pressures. It underscores the importance of accurately estimating and assessing costs when considering proposed legislation.

This Paper identifies several issues to aid Assembly financial scrutiny of the Bill. Failing to receive clarification from the DHSSPS about them makes it difficult to conclude anything more than:

- It is unclear why certain costs have been excluded from the lower estimate;
- It is unclear whether all the data used is reliable; and,
- It is unclear whether any sensitivity analysis was conducted.

[28] http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150617/halltext/150617h0002.htm