

Investigatory Powers Act: Domestic right of appeal from the Investigatory Powers Tribunal <b>IA No:</b> HO0271  <b>Lead department or agency:</b> Home Office  <b>Other departments or agencies:</b> FCO, NIO, Cabinet Office, NCA, MPS, GCHQ, MI5, SIS, MOD, MOJ, wider law enforcement, other public authorities	<b>Impact Assessment (IA)</b>			
	<b>Date:</b> 3 March 2017			
	<b>Stage:</b> Enactment			
	<b>Source of intervention:</b> Domestic			
	<b>Type of measure:</b> Primary legislation			
<b>Contact for enquiries:</b> public.enquiries@homeoffice.gsi.gov.uk				
<b>Summary: Intervention and Options</b>			<b>RPC Opinion:</b> Not applicable	

Cost of Preferred (or more likely) Option				
Total Net Present Value	Business Net Present Value	Net cost to business per year (EANDCB on 2014 prices)	In scope for One-in, Two-out (O12O)?	Business Impact Target status
£0m	£0m	£0m	N/A	Not a Regulatory Provision

**What is the problem under consideration? Why is government intervention necessary?**

Individuals who believe themselves to have been subject to unlawful surveillance can bring a case before the Investigatory Powers Tribunal (IPT). Currently those wishing to challenge a decision or determination of the IPT must pursue an appeal before the European Court of Human Rights (ECtHR), a system which has been identified as time consuming, opaque and difficult to understand. Legislation is necessary to provide the public with reassurance that surveillance bodies can be held to account effectively within the domestic courts.

**What are the policy objectives and the intended effects?**

To achieve a potential means by which a Claimant can have their appeal heard by an appellate court in the domestic court system, following permission to appeal from the IPT. This is intended to increase public confidence that those who use investigatory powers are fully held to account by the law, and that Articles 8 and 10 of the European Convention on Human Rights are respected. It will also serve to bring the IPT in line with the wider British Tribunal system and aims to lessen the cost, time and inconvenience for those who wish to pursue an appeal.

**What policy options have been considered, including any alternatives to regulation? Please justify preferred option (further details in Evidence Base)**

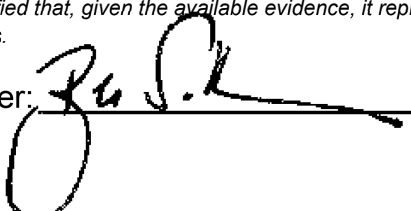
Option 1: Do nothing- maintain the current system wherein the only route for challenging a judgment by the Tribunal is to bring a claim at the European Court of Human Rights.

Option 2: The Investigatory Powers Act create a domestic right of appeal that would enable appeals from a decision or determination of the Investigatory Powers Tribunal to be pursued in the UK court system, where there is a point of law which raises an important point of principle or practice or there is another compelling reason for the appeal to be heard.

Option 2 is the preferred option as it best meets the policy objectives set out above.

<b>Will the policy be reviewed?</b> It will be reviewed. <b>If applicable, set review date:</b> June - Dec 2022					
Does implementation go beyond minimum EU requirements?			N/A		
What sizes of organisation are affected?		<b>Micro</b> No	<b>Small</b> Yes	<b>Medium</b> Yes	<b>Large</b> Yes
What is the CO <sub>2</sub> equivalent change in greenhouse gas emissions? (Million tonnes CO <sub>2</sub> equivalent)			<b>Traded:</b> N/A	<b>Non-traded:</b> N/A	

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

Signed by the responsible Minister: 

Date: 26-4-17

# Summary: Analysis & Evidence

# Policy Option 1

Description: Do nothing

## FULL ECONOMIC ASSESSMENT

Price Base Year 2016	PV Base Year 2016	Time Period Years 10	Net Benefit (Present Value (PV)) (£m)		
			Low:	High:	Best Estimate: 0

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	10		
High			
Best Estimate		0	0

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

This option is the baseline and there are no additional costs or benefits associated with this option.

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

This option is the baseline and there are no additional costs or benefits associated with this option.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	10		
High			
Best Estimate		0	0

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

This option is the baseline and there are no additional costs or benefits associated with this option.

