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Public Finance Scrutiny Unit

Mental Capacity Bill: DoJ's Recurring Costs

Paper 5 of 5

To facilitate Assembly consideration of the costs arising from the Mental Capacity Bill, this Briefing Paper is the fifth in a five-part series produced by RaISe's Public Finance Scrutiny Unit (PFSU). The Paper examines the estimates that the Department of Justice (DoJ) 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 Department of Health, Social Services and Public Safety's (DHSSPS) estimates of one-off pre-introductory training and Deprivation of Liberty Assessment costs. Paper 4 examined the ongoing or recurring costs that are expected to arise for the DHSSPS from implementation the Bill.

This Paper examines the ongoing or recurring costs that are expected to arise for the Department of Justice (DoJ). Seeking to facilitate the Assembly's scrutiny of the Bill, the Paper examines the reliability and robustness of the DoJ's estimates.

The Paper is structured in the following way:

- Section 1 presents the DoJ's estimated recurring costs;
- Section 2 examines the assumptions underpinning the estimates; and,
- Section 3 provides concluding remarks.

Scrutiny points are raised throughout.

¹ As introduced by the DHSSPS on 8 June 2015, the Mental Capacity Bill (the Bill) fuses together mental health and mental capacity law. For further information, refer to RaISe paper NIAR 420-14

1. DoJ'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.

Of the total estimated recurring costs of £68 million (m) to £102.7m, between £4m to £11m (6% to 11% of the total) are anticipated to accrue to the DoJ.³ The composition of these upper and lower estimates is shown in **Table 1**, as compiled by the Public Finance Scrutiny Unit (PFSU) within RaiSe, using information and data provided by the DHSSPS/DoJ.³

Table 1: Recurring costs related to criminal justice provisions

£	Pre-implementation	Year 1	Year 2	Year 3 onwards
Criminal Justice - General	--	500,000	500,000	500,000
Protection Order Service Provision	--	250,000	250,000	250,000
Training	--	75,000	15,000	15,000
Review Tribunal:	--	300,000 to 4,300,000	300,000 to 4,300,000	300,000 to 4,300,000
Legal Aid: Review Tribunal:	--	1,300,000 to 4,000,000	1,300,000 to 4,000,000	1,300,000 to 4,000,000
Legal Aid: Judicial Reviews	--	24,000	48,000	48,000
Office of the Public Guardian	155,000	1,600,000	1,400,000	1,800,000

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)

³Letter from the DHSSPS to RaiSe-PFSU, dated 20 May 2015

2. Assumptions underpinning DoJ's estimates

This section examines assumptions underpinning DoJ estimated costs under the Bill, using the DoJ cost categories, as stated in Table 1.

2.1. Criminal Justice - General

This DoJ cost category relates to additional costs incurred in relation to healthcare provision for the treatment of mentally disordered individuals within the justice system. The DoJ calculated these costs using figures based on the current prison population, as well as the existing caseload under the *Mental Health (Northern Ireland) Order 1986*. The DoJ has advised that “*the number of individuals subject to Parts 9 and 10 of the Bill is not expected to increase significantly beyond the current justice caseload*” under the prevailing legislation.³

Scrutiny point

1. The Assembly may wish to ask the DoJ to detail why the number of individuals subject to Parts 9 and 10 of the Bill is not expected to increase significantly beyond the current justice caseload? This will help to assess whether the assumption of a limited increase is reasonable.

2.2. Protection Order Service Provision

This DoJ cost category relates to the costs of transferring prisoners to Great Britain for specialist provision. The DoJ based its estimate on current cost data, and has assumed one case per year.

Scrutiny points:

1. The Assembly may wish to request data from the DoJ on the number of prisoners that have been transferred to Great Britain for specialist provision in recent years. This will help to assess whether one case per year is a realistic assumption.

