

Title: Prisons and Courts Bill: JAC provision of Assistance and Charging IA No: MoJ004/2017 RPC Reference No: N/A Lead department or agency: Ministry of Justice Other departments or agencies: Judicial Appointment Commission	Impact Assessment (IA)			
	Date: 22/02/2017			
	Stage: Final			
	Source of intervention: Domestic			
	Type of measure: Primary legislation			
Contact for enquiries: Sam Allan - Samuel.Allan@justice.gsi.gov.uk				
Summary: Intervention and Options				RPC Opinion: Not Applicable

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB in 2014 prices)	One-In, Three-Out	Business Impact Target Status
N/A	N/A	N/A	Not in scope	Qualifying provision

What is the problem under consideration? Why is government intervention necessary?
 The Judicial Appointments Commission (JAC) was established in 2006 as an executive non-departmental public body to select candidates for judicial office. The JAC is a world leader in independent merit-based appointments and is often approached to provide assistance for judicial appointments which are not expressly under its statutory duties. In 2015, the Ministry of Justice (MoJ) conducted a triennial review of the JAC which recommended it explore providing assistance to a wider range of appointments and develop a charging model to recover the costs involved. Providing the JAC with clear vires to offer its assistance by sharing its skills and expertise when appropriate will enable the UK to make full use of this asset.

What are the policy objectives and the intended effects?
 We seek to provide the JAC with a clear legal basis for providing assistance for appointments other than those made by, or on the recommendation of, Ministers, and the ability to appropriately recover the costs of doing so. This will allow the maximum benefit to be derived from the JAC's expertise by allowing others access to it whilst ensuring that the associated costs of this assistance are met by those receiving it. It is not anticipated that this provision will be used extensively, with each use of the new power requiring instruction from the Lord Chancellor, after consideration and consultation with the Lord Chief Justice, and the JAC themselves. It is an explicit intention of the legislation that the current statutory duties of the JAC are preserved, and prioritised by this amendment, which requires that they are not adversely affected.

What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)
 Option 0/Do nothing: No amendment is made to the Constitutional Reform Act 2005 (CRA 2005)
 Option 1: Amend the 98 CRA 2005 to allow the Lord Chancellor to request the JAC provide assistance in appointments not made by them or a Minister of the Crown and for the JAC to charge to enable the costs of this assistance to be recovered.

 As a statutory corporation, the JAC derives its powers from statute, currently within the CRA 2005. The use of existing provisions providing for incidental activity by the JAC have been considered, but it is the government's view that a change to primary legislation is necessary in order for the JAC to carry out, and charge for, the proposed activities. The recovery of costs through charging required parliamentary approval. Option 1 is therefore the preferred option.

Will the policy be reviewed? There is no plan to review the policy.					
Does implementation go beyond minimum EU requirements?			Yes / No / N/A		
Are any of these organisations in scope?		Micro Yes/No	Small Yes/No	Medium Yes/No	Large Yes/No
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)			Traded:		Non-traded:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options.

Signed by the responsible Minister  Date: 22/02/2017

Summary: Analysis & Evidence

Policy Option 1

Description: Amend section 48 of the Constitutional Reform Act and allow the JAC to charge for services outside its statutory duties

FULL ECONOMIC ASSESSMENT

Price Base Year 2014	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: N/A

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	Optional	Optional	N/A
High	Optional	Optional	N/A
Best Estimate			N/A

Description and scale of key monetised costs by 'main affected groups'

The monetised costs cannot be fully estimated as the number of additional campaigns that the JAC will undertake is unknown. To illustrate the possible costs, various scenarios concerning the number and scale of the campaigns the JAC might undertake are considered. The lower end of scale is anticipated to match the actual level of provision.

Other key non-monetised costs by 'main affected groups'

None

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	Optional	Optional	N/A
High	Optional	Optional	N/A
Best Estimate			N/A

Description and scale of key monetised benefits by 'main affected groups'

The monetised benefits cannot be estimated as the number of additional campaigns that the JAC would undertake is unknown. The JAC would reclaim any costs accrued through the charging model. The JAC would make a profit by charging organisations outside of central government a real rate of return based on HM Treasury's Managing Public Money guidance.

Other key non-monetised benefits by 'main affected groups'

The legislation will allow other government departments and organisations the opportunity to make use of the JAC's skills and experiences with organising and running recruitment campaigns of a specialist nature, and making use of their bespoke software (JARS).

