

EXPLANATORY MEMORANDUM TO
THE AUDIT COMMISSION FOR LOCAL AUTHORITIES AND THE NATIONAL
HEALTH SERVICE IN ENGLAND (SPECIFIED ORGANISATIONS) (ENGLAND)
ORDER 2009

2009 No. 1360

1. This explanatory memorandum has been prepared by the Department for Communities and Local Government and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 This Order specifies the organisations in respect of which the Audit Commission for Local Authorities and the National Health Service in England (“the Audit Commission”) is under a duty to prevent certain inspections.
 - 2.2 The duty applies in relation to inspections by certain inspectorates where the Audit Commission considers the proposed inspection or manner of inspection would impose an unreasonable burden on the organisation concerned.
3. **Matters of special interest to the Joint Committee on Statutory Instruments *or* the Select Committee on Statutory Instruments**

None.
4. **Legislative Context**
 - 4.1 Section 149 to the Local Government and Public Involvement in Health Act 2007 inserted a new section 47B and Schedule 2A (“Schedule 2A”) into the Audit Commission Act 1998. Section 47B provides that Schedule 2A has effect. Schedule 2A makes provision about the interaction of the Audit Commission with other authorities in respect of inspection programmes and frameworks, inspections by other inspectors of organisations within the Commission’s remit, co-operation, joint action, delegation of functions, assistance for other public authorities and arrangements with other authorities for the carrying out of inspections by the Commission on their behalf.
 - 4.2 Paragraph 5(1) to Schedule 2A provides that if a “specified inspector” proposes to carry out an inspection of a “specified organisation” and the Audit Commission considers that the proposed inspection by a specified inspector would impose an unreasonable burden on the specified organisation, the Audit Commission must give notice to the specified inspector not to carry out the proposed inspection or not to carry it out in a particular manner.
 - 4.3 “Specified inspector” is defined at paragraph 5(2) as
one of the inspection authorities listed in paragraph 1(1) (as amended) namely Her Majesty’s Chief Inspector of Prisons, Her Majesty’s Chief Inspector of Constabulary, Her Majesty’s Chief Inspector of the Crown Prosecution

Service, Her Majesty's Chief Inspector of Probation for England and Wales, Her Majesty's Chief Inspector of Court Administration, Her Majesty's Chief Inspector of Education, Children's Services and Skills, and the Care Quality Commission and also Her Majesty's Inspectors of Constabulary, Her Majesty's Inspectorate of Probation for England and Wales and Her Majesty's Inspectorate of Court Administration;

any person authorised under section 139A of the Social Security Administration Act 1992 (persons authorised to consider authorities' performance in the prevention and detection of fraud relating to housing benefit and council tax benefit and their compliance with the best value requirements of Part 1 of the Local Government Act 1999); or

any person or body specified by order. No one has been specified by order for these purposes.

4.4 Paragraph 5(3) provides that a specified organisation is a person or body specified by order of the Secretary of State. Article 2 of this Order specifies the organisations for the purposes of paragraph 5(3).

4.5 Where notice is given by the Audit Commission under paragraph 5(1), the proposed inspection is not to take place or is not to take place in the manner proposed, subject to the power of the Secretary of State under paragraph 5(8) to give consent to the inspection if satisfied that it would not impose an unreasonable burden.

4.6 Paragraph 5(6) provides that the Secretary of State may specify cases or circumstances where the notice procedure under paragraph 5(1) need not or shall not apply. Article 3 of this Order specifies those inspections where the notice procedure is not to apply.

5. Territorial Extent and Application

This instrument applies to England only.

6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 The Local Government White Paper "Strong and Prosperous Communities" (2006) introduced a new local performance framework which provides the broader context for gatekeeping of inspections of local authorities. This performance framework applies to results delivered by local authorities, whether alone or in partnership, and includes a new approach to assessment and inspection (the Comprehensive Area Assessment, or CAA). Ministers jointly commissioned the inspectorates in April 2007 to work together to develop and test a methodology for CAA. Since the introduction of CAA from April 2009, Government expects the inspectorates to start from a shared understanding of when and how they will obtain

information from localities in order to make their assessments of performance. Inspectorates will need to work together to co-ordinate their inspection activity and they have publicly affirmed their commitment to doing so.

7.2 The Government's policy about how inspections for local public service deliverers would be managed (gatekept) was stated in the Local Government White Paper: "The relevant public sector inspectorates will each have a statutory duty to co-operate with each other and to manage the burden of inspection on individual organisations within their sector. The Audit Commission will be the gatekeeper for all inspection affecting local authorities." (paragraph 6.54).

7.3 The White Paper also stated that "The changes we propose do not impact on regulatory inspection (for example of care homes), inspection of institutions (for example schools, prisons), or the corporate effectiveness of public sector bodies other than local authorities." (footnote 26 to paragraph 6.45) The Government thus does not intend that the Audit Commission's gatekeeping function should impact on regulatory and licensing inspection of institutions.