2.3. Training

This DoJ cost category relates to costs for the provision of training to support implementation of the Bill. As noted in Paper 2 in this series,⁴ the DoJ's estimated training costs are strikingly low when compared to the DHSSPS's estimated training costs. In Paper 2, the PFSU provided the following Scrutiny Points, to assess the DoJ's given estimate:

⁴<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/hssps/9215.pdf> (see pages 10-11)

Scrutiny points:

- 1. The Assembly may wish to ask the DoJ to identify who in the criminal justice system would need training regarding the Bill's implementation.**
- 2. The Assembly may wish to ask the DoJ to detail its rationale for the estimated staff training costs.**

2.4. The Review Tribunal

The DoJ has identified two cost categories relating to the Review Tribunal, i.e. 'Review Tribunal' and 'Legal Aid – Review Tribunal'.

These arise from Clause 263 of the Bill – as introduced – which provides that the Mental Health Review Tribunal for Northern Ireland constituted under Article 70 of the *Mental Health Order 1986*, as amended, is renamed the 'Review Tribunal'.⁵ The Review Tribunal would have a variety of powers, including:⁶

- to appoint and revoke a nominated person;
- to consider cases referred to it by the Attorney General, the DHSSPS or the Master of Care and Protection, on the direction of the High Court or a Health and Social Care (HSC) Trust; or,
- to revoke or vary authorisations for medical interventions under the proposed mental capacity regime.

If enacted, it seems this provision would generate costs relating to the above; e.g. costs to public bodies and the Tribunal relating to the preparation, processing and hearing of cases.

Table 1 shows two DoJ cost categories in relation to the Review Tribunal: general running costs; and, Legal Aid. One significant cost driver for both these categories is the total number of claims to be heard by the Review Tribunal, i.e. anticipated caseload.

The PFSU requested further information from the DoJ on its methodology for predicting the Review Tribunal caseload. In response, the DoJ provided the following explanation:

The predicted caseload for the Review Tribunal has been calculated using figures provided by the Department of Justice (DoJ) and the Department of Health, Social Services and Public Safety (DHSSPS).

⁵<http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity---as-introduced.pdf> (page 142)

⁶ Law Centre (NI) *The Mental Capacity Bill explained* <http://www.lawcentreni.org/Publications/Policy-Briefings/Mental-Capacity-Bill-explained-July-2014.pdf> (pages 11-18)

The DoJ has based its predicted caseload figures on the annual number of interventions which currently take place under the Mental Health (NI) Order 1986. The figures for transfer to hospital were then revised, in consultation with healthcare professionals, to include an expected small increase in the amount of transfers out of prison to hospital as a result of the Bill. The figures also include an estimated number for authorisations of serious physical illness or mental health treatments whilst in criminal detention.

In addition, DHSSPS provided DOJ with high-level figures for the estimated volumes of interventions per annum i.e. short term detentions in hospital, compulsory treatments, attendance requirements in the community, and community residence requirements imposed. These figures also included an estimate for the annual number of Deprivation of Liberty cases, calculated using data obtained from one of the HSC Trusts and extrapolated to provide an estimate for Northern Ireland as a whole.⁷

It appears that the DoJ's key assumption is the existing number of interventions made under the prevailing legislative framework, with an adjustment to include an increase due to the Bill, if enacted and implemented.

It should be noted however, that the estimated number of interventions is subject to ongoing review by the DoJ, in consultation with the DHSSPS.⁸ It appears that at the time of writing neither department has identified a completion date for their reviews of costs.

In the absence of amended or revised estimated costs, the following subsections examine the information that has been provided to date.

Prior to this, it is important to point out that the DoJ's estimated costs relating to the Review Tribunal do not appear to include all key costs that would be incurred by the public purse under the Bill. Arguably such costs should include other reasonably foreseeable costs, e.g. when a public body would have to defend a claim in the Tribunal: such costs would impact that body's budget. As discussed earlier, this cost would be driven by the anticipated increase in its caseload.

Scrutiny point:

1. The Assembly may wish to ask the DoJ whether its estimate includes all key costs that would be incurred by the public purse as a result of the Review Tribunal, and are reasonably foreseeable..