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

This option is the baseline and there are no additional costs or benefits associated with this option.

Key assumptions/sensitivities/risks Discount rate (%) 3.5

The existing system has been identified as time consuming, opaque and difficult to understand. Doing nothing risks the public lacking reassurance that surveillance bodies can be held to account effectively within the domestic courts.

## BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			Score for Business Impact Target £m (qualifying regulatory provisions only)
Costs: 0	Benefits: 0	Net: 0	

# Summary: Analysis & Evidence

# Policy Option 2

Description: Create a domestic right of appeal from the Investigatory Powers Tribunal

## FULL ECONOMIC ASSESSMENT

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

COSTS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Cost (Present Value)
Low	10		
High			
Best Estimate		N/K	N/K

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

The Home Office and Ministry of Justice have agreed that the impact to the justice system is likely to be minimal. There will be costs associated with training judicial and court staff which will be considered as part of the ongoing terms of trade discussions between the two departments.

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

There will likely be a necessary time cost to train the IPT and its secretariat in the new rules and procedures.

BENEFITS (£m)	Total Transition (Constant Price) Years	Average Annual (excl. Transition) (Constant Price)	Total Benefit (Present Value)
Low	10		
High			
Best Estimate		N/K	N/K

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

No benefits have been monetised for this policy.

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

Less time consuming than the current arrangements, whereby challenges are heard via the ECtHR process. Easier to understand to those involved. Public reassurance that those who use investigatory powers can be fully held to account for their lawfulness.

Key assumptions/sensitivities/risks	Discount rate (%)	3.5
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Appeals could entail extra costs for departments and agencies, and a greater strain on staff resources. It is possible that reform may not generate the expected increase in confidence amongst the public.

## BUSINESS ASSESSMENT (Option 2)

Direct impact on business (Equivalent Annual) £m:			
Costs: 0	Benefits: 0	Net: 0	Score for Business Impact Target £m (qualifying regulatory provisions only)

# Evidence Base

## A. Strategic Overview

### A.1 Background

The Investigatory Powers Tribunal (IPT) was established in October 2000 under the Regulation of Investigatory Powers Act 2000 (RIPA). It is one of a range of oversight provisions which ensure that public authorities act in ways that are compatible with the Human Rights Act 1998. Specifically it provides a right of redress for anyone who believes they have been a victim of unlawful surveillance or wider human rights infringements in breach of the Human Rights Act 1998.

The Tribunal investigates and determines two types of application:

- a.) Complaints against a broad range of public authorities using covert investigative techniques, including those currently regulated under RIPA. This includes complaints relating to alleged interception, surveillance and interference with property. The public authorities include UK security and intelligence agencies, the armed forces and law enforcement agencies, as well as a range of Government Departments, regulators and local authorities.
- b.) Human rights claims. These claims can relate to the use of covert investigative techniques by the security and intelligence agencies, the armed forces and the law enforcement agencies.

There is currently no domestic route of appeal from the IPT; a Complainant wishing to challenge a decision or determination of the IPT must pursue an appeal to the ECtHR. It is important for public trust and confidence in the use of investigatory powers that there is a robust means by which the use of these sensitive investigative techniques use can be challenged.

Three independent reviews undertaken in 2014-2015 (by the Intelligence and Security Committee of Parliament, David Anderson QC and the Royal United Service Institute) all recommended the creation of a domestic route of appeal on a point of law. David Anderson commented that:

*The IPT is unusual in being subject to no process of appeal, an incongruous state of affairs given that it is the only appropriate tribunal for certain categories of human rights appeals (RIPA s65(2)(3)), and that it can decide issues of great general importance involving vital issues of principle.*

*The Court of Appeal is now accustomed to hearing appeals involving closed materials. It is desirable that human rights cases should be finally determined in the UK if possible; and if not, that the ECtHR should have the benefit of views reached after the benefit of argument in more than one court, and expressed at a very senior judicial level within the UK.*

While the IPT's rules and procedures have been found to be lawful by the ECtHR (Kennedy v United Kingdom [2011] 52 EHRR 4), there still remains a concern that the decisions of the IPT should be capable of being subject to scrutiny by the domestic courts, just as other Tribunals are.