Key assumptions/sensitivities/risks

Discount rate (%)

-

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target (qualifying provisions only) £m:
Costs:	Benefits:	Net:	

Evidence Base

A. Problem under consideration

The Judicial Appointments Commission

1. The Judicial Appointments Commission (JAC) was established in 2006 as an executive non-departmental public body in order to select candidates for judicial office. The JAC is a world leader in independent merit-based appointments and is often approached to provide assistance for judicial appointments which are not expressly under its statutory duties.
2. A small number of activities undertaken by the JAC, whilst clearly appropriate, have had to rely on the JAC's power to carry out activities which are incidental to its functions. Examples of this include the loan of staff to the Welsh Government, and the provision of judicial recruitment services to overseas territories (e.g., the Falkland Isles, St Helena).
3. In January 2015, the Ministry of Justice (MoJ) published a triennial review into the work of the JAC¹, as part of the Cabinet Office led Public Bodies Reform Agenda. The review was governed by a project board, robustly examined by a challenge group (including representatives from the Cabinet Office and National Audit Office) and quality assured by an independent reviewer.
4. Recommendation 2 of this review was: "The JAC, MoJ and the judiciary should explore options to clarify and expand the JAC's functions in terms of senior appointments, promoting international rule of law, international and Overseas Territorial appointments, and appointments which are not constitutionally judicial, but judicial in nature." The review also stated (finding 8) that: "The JAC and MoJ should explore the potential for the JAC to develop a charging model, following full consultation with National Audit Office and Her Majesty's Treasury on final models and accountability."
5. Because the JAC can only operate within its statutory provisions, providing legal certainty for its broader activities can only be achieved through primary legislation. Similarly as a statutory corporation, the JAC does not have the same ability to set up non-statutory commercial services as would a Government Department. In order for the JAC to charge for the provision of services, it must have a statutory charging power. The case of *McCarthy & Stone*² is authority that an 'incidental functions' power is not sufficient to charge for a service.
6. The government has decided to act on these recommendations. This Impact Assessment (IA) assesses the impacts of taking this forward.

B. Policy Rationale and Objectives

7. The conventional economic rationales for government intervention are based on efficiency and equity arguments. The government may consider intervening if there are failures in the way markets operate (e.g., monopolies overcharging consumers) or where there are failures with existing government interventions (e.g., waste generated by misdirected rules). The proposed new interventions should avoid creating a further set of disproportionate costs and distortions. The government may also intervene for equity (fairness) and re-distributional reasons (e.g., to reallocate goods and services to the more needy groups in society).
8. The rationale the options in this IA is efficiency as the current legislative arrangement do not allow the JAC to make full use of its skills and expertise: providing the JAC with clear vires to offer its assistance by sharing its skills and expertise when appropriate to do so will enable the UK to make full use of this asset.
9. The associated policy objective is to amend section 98 of the Constitutional Reform Act 2005 (CRA 2005) so as to provide that the Lord Chancellor may request the JAC to provide assistance in respect

¹ <https://www.gov.uk/government/publications/judicial-appointments-commission-triennial-review-report>

² *McCarthy & Stone (Developments) Ltd v Richmond upon Thames London Borough Council* [1992] 2 AC 48

of an appointment or recommendation for appointment, whether or not such appointment or recommendation is to be made by the Lord Chancellor or a Minister of the Crown and that the JAC should be able to charge to enable the costs of such assistance to be met by those who receive it.

10. We have considered in some detail the need to maintain protection and oversight of the JAC's activities to ensure that any work undertaken does not undermine the current statutory functions of the JAC. We considered if this could be achieved without such protection being a feature of the primary legislation, but consider that given the necessity of such protection, from a constitutional perspective, that there should be specific provision in the legislation to ensure that additional activities do not adversely affect the JAC's core functions. The requirement for a request to come from the Lord Chancellor, subsequent to consultation with the Lord Chief Justice and the JAC themselves, is also an important safeguard in respect of the exercise of this power.

C. Affected Stakeholder Groups, Organisations and Sectors

11. The main groups and stakeholders who will be affected by the options in this IA is shown below:

- The JAC;
- Other Government Departments and their 'arms length' bodies
- Other organisations who might request assistance from the JAC;
- Wider society, including taxpayers, who fund the activities of the JAC.