⁷Letter from DoJ to PFSU, dated 18 August 2015

⁸Letter from DoJ to PFSU, dated 18 August 2015

2.4.1. Review Tribunal: general running costs

The DoJ identifies another cost category concerning the Review Tribunal, i.e. annual recurring costs. The DoJ estimates this to range between £300,000 and £4,300,000. This is quite a wide range.

The upper and lower estimates are based on the following assumptions:⁹

- £4,300,000 is based on the DoJ assumption that **75%** of the total number of projected interventions under the Bill, which would result in an action in the Tribunal. Secondly, this higher figure assumes that the Review Tribunal would hear one appeal heard per session; and,
- £300,000 is based on the DoJ assumption that **25%** of the total number of projected interventions under the Bill, which would result in an action in the Review Tribunal. Secondly, this lower figure assumes that the Review Tribunal would hear three appeals per session.

It can be seen that each estimate is based upon two variables: the caseload; and, the number of appeals heard per session. Due to this presentation of figures, it is difficult to see exactly what is driving the variation in costs because **both** variables are adjusted at the same time.

2.4.2. Review Tribunal: Legal Aid

In addition to the general Review Tribunal running costs set out above, the DoJ has also estimated the cost of providing Legal Aid to individuals bringing Tribunal claims. As above, the DoJ has provided upper and lower estimates, based on the following assumptions:¹⁰

- The DoJ's **upper estimate** is for £4.0 million per year for Legal Aid. This estimate is derived on the assumption that **75%** of the total number of projected interventions under the Bill, which would result in an action in the Review Tribunal ; and,
- The DoJ's **lower estimate** is for £1.3 million per year for Legal Aid. This estimate is derived on the assumption that **25%** of the total number of projected interventions under the Bill, which would result in an action in the Review Tribunal.

Scrutiny points:

To facilitate the Assembly's scrutiny of the Legal Aid cost estimates relating to the Review Tribunal:

- 1. The Assembly may wish to ask the DoJ to detail what adjustments it made to estimate the anticipated number of claims which would be heard by the Tribunal under the Bill.**

⁹Letter from DHSSPS to RalSe, dated 20 May 2015

¹⁰Letter from DHSSPS to RalSe, dated 20 May 2015

2. The Assembly may wish to ask the Legal Services Agency to provide current Legal Aid information data to demonstrate the historic cost of facilitating claims such as these, i.e. claims to the existing Mental Health Review Tribunal.

3. The Assembly may wish to ask the DHSSPS and the DoJ to specify when amended cost estimates will be available.

4. The Assembly may wish to ask the DHSSPS and the DoJ to present future cost estimates more fully and clearly, so that the impact of adjustments to individual variables are explained in detail.

2.2. Judicial Reviews

The DoJ has identified a further cost category relating to the Bill, i.e. 'Legal Aid - Judicial Reviews'.

Prior to discussing this cost category, it first is important to highlight that key costs relating to Judicial Reviews (JRs) would apparently arise from:

- An individual bringing a JR. These costs first would relate to making an application for leave to bring the JR (Legal Aid is currently available for this); and second, if leave is granted, would relate to preparing and presenting the application in the JR Court within the High Court. (Legal Aid is currently available for this.)
- An intervenor, i.e. a third-party to a JR application, with an interest in the proceedings, e.g. a relative of a patient. Like an individual (above), these costs first would relate to participating in the JR. (Legal Aid is currently available for this). Second, if leave is granted, such costs would relate to preparing and presenting the intervenor's submissions in the JR Court within the High Court. (Legal Aid is currently available for this.)
- A public body bringing a JR. These costs would relate to legal representation to prepare and to present a claim in the application for leave hearing, and if leave granted thereafter.
- A public body defending a JR. These costs would relate to legal representation to prepare and to defend the claim in the application for leave hearing, and if leave granted thereafter.
- The JR Court within the High Court. These costs would relate to processing and hearing the application for leave, and thereafter JR applications.