### A.2 Groups Affected

- Government Departments (Home Office, FCO, Cabinet Office, NIO)
- SIAs (Security Service, Secret Intelligence Service, GCHQ)
- Law enforcement agencies and other public authorities
- Ministry of Justice
- Scottish Government
- HM Courts and Tribunal Service
- Crown Prosecution Service
- HM Prison Service

- The general public, whose safety and security are affected by the capabilities of the police and other agencies to prevent and detect crime, and whose privacy needs to be protected.

### **A.3 Consultation**

#### **Within Government**

While efforts have been made to understand the costs and benefits to all affected groups, it is necessary to make some assumptions. The Home Office has (as far as is possible) strengthened and confirmed the evidence base through information gathered through consultation with Government departments; the Office of the Lord Chief Justice and operational partners.

#### **Public Consultation**

The draft Bill was published on 4 November 2015 and scrutinised by three Parliamentary Committees: the Intelligence and Security Committee of Parliament, the Science and Technology Commons Committee and a Joint Committee convened to scrutinise the Bill. Written submissions were made by members of the public, key stakeholders and other parties to the Joint Committee as part of the consultation process for pre-legislative scrutiny. The Joint Committee recommended that:

*We recommend that rulings in the Investigatory Powers Tribunal should be subject to an interim right of appeal on the grounds of an error of law to save time and costs*

And:

*We recommend that the appeal route for Scotland and Northern Ireland should appear on the face of the Bill*

And:

*The Investigatory Powers Tribunal should have the power to decide whether proceedings should be held in public. When making a decision whether a hearing or part of a hearing should be open or not the Tribunal should apply a public interest test.*

Revised policy was needed in order to address these points.

A Bill was introduced in the House of Commons on 1 March, and completed its passage on 16 November, meeting the timetable for legislation set by Parliament during the passage of the Data Retention and Investigatory Powers Act 2014. Over 1,700 amendments to the Bill were tabled and debated during this time. The Investigatory Powers Act 2016 was given Royal Assent on 29 November 2016.

## **B. Rationale**

The only option available to a Complainant wishing to challenge a decision or determination of the IPT is to bring a case before the ECtHR.

The current process of taking challenges to the ECtHR creates inherent inefficiencies in the process of seeking justice domestically, due to the need to take matters outside of the domestic court system. The ECtHR can take a considerable amount of time to consider an applicant's claim, resulting in lengthy delays and may also require a reference to the Committee of Ministers of the Council of Europe in order to execute any judgment made.

It also makes the process of challenging the Tribunal's decisions opaque. The ECtHR does not act as a court of appeal in relation to national courts; it does not rehear cases, and so there can be a perceived lack of accountability to the IPT's judgments.

## C. Objectives

The overarching aim of introducing a domestic right of appeal, enabling parties to challenge the IPT's rulings on points of law – including points of law of general public importance, is to increase public confidence in the independence of the Tribunal and the quality of the Tribunal's decisions and determinations. We are also seeking to address the recommendations so far as is practical of the three independent reports on investigatory powers and the pre-legislative scrutiny conducted by Parliament.

We intend to create a system that is easier to understand, and less time consuming for those involved. The aim is also to reassure the public that those bodies which use investigatory powers can be fully held to account for the lawfulness of their actions.

## D. Options

Option 1: make no changes (do nothing).

Option 2: the Investigatory Powers Act introduces a new domestic right of appeal from the IPT on a point of law.

In 2014 the Tribunal received 215 complaints and claims in total, of which 60 were complaints, 58 were claims and 97 were a joint claim and complaint.