D. Description of options considered

12. To meet the policy objectives, the following options are assessed in this IA:

- **Option 0/Baseline: No amendment is made to section 98 of the CRA 2005**
- **Option 1: Amend the 98 CRA 2005 to allow the Lord Chancellor to request the JAC provide assistance in appointments not made by them or a Minister of the Crown and for the JAC to charge to enable the costs of this assistance to be recovered.**

Option 0: No amendment is made to s98 of the CRA 2005

13. This option would require continuing reliance on the JAC's incidental functions power; which is unlikely to be broad enough for the JAC to undertake the full scope of intended activities. This could mean, for example, obliging the Welsh government to make alternative arrangements for the appointment of judges to Welsh tribunals, or limiting the JAC's contribution to UK international activities promoting the Rule of Law. It would also mean that the MoJ would continue to be unable to recover the cost of the assistance provided by the JAC to other areas of government.

Option 1: Amend the s98 of the CRA 2005 to allow the Lord Chancellor to request the JAC provide assistance in appointments not made by them or a Minister of the Crown and for the JAC to charge to enable the costs of this assistance to be recovered.

14. Under this option section 98 CRA 2005 would be amended so as to provide that the Lord Chancellor may request the JAC to provide assistance in respect of an appointment or recommendation for appointment, whether or not such appointment or recommendation is to be made by the Lord Chancellor or a Minister of the Crown and that the JAC should be able to charge to enable the costs of such assistance to be met by those who receive it.

15. It is not anticipated that this provision would be used extensively, with each use of the new power requiring instruction from the Lord Chancellor, after consideration and consultation with the Lord Chief Justice and the JAC themselves. It is an explicit intention of the legislation that the current statutory duties of the JAC are preserved and prioritised by this amendment which requires that they are not adversely affected.

16. The charging model would be based on HM Treasury guidance. Managing Public Money (MPM)³ offers guidance on how government departments should charge other organisations for statutory services. In particular it states the charging methodology to be applied for different type of organisations. For central government departments (including any 'arms length' bodies of these departments), charging will be applied on a full cost recovery basis with a cost of capital of 3.5%. For organisations outside of central government and where other competitors are in the market, charges will be set at full cost recovery, including a real rate of return in line with the rates achieved by comparable businesses facing a similar level of risk.

E. Cost and Benefit Analysis

17. This IA follows the procedures and criteria set out in the Impact Assessment Guidance and is consistent with the HM Treasury Green Book.

18. The IA aims to identify, as far as possible, the potential impacts of the option on society. A critical part of the process is to undertake a Cost Benefit Analysis (CBA) of the proposals. CBA assesses whether the proposals would deliver a positive impact to society, accounting for economic and social factors and, where possible, seeks to show how those impacts are distributed across the affected groups. The IA should therefore not be confused with a financial appraisal, which is focused purely on assessing how much resource government would save from certain proposals.

19. Where possible, this IA identifies both monetised and non-monetised impacts on individuals, groups and businesses in England and Wales with the aim of understanding what the overall impact on society might be from the proposals under consideration. CBA places a strong focus on the monetisation of costs and benefits. There are often, however, important impacts that cannot sensibly be monetised. These might be impacts on certain groups of society or some data privacy impacts, positive or negative. CBA in this IA is therefore interpreted broadly, to include both monetisable and non-monetisable costs and benefits, with due weight given to those that are non-monetisable.

20. The costs and benefits of each proposal are compared to option 0, the do nothing or 'baseline' case. As the 'baseline' option is compared to itself, the costs and benefits are necessarily zero, as is its Net Present Value (NPV).

21. The annual costs and benefits are presented in steady state throughout this IA. All estimates, unless stated otherwise, are annualised figures in 2014-15 prices.

Option 1: Amend the 98 CRA 2005 to allow the Lord Chancellor to request the JAC provide assistance in appointments not made by them or a Minister of the Crown and for the JAC to charge to enable the costs of this assistance to be recovered.

Cost scenarios

22. The nature and volume of the support that the JAC will charge for is unknown. To illustrate the potential costs involved, various scenarios have been set and modelled for both the costs of additional campaigns and for making use of the JACs JARS software.

23. The three cost scenarios have been chosen by operational staff in the JAC to reflect the cost of different type of campaigns the JAC processed in 2015/16. The low scenario reflects the costs for running a campaign for Senior Circuit Judges where 1 appointment was made, the medium scenario reflects the costs for running a campaign for Circuit Judges where 55 appointments were made, and the high scenario reflects the costs for running a campaign for Recorders where 99 appointments were made. Three scenarios have also been derived for the additional number of campaigns the JAC will run per year.