A caveat to the above is the rule that 'costs go with the event', meaning the losing party pays all costs related to the JR. However, in practice public bodies do not always recoup their costs from the Legal Services Agency, e.g. where the public body defending the JR is successful.¹¹

¹¹ See: John F. Larkin and David A Scoffield. *Judicial Review in Northern Ireland: A Practitioner's Guide*. June 2007.

For this Bill, the DoJ identifies a cost category relating to JRs, i.e. ‘Legal Aid - Judicial Reviews’. Before examining the DoJ estimates for this category, it first is important to point out that the DoJ’s JR-related estimated costs do not appear to include costs to the public purse relating to: public bodies either bringing or defending a JR; an intervenor; or, the JR Court within the High Court.

Scrutiny point:

- 1. The Assembly may wish to ask the DoJ why it appears to not have included estimates for the costs of JRs to all relevant parties, as set out above?**
- 2. Based on the reply to the above, the Assembly may wish to request that the DoJ provide such estimates.**

2.2.1. Legal Aid – Judicial Reviews

Table 1 shows the DoJ’s estimated costs arising from Legal Aid-funded JRs under the Bill. In Year 1, the DoJ has estimated a relatively small cost of £24,000, and in the subsequent years of £48,000.

The DoJ’s estimate is based upon the assumption of “*an additional two [Judicial Reviews] in the first year and four in the following years at a cost of £12,000 a case.*”¹² There are two elements to this assumption, i.e. the number of cases; and the cost of those cases on average.

The DoJ has not explained the basis for the assumed number of JR cases.

In addition, it is unclear from the currently available information as to how the DoJ estimated the average JR cost. It seems that the Legal Services Agency may be in a position to provide relevant information and data on this issue.

Scrutiny points:

- 1. The Assembly may wish to ask the Legal Services Agency to provide Legal Aid data that sets out the historic cost of facilitating Judicial Reviews in comparable cases.**
- 2. The Assembly may wish to ask the DoJ to detail its rationale for its estimated cost of £12,000 per Judicial Review.**

2.3. Office of the Public Guardian

The Bill provides for a new officer to be known as the ‘Public Guardian’. This officer is to be appointed by the DoJ and would work in the Office of the Public Guardian (OPG). The Public Guardian would have the following functions:

¹²Letter from DHSSPS to RalSe, dated 20 May 2015

- To maintain a register of Lasting Powers of Attorney (LPAs), deputies (and the supervising of deputies);
- To direct court visitors to visit LPAs and deputies; and,
- To request and the examination of reports.

In essence, the OPG would take over the current functions of the Office of Care and Protection.¹³

The following sub-sections of this Paper examine two key aspects of the DoJ's estimated cost for the establishment of the proposed OPG: running costs; and, projected fees and income.

2.3.1 Office of the Public Guardian: running costs

In relation to the establishment of the OPG, Table 1 shows that the DoJ has estimated costs of £155,000 pre-implementation, and then ranging from £1.4 to £1.8 million for Years 1 onwards. Those costs:

...include the cost of a project which will be tasked with establishing and implementing the [Office of the Public Guardian] OPG. Court Service estimate that this team will cost £190,000 (£155,000 of which would be incurred pre-implementation) and will need to be in place for two years prior to the implementation of the Bill and retained [...] for approximately one year thereafter to ensure a smooth transition.¹⁴

In addition, the estimated costs for Year 1 include a number of one-off, or non-recurring, costs for set up of the OPG – namely £1.25 million. This figure includes, e.g., £750,000 capital expenditure for Information Technology. After that point, the vast majority of projected overall costs arises from salaries. From a total estimated cost of £1,842,900 for Year 1, salaries account for £1,368,000 (74%).