After the IPT have considered/heard a claim or complaint, they provide the complainant with one of the following:

- A determination in the complainant's favour - s68(4)(a) Where the IPT upholds a complaint/claim, finding that conduct was unlawful, the IPT provides a summary of their determination together with any findings of fact that have arisen from its investigation. The IPT has the power to make an award of compensation, or other order, as it considers appropriate (section 67(7) of RIPA).
- A statement that 'no determination' has been made in the complainant's favour – s68(4)(b) Where the IPT do not uphold a complaint/claim, they will simply state that no determination has been made in the complainant's favour. This limited approach is adopted, as it is not possible to confirm whether conduct has or has not been taken against individuals, reflecting wider NCND policy (neither confirm nor deny). As a result, such a determination can mean:
  - That no conduct took place against the individual; or
  - That conduct was taken against the individual, but that such activity was lawful.

In addition to the formal determinations referred to above, the Tribunal is also able to issue decisions. Often these decisions will be on a preliminary point of law which is being disputed by the Parties, with the IPT reaching an initial decision on a point of law on the basis of assumed facts (before proceeding to make a formal determination on the facts raised in the complainants case).

As noted above, at present Claimants wishing to challenge a decision or determination of the IPT judgement must then do so via the ECtHR.

Proceedings in the ECtHR are generally dealt with on paper, with public hearings being exceptional, with claimants having to bear their own costs (e.g. lawyers' fees and expenses relating to research and correspondence).

Applications to the ECtHR that are clearly inadmissible (i.e. due to failure to exhaust domestic remedies) will be dealt with by a single judge. Where a case is admissible but concerns matters previously ruled on a Committee of three judges will consider the claim on merits. Where a claim brings up matters not previously ruled on it will be considered by a Chamber of seven judges. In

exceptional circumstances, such as where a claim raises a serious question about the interpretation of the Convention, it may be relinquished to the Grand Chamber of seventeen judges.

This option would see the introduction of a domestic right of appeal on a point of law as recommended by David Anderson, and on the basis of either a decision or a determination made by the IPT in line with the recommendation of the Joint Committee. We anticipate that there will be few (fewer than 10 annually, on the basis that in 2014 there were only three matters which warranted oral hearings) claims/complaints which will be eligible for an appeal.

A lot of the claims and complaints considered by the IPT could potentially give rise to national security issues and so inevitably a significant proportion of the work undertaken by the IPT has to be conducted in closed sessions. Therefore, complainants will not always know whether there is a point of law which has been considered, which could be the subject of an appeal. In these circumstances we are proposing that the appeal process will operate as follows (The same process would be employed in the event that a complaint does not raise national security issues that require closed session):

- All applications (complaints and claims) will be capable of being subject to an appeal, where there is a point of law which raises an important point of principle or practice or if there is another compelling reason to allow an appeal.
- The IPT will determine whether the complaint/claim raised a point of law relevant for the purposes of an appeal. This will be done at the same time as considering/hearing the claim/complaint.
- The IPT will confirm to the complainant whether or not there is a relevant point of law for the purposes of an appeal, at the time of providing their determination/non-determination to the complainant.
- Where the IPT consider that there is a point of law, the complaint will have the right to:
  - Make an initial application to the IPT for permission to appeal. If permission is granted, then the appeal can proceed to the relevant appeal court, which will be identified by the IPT.
  - Where permission is refused by the IPT, the Tribunal will confirm to the complainant which the relevant appeal court is for the purposes of seeking permission. The complainant will then be able to make an application for permission to appeal directly to the higher court.

## **E. Appraisal (Costs and Benefits)**

### **GENERAL ASSUMPTIONS & DATA**

- The Government would continue to provide for a right to redress to Claimants through the IPT, we have therefore assumed that IPT provisions within the Regulation of Investigatory Powers Act 2000 would continue to stand.
- While efforts have been made to understand the costs and benefits to all affected groups, it is necessary to make some assumptions. The Home Office has (as far as is possible) strengthened and confirmed the evidence base through information gathered through consultation with Government departments; the Office of the Chief Justice and operational partners.

### **OPTION 2 – Create a domestic right of appeal from the Investigatory Powers Tribunal**

#### **COSTS**

The Home Office and Ministry of Justice have agreed that the impact to the justice system is likely to be minimal. There will be costs associated with training judicial and court staff which will be considered as part of the ongoing terms of trade discussions between the two departments.