24. The administrative running costs of the charging model are assumed to be negligible.

³ <https://www.gov.uk/government/publications/managing-public-money>

25. To illustrate the costs another government department or organisation may accrue from using the JAC's bespoke software JARS, the assumptions listed below have been estimated using existing JAC management information and operational knowledge:

- JARS end of life = 2024
- Value at end of life = £0
- Future annual applications = 4,730 (based on the average annual applications from the last 5 years and a mid-range estimate for the number of applications through additional campaigns)
- Historic costs of JARS = £800,000
- Annual ongoing costs of JARS = £190,500

Costs of Option 1

JAC

26. The JAC would provide support to other organisations running recruitment campaigns, for appointments outside schedule 14 to the Constitutional Reform Act 2005. To support these campaigns the JAC would accrue additional costs and claim these back through the charging model. The costs will depend on the nature of each of the campaigns, such as the staffing resources required and the tasks involved in the campaign for example development, shortlisting applicants and running selection days. .

27. Table 1, below, illustrates the cost to the JAC for running additional campaigns which are of similar nature as the low, medium and high costing campaigns derived above.

Table 1: Annual cost to the JAC to run additional campaigns

Size of new campaigns	Number of additional campaigns per year (£000)		
	1	3	5
Low	14	41	68
Med	255	765	1,276
High	539	1,618	2,697

Other government departments

28. Managing Public Money (MPM) offers guidance on how government departments should charge other organisations for statutory services. In particular it states the charging methodology to be applied for different type of organisations. For central government departments (including any 'arms length' bodies), charging will be applied on a full cost recovery basis with a cost of capital of 3.5%.

29. Table 2, below, illustrates the charge to different types of organisations for the JAC to run their recruitment campaigns. To calculate this, the 3.5% cost of capital has applied to the full cost recovery for the JAC when dealing with other government departments and their 'arms length' bodies. For organisations outside central government, a real rate of return uplift has been applied.

Table 2: Cost per campaign for organisations

Size of new campaign	Type of Organisation (£000)		
	Other government departments	Other organisations	
		5% real rate of return	10% real rate of return
Low	14	15	15
Med	264	277	290
High	558	586	614

30. Other government departments would be charged for the cost of running campaigns and for using the JAC's bespoke software. The full cost recovery charging of JARS would involve estimating the

full costs of developing and maintaining JARS and estimating the number of applications that will be processed over its lifetime. Table 3 provides an example of the charges other government departments would accrue to make use of JARS based on the assumptions listed above.

Table 3: Cost of JARS software for organisations

Size of campaign using JARS	Type of Organisation (£)		
	Other government departments	Other organisations	
		5% real rate of return	10% real rate of return
Low	121	127	133
Med	7,420	7,790	8,160
High	49,600	52,100	54,600

(Note: figures have been rounded to 3 significant figures)

Organisations outside government

31. For organisations outside of central government and where other competitors are in the market, charges would be set at full cost recovery, including a real rate of return in line with the rates achieved by comparable businesses facing a similar level of risk. This level of risk is yet to be defined but MPM provides an indicative, although not constrained to, range of 5-10%. Table 2 and 3 also include example costs for organisations outside government which make use of JAC's expertise running recruitment campaigns and to make use of JARS, respectively.

Benefits of Option 1

Wider Society

32. The receipts from the charges would be paid into the consolidated fund unless otherwise agreed by the Lord Chancellor and HM Treasury. The JAC/MoJ would be required to submit a business case to HMT in to request that the JAC may retain receipts to directly offset the JAC's expenditure.
33. Some illustrative examples of the profit paid into the consolidated fund are provided in Table 4 below. The profit is simply the rate of return applied to non-government organisations. Varying scenarios are created for the MPM indicative rate of return range of 5-10%, which is applied to the average cost of campaign in 15-16, and the volume of statutory services outside central government in a commercial market.

Table 4: Profit to the consolidated fund per campaign (£)

Size of new campaign	Recruitment campaign		Use of JARS	
	Rate of return		Rate of return	
	5%	10%	5%	10%
Low	703	1,406	6	12
Med	13,200	26,400	370	740
High	27,900	55,800	2,480	4,960

F. Wider Impacts

34. An equality statement has been prepared and should be read in conjunction with this IA