The Northern Ireland Courts and Tribunal Service (NICTS) provided the PFSU with the planned staffing structure for Year 3, as follows:¹⁵

- 1 x Public Guardian (Grade 6)
- 1 x Deputy PG (Grade 7)
- 1 x Senior Legal Officer (Grade 7)
- 2 x Legal Officers (Deputy Principal)
- 2 x Managers (Staff Officer)
- 1 x Customer Service / Comms (Staff Officer)
- 14 x Case Worker (Executive Officer)
- 12 x Administrative Officers

¹³See RalSe paper NIAR 420-14 for more information

¹⁴Letter from DHSSPS to RalSe, dated 20 May 2015

¹⁵Letter from DoJ to RalSe, dated 19 August 2015

- 2 x Administrative Assistants

At first glance, it might appear that the proposed structure would be quite large. However, when compared to the existing staff employed by the OPG in England and Wales, it is apparent that that would not be the case – see **Table 2** overleaf:

Table 2: workforce composition in the OPG in England and Wales¹⁶

	Male	Female
Board Members	3	2
SCS	0	1
OPG employees (excluding SCS)	368	528

Table 2 does not report full time equivalents, and it is quite possible that a proportion of this workforce is part-time. Nevertheless, it is quite clear that the OPG in England and Wales employs significant human resources.

Scrutiny point:

1. The Assembly may wish to ask the NICTS to provide a detailed explanation of the proposed staffing structure of the Northern Ireland OPG, to clarify why such a structure is needed to effectively and efficiently deliver the office’s duties and responsibilities.

2.3.2. OPG: Fees and Income

The NICTS has informed the PFSU that it aims to attain “*as far as possible, full cost recovery for the services provided balanced with the need for access to justice and the need to protect the interests of vulnerable people.*”¹⁷ In order to recover costs, the NICTS has stated that it would charge fees for a variety of functions under the Bill, such as the registration of Lasting Powers of Attorney.

The NICTS has further stated that fee income was estimated by applying a 31:1 ratio to the income generated by the OPG for England and Wales.¹⁸ In other words, the NICTS has divided the income received by the OPG for England and Wales by 31, to approximate income for the Northern Ireland OPG. This ratio reflects the relative size of the populations of England and Wales compared to Northern Ireland. In effect therefore, it seems that the NICTS has based its estimate of income using a proxy measure, rather than estimating costs and thereafter calculating an appropriate fee structure.

¹⁶https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438183/OPG_Annual_Report_Accounts_2014-2015_web_.pdf (see page 22)

¹⁷Letter from DoJ to PFSU, dated 18 August 2015

¹⁸Letter from DoJ to PFSU, dated 18 August 2015

The Department of Finance and Personnel's (DFP) guidance for Northern Ireland departments *Managing Public Money* explains the importance of a correct calculation of costs when determining the level at which fees should be set:

With some exceptions, fees for services should generally be charged at cost, sometimes with an explicit additional element to match the returns of commercial competitors. So to set many fees for public services it is essential to calculate the cost of providing them accurately.¹⁹

The Northern Ireland OPG will **not** be operating in a field in which there are commercial competitors. So, this means that fees should be charged at cost. In other words, fees should recover all the cost of providing the services – no more and no less. However, the DFP guidance also acknowledges that income levels fluctuate, meaning fee levels may require adjustment:

Despite every effort to measure and forecast costs, surpluses and deficits are bound to arise from time to time. Causes may include variations in demand, in year cost changes, and so on. It is good practice to consider mid-year adjustment to fee levels if this is feasible.²⁰

Table 3 below shows the financial summary from the OPG for England and Wales' most recent Annual Report and Accounts. This shows an example of the generation of a surplus, as described in the cited passage.