## **BENEFITS**

The overarching aim of introducing a domestic right of appeal, enabling parties to challenge the IPT's rulings on points of law – including points of law of general public importance, is to increase public confidence in the independence of the Tribunal and the quality of the Tribunal's decisions.

Bringing the IPT in line with the broader British justice system will have a positive impact on those who are able to appeal. It will:

- be less time consuming than the current arrangements - whereby challenges are heard via the ECtHR process
- be easier to understand
- reassure the public that those who use investigatory powers can be fully held to account for their lawfulness, and that Article 8 and Article 10 of the European Convention on Human Rights are being upheld; and
- increase the transparency of proceedings, as the IPT would confirm whether there was a valid point of law for appeal.

The creation of a domestic right of appeal should also provide the following benefits:

- Fewer cases being referred to the ECtHR, having been dealt with in the domestic courts – thus saving those bringing challenges both time and cost associated with long, drawn-out legal cases. This will not preclude cases being taken to the ECtHR, but does provide an opportunity for a remedy domestically in the first instance.
- For those cases that do go to the ECtHR, the benefit of arguments that have been heard in more than one court and expressed at a very senior judicial level will aid the legal process, ensuring stronger judgements overall.

### **Business Impact Target**

Not applicable.

## **F. Risks**

### **OPTION 2 – Create a domestic right of appeal from the Investigatory Powers Tribunal**

The extent of the increase in costs will depend on the quantity of cases eligible for appeal, which may exceed the assumptions made. The bar for appeals under the proposed domestic route would be higher than for challenges at the ECtHR, so this risk is relatively low.

Appeals could entail extra costs for departments and agencies, and a greater strain on staff resources. Measures to mitigate this are in the early planning stages.

It is possible that reform may not generate the expected increase in confidence amongst the public; however we are confident that the new system's greater transparency and increase in oversight of the bodies which use investigatory powers will – as part of the broader package of reform to oversight – will serve to reinforce public trust in the system.

## **G. Enforcement**

Not applicable.

## **H. Summary and Recommendations**

The table below outlines the costs and benefits of the proposed changes.



Table H.1 Costs and Benefits		
Option	Costs	Benefits
2	£N/K	£N/K
	Non-monetised: Training for the IPT	Non-monetised: Time savings. Public reassurance
Source: Refer to cost and benefit section		

There are no monetised costs or benefits to these provisions in the Act. The policy option 2 has therefore been selected on the basis of non-monetised benefits.

## I. Implementation

The Investigatory Powers Bill was subject to comprehensive Parliamentary scrutiny before Royal Assent. The Act provides for an amendment to RIPA, creating an appeals procedure from the IPT. This is a complex process and full implementation plans will be considered on an ongoing basis before the provisions in the Act relating to the IPT commence in 2017.

The Government plans to implement these changes in 2017.

## J. Monitoring and Evaluation

The effectiveness of the new regime would be monitored by post-legislative scrutiny undertaken in 2022. The Act took account of the recommendations made by the three independent reviews of investigatory powers legislation and the recommendations of the Joint Committee who scrutinised the draft Bill.

## K. Feedback

The new regime will be subject to post-legislative scrutiny undertaken in 2022.

### Impact Assessment Checklist

#### Economic Impact Tests

Does your policy option/proposal consider...?	Yes/No
<b>Business Impact Target</b> The Small Business, Enterprise and Employment Act 2015 ( <a href="#">s. 21-23</a> ) creates a requirement to assess the economic impacts of qualifying regulatory provisions on the activities of business and civil society organisations. [ <a href="#">Better Regulation Framework Manual</a> ]	No.

