

## EXPLANATORY MEMORANDUM TO

### THE CARE QUALITY COMMISSION (SPECIFIED ORGANISATIONS ETC) ORDER 2010

#### 2010 No. 496

1. This explanatory memorandum has been prepared by the Department of Health 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 Care Quality Commission (“the Commission”) is under a duty, under the provisions of paragraph 6 of Schedule 4 to the Health and Social Care Act 2008 (“the 2008 Act”), to prevent or limit certain inspections.

2.2 The duty applies in relation to inspections of such specified organisations by certain inspectors (which are listed in paragraph 1(2) of Schedule 4 to the 2008 Act) where the Commission considers the proposed inspection or manner of inspection would impose an unreasonable burden on the organisation concerned.

2.3 If the Commission considers that the proposed inspection would impose an unreasonable burden on the specified organisation, the Commission must give a notice to the inspector requiring the inspector not to carry out the proposed inspection, or not to carry it out in that way.

#### 3. Matters of special interest to the Joint Committee on Statutory Instruments

None

#### 4. Legislative Context

4.1 The Care Quality Commission was established under the 2008 Act and is responsible for the regulation of health and adult social care in England.

4.2 Sections 66 to 68 of, and Schedule 4 to, the 2008 Act make provision about the Commission in respect of its interactions with other inspection authorities, coordination of reviews or assessments and avoidance of unreasonable burdens in exercise of regulatory powers.

4.3 Paragraph 6 of Schedule 4 of the 2008 Act is about the inspection by other inspectors of activities within the Commission’s remit. Paragraph 6(1) of Schedule 4 provides that if a “specified inspector” is proposing to carry out an inspection that would involve inspecting a specified organisation, and the Commission considers that the proposed inspection would impose an unreasonable burden on the specified organisation, or would do so if carried out in a particular way, the Commission must (subject to any provision made under paragraph 6(6) of Schedule 4) give a notice to the specified inspector not to carry out the proposed inspection, or not to carry it out in that way.

4.4 “Specified inspector” is defined at paragraph 6(2) of Schedule 4 as:

4.4.1 one of the inspection authorities listed in paragraph 1(2) of Schedule 4, 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 Audit Commission for Local Authorities and the National Health Service in England;

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

4.5 Paragraph 6(3) of Schedule 4 provides that "specified organisation" means a person or body specified by order of the Secretary of State. Paragraph 6(4) of Schedule 4 provides that a person or body may be specified for the purposes of paragraph 6(3) in relation to particular functions or particular activities.

4.6 Paragraph 6(6) of Schedule 4 provides that the Secretary of State may specify cases or circumstances in which a notice need not, or may not, be given by the Commission under paragraph 6.

4.7 Article 2(1) of this Order specifies the organisations, and in some cases the particular activities in respect of which they are so specified, for the purposes of paragraph 6(3).

4.8 This specification is however subject to article 2(2), which provides that these organisations are not specified in respect of any services they provide in any of the institutions listed in article 2(2).

4.9 Some of the organisations specified in article 2 are described by reference to their being registered as service providers under the 2008 Act. This system of registration will not be fully in force until October 2010 (subject to the appropriate Parliamentary consents). Until then, these service providers are registered under the provisions of the Care Standards Act 2000.

4.10 Article 3 of this Order makes transitional arrangements to cover these specified organisations for the period up to 30 September 2010, by reference to the system by which they will be registered for that period.

4.11 Article 4 of this Order (in reliance on the power in paragraph 6(6) of Schedule 4 to the 2008 Act) specifies those cases where a notice may not be given by the Commission.

## **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 Voluntary arrangements between the various inspectorates have sought to coordinate inspection programmes and manage their impact upon organisations in the health and adult social care sector. Such efforts have helped to constrain unwarranted inspection but have not proved effective enough to remove the problem of uncoordinated inspection programmes and their increasing demands. A "Gatekeeper" function is intended to protect organisations from such pressures.

7.2 These “Gatekeeping” powers derive from a cross-government agreement on reducing the burden of uncoordinated visits and inspections, with similar clauses in legislation governing the other public sector inspectorates - Ofsted for children’s services, the Audit Commission for local authorities and the justice inspectorates covering prisons, courts, the constabulary and probation service.

7.3 Organisations that are to be subject to the Commission’s “Gatekeeping” function have been specified according to the Commission’s areas of jurisdiction and responsibility. “Gatekeeping” roles for all inspectors have been or will be allocated to the inspectorate with the best overview of the collective impact of inspection on a particular body or person.

7.4 The aim of this policy is to ensure that inspectorates act in a reasonable and proportionate way when scheduling visits and inspections and that where multiple inspections are necessary, they are undertaken in the least burdensome way.

7.5 There is a duty on the Care Quality Commission and the other inspectorates to prepare inspection programmes and inspection frameworks and a duty ultimately to block inspections of specified organisations if the Commission considers it would impose an unreasonable burden. This provides a clear solution for reaching a decision on inspection where a joint approach cannot be agreed between the inspectorates. The objective however is not to stop an inspection happening, but to seek better coordination regarding the timing of inspections. Inspectorates should be planning ahead, sharing information, being flexible and working in close collaboration to the benefit of their sectors.

## **8. Consultation outcome**

This Order, which specifies the organisations for which the Care Quality Commission will act as Gatekeeper, has been drawn up in consultation with the sponsor department for each specified inspector and the Care Quality Commission. There has been no public or media interest. 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.

## **9. Guidance**

9.1 The Department of Health will not be issuing any formal guidance about Gatekeeping of inspections of health and adult social care providers.

9.2 The Department of Health retains a sponsorship role providing support and guidance to the Care Quality Commission in carrying out its functions. Government expects 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 and/or other agreements between the inspectorates.

## **10. Impact**

10.1 A short Impact Assessment has been