Table 3: Financial Summary, OPG England and Wales 2014-15 and 2013-14²¹

	2014/15	2013/14	Difference	
	£m	£m	£m	%
Operating income	-57.5	-48.9	-8.6	18%
Fee exemptions and remissions	6.1	6.3	-0.2	(3%)
Total income	-51.4	-42.6	-8.8	21%
Expenditure				
Staff costs	25.8	19.9	5.9	30%
Other operating costs	10.2	7.8	2.4	31%
Non-cash charges	4.3	4.1	0.2	5%
Total expenditure	40.3	31.8	8.5	27%
Net operating surplus	-11.1	-10.8	-0.3	(3%)

In the last financial year the OPG in England and Wales reported a **net operating surplus** of £11.1 million

¹⁹ http://www.dfpni.gov.uk/index/finance/afmd/afmd-key-guidance/afmd-mpmni/a.6.2_how_to_calculate_fees.pdf (paragraph A6.2.1)

²⁰ http://www.dfpni.gov.uk/index/finance/afmd/afmd-key-guidance/afmd-mpmni/a.6.2_how_to_calculate_fees.pdf (paragraph A6.2.8)

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438183/OPG_Annual_Report_Accounts_2014-2015_web_.pdf (see page 21)

The surplus generated by the OPG for England and Wales in two successive years is germane to the Assembly's consideration of the NICTS estimates. This is because, as stated above, the NICTS estimated income for the Northern Ireland OPG by dividing the OPG for England and Wales' income by 31. This means that the estimated income for Northern Ireland would reflect the fee structure in England and Wales. But, the OPG for England and Wales received specific parliamentary authority to generate surplus income:

In 2011, parliamentary authority was given to exceed our cost recovery objective to fund investment in our transformation programme.²²

In other words, through *The Public Guardian (Fees, Etc.) (Amendment) Regulations 2011*²³ Parliament allowed the OPG for England and Wales to charge fees at a **higher level than required to cover its current costs in order to build up sufficient reserves** to fund a specific objective.²⁴ In effect then, **service users are charged more than cost recovery rates.**

However, it should be noted that the proposed Northern Ireland OPG would be a new body, and would not therefore require a 'transformation programme.' It is therefore unclear whether the NICTS's application of a ratio to the OPG in England and Wales' fee income is appropriate for calculating the required fee structure for a Northern Ireland OPG.

Scrutiny point:

- 1. The Assembly may wish to ask the NICTS to detail its rationale for the application of a population-based ratio to the OPG in England and Wales' fee income when estimating income for Northern Ireland.**
- 2. The Assembly may wish to seek an assurance from the NICTS and the DoJ that if the OPG in Northern Ireland records a surplus, its fee levels would be reduced in line with the DFP guidance.**

²²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/438183/OPG_Annual_Report_Accounts_2014-2015_web.pdf (see page 21)

²³http://www.legislation.gov.uk/ukxi/2011/2189/pdfs/ukxiem_20112189_en.pdf

²⁴For more detail see the UK Department of Justice's consultation paper: <http://www.mentalhealthlaw.co.uk/media/OPG-fees-consultation-feb2011.pdf> (pages 38-41)

3. Concluding remarks

As outlined above, the DoJ has provided estimated costs as shown in Table 1.

It appears however, that the DoJ has not fully or explicitly considered some potential areas of costs that could arise under the Bill, such as the overall cost to the public purse of JRs, e.g. not just Legal Aid, but also to public bodies.

In relation to the proposed Review Tribunal, this Paper has highlighted two particular assumptions: the proportion of the total number of interventions under the Bill that would be referred to the Review Tribunal. Further data would help the Assembly assess the reliability and robustness of the estimates.

In addition, it would be useful for the DoJ and the DHSSPS to inform the Assembly when revised and amended figures will be available. The Assembly will require time to scrutinise amended figures.

In relation to the proposed OPG, this Paper has raised an issue around the level of fees. In particular, explanation for the NICTS's rationale for applying a population-based ration to fee income for the OPG in England and Wales would be helpful. In addition, it might also be helpful for the Assembly to seek an assurance about the build-up of surpluses.

Overall, fairly detailed and useful information has been provided by the DoJ to the PFSU upon request. Nonetheless, as discussed in the Paper, for the Assembly to have more confidence in the estimates, the Assembly may wish to seek further information to enhance its examination of the reliability and robustness of the DoJ's cost estimates.