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<p><b>Review clauses</b></p> <p>The Small Business, Enterprise and Employment Act 2015 (<a href="#">s. 28</a>) creates a duty to include a review clause in secondary legislation containing regulations that impact business or civil society organisations.</p>	No.
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<p><b>Small and Micro-business Assessment (SaMBA)</b></p> <p>The SaMBA is a Better Regulation requirement intended to ensure that all new regulatory proposals are designed and implemented so as to mitigate disproportionate burdens. The SaMBA must be applied to all domestic measures that regulate business and civil society organisations, unless they qualify for the fast track. [<a href="#">Better Regulation Framework Manual</a>]</p>	No.
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<p><b>Clarity of legislation</b></p> <p>Introducing new legislation provides an opportunity to improve the clarity of existing legislation. Legislation with multiple amendments should be consolidated, and redundant legislation removed, where it is proportionate to do so.</p>	No.
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<p><b>Primary Authority</b></p> <p>Any new Government legislation which is to be enforced by local authorities will need to demonstrate consideration for the inclusion of Primary Authority, and give a rationale for any exclusion, in order to obtain Cabinet Committee clearance.</p> <p>[<a href="#">Primary Authority: A Guide for Officials</a>]</p>	No.
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<p><b>New Burdens Doctrine</b></p> <p>The new burdens doctrine is part of a suite of measures to ensure Council Tax payers do not face excessive increases. It requires all Whitehall departments to justify why new duties, powers, targets and other bureaucratic burdens should be placed on local authorities, as well as how much these policies and initiatives will cost and where the money will come from to pay for them.</p> <p>[<a href="#">New burdens doctrine: guidance for government departments</a>]</p>	No.
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<p><b>Competition</b></p> <p>The Competition guidance provides an overview of when and how policymakers can consider the competition implications of their proposals, including understanding whether a detailed competition assessment is necessary. [<a href="#">Government In Markets Guidance</a>]</p>	No.
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## Social Impact Tests

<b>New Criminal Offence Proposals</b> Proposed new criminal offences will need to be agreed with the Ministry of Justice (MOJ) at an early stage. The Justice Impact Test (see below) should be completed for all such proposals and agreement reached with MOJ before writing to Home Affairs Committee (HAC) for clearance. Please allow 3-4 weeks for your proposals to be considered.	Yes
<b>Justice Impact Test</b> The justice impact test is a mandatory specific impact test, as part of the impact assessment process that considers the impact of government policy and legislative proposals on the justice system. [ <a href="#">Justice Impact Test Guidance</a> ]	Yes.
<b>Statutory Equalities Duties</b> The public sector equality duty requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations in the course of developing policies and delivering services. [ <a href="#">Equality Duty Toolkit</a> ]	No.
<b>Privacy Impacts</b> A Privacy Impact Assessment supports an assessment of the privacy risks to individuals in the collection, use and disclosure of information. [ <a href="#">Privacy Impact Assessment Guidance</a> ]	Yes.
<b>Family Test</b> The objective of the test is to introduce a family perspective to the policy making process. It will ensure that policy makers recognise and make explicit the potential impacts on family relationships in the process of developing and agreeing new policy.  [ <a href="#">Family Test Guidance</a> ]	No.
<b>Powers of Entry</b> A Home Office-led gateway has been set up to consider proposals for new powers of entry, to prevent the creation of needless powers, reduce unnecessary intrusion into people's homes and to minimise disruption to businesses. [ <a href="#">Powers of Entry Guidance</a> ]	No.
<b>Health Impact Assessment of Government Policy</b> The Health Impact Assessment is a means of developing better, evidenced-based policy by careful consideration of the impact on the health of the population.	No.

<a href="#">[Health Impact Assessment Guidance]</a>	
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Environmental Impact Tests

<p><b>Environmental Impacts</b></p> <p>The purpose of the environmental impact guidance is to provide guidance and supporting material to enable departments to understand and quantify, where possible in monetary terms, the wider environmental consequences of their proposals.</p> <p><a href="#">[Environmental Impact Assessment Guidance]</a></p>	No.
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<p><b>Sustainable Development Impacts</b></p> <p>Guidance for policy officials to enable government departments to identify key sustainable development impacts of their policy options. <i>This test includes the Environmental Impact test cited above.</i> <a href="#">[Sustainable Development Impact Test]</a></p>	No.
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<p><b>Rural Proofing</b></p> <p>Guidance for policy officials to ensure that the needs of rural people, communities and businesses are properly considered. <a href="#">[Rural Proofing Guidance]</a></p>	No.
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