7.4 Gatekeeping is intended to help reduce the burden of inspection on specific organisations by ensuring that the administrative impact of proposed inspections is reasonable. For some specific services the subject areas of the inspectorates will not be mutually exclusive; so there will be occasions where the inspectorate making a judgement about operational services will be different from the one that has the gatekeeping responsibility for the corporate body that runs that service. When Government decided how to determine the inspectorates' areas of jurisdiction or responsibility, the gatekeeping role was allocated to the inspectorate with the best overview of the collective impact of inspection on the organisations in question. The wide range of services that local authorities deliver and commission (as compared with other organisations) makes them particularly vulnerable to the burden of inspection by different inspectorates. The Audit Commission's gatekeeping role enables it to prevent inspections of the local government sector by other inspectorates, where the Audit Commission considers that a proposed inspection (or the proposed manner of inspection) places an unreasonable burden on the authority in question.

7.5 As an example of how this is expected to work in practice; Her Majesty's Chief Inspector of Education, Children's Services and Skills will inspect children's services delivered by local authorities who will be gatekept by the Audit Commission, but will gatekeep the rest of the children and learners sector. Likewise, the Care Quality Commission will gatekeep the healthcare sector and inspect NHS bodies, but will also inspect adult social care services delivered by local authorities who will be gatekept by the Audit Commission.

7.6 There are certain statutory inspections that have been excluded from the Audit Commission's gatekeeping function, as set out in article 3 of the Order. The exceptions have been kept as specific as possible as to do otherwise could take away the very role that Schedule 2A, and in particular paragraph 5, gives the Audit Commission.

7.7 The practical result of articles 2 and 3 of the Order is that the Audit Commission will act as the gatekeeper in respect of the inspection programme of any

local authority service area or corporate function, but not for specified regulatory and licensing inspections of institutions. The Audit Commission's gatekeeping role would, however, come into play if the regulatory inspection activity were to go beyond the scope of the inspection powers specified in the Order and in doing so impact on the corporate functions of the parent body.

7.8 Inspections formally requested from the Office for Standards in Education, Children's Services and Skills by the Secretary of State for Children, Schools and Families are also excluded from the Audit Commission's gatekeeping responsibilities, as are some inspections carried out by the Care Quality Commission relating to a formal request from the Secretary of State for Health. The expectation is that requests by the Secretary of State for an inspection will only be made in exceptional circumstances where rapid action by the inspectorates is considered essential; protection of people whose circumstances make them vulnerable would be the most likely subject for inspection on this basis.

7.9 The Secretary of State may consent to an inspection being carried out (paragraph 5(8) of Schedule 2A) and thus overturn a decision of the Audit Commission if she considers that a proposed inspection would not impose an unreasonable burden on the organisation (see paragraph 4.5 above).

7.10 Gatekeeping provides a clear solution for reaching a decision on inspection where a joint approach cannot be agreed between the inspectorates. Differences of opinion are, however, less likely to arise if the inspectorates think ahead, share information, are flexible and work closely together to plan and, where useful, carry out inspections. Government expect the inspectorates to work through the details of the gatekeeping arrangements; protocols for how the various responsibilities will operate in practice could be set out in internal guidance or other agreements between the inspectorates

Consolidation

7.11 This Order is the first to be made under Schedule 2A and does not amend any other instrument.

8. Consultation outcome

8.1 This Order, which specifies the organisations for which the Audit Commission will act as gatekeeper, has been drawn up in discussion with the sponsor department, other Government Departments, the Audit Commission and the local government sector. There has not been a public consultation, since the Order gives effect to policy already publicly stated in the 2006 Local Government White Paper. There has been no public or media interest in the development of the Order, although the local government specialist press has from time to time referred to gatekeeping in the context of the sector's wish for the burden of inspections to be managed and reduced. The provision is a relatively small but important part of the Government's strategy for modernising public sector inspections, in the context of its strategy for reducing regulatory burdens generally. The local government sector remains supportive of the implementation of the gatekeeping approach.

9. Guidance

9.1 The Department for Communities and Local Government will not be issuing any formal guidance about gatekeeping of inspections of local authorities.

9.2 The Audit Commission and the other six local public service inspectorates who were commissioned by Ministers to develop and implement a methodology for CAA (then the Commission for Healthcare Audit and Inspection and the Commission for Social Care Inspection but now the Care Quality Commission, Her Majesty's Inspectorate of Prisons, Her Majesty's Inspectorate of Constabulary, Her Majesty's Inspectorate of Probation for England and Wales, and the Office for Standards in Education, Children's Services and Skills) have developed joint internal guidance for their staff about carrying out CAA; they have made this public to help understanding of CAA and related inspections. This guidance can be found online at www.audit-commission.gov.uk/caa

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 The impact on the public sector is negligible. This is a burden-reducing measure which should significantly reduce duplicate inspections.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

The legislation does not apply to small business.

12. Monitoring & review

12.1 The Audit Commission will be responsible for implementing the gatekeeper function and will be able to give any necessary further guidance to staff on its operation. Guidance on how the inspectorates will work together to plan and carry out inspections has been included in the joint inspectorates' guidance for staff described at paragraph 9.2 of this memorandum. This guidance is web-based and will be subject to review when updated information is available.

12.2 Government Departments have agreed that the implementation of gatekeeping in practice will be kept under review as part of overall monitoring of inspection under CAA. The effectiveness of CAA overall, including its costs and benefits, will be monitored and evaluated through independent research projects being let and managed by the Department for Communities and Local Government and by the local public service inspectorates.

13. Contact

Lucy Fitzgerald at the Department for Communities and Local Government (telephone 020 7944 4645 or email lucy.fitzgerald@communities.gsi.gov.uk), can answer any queries regarding the instrument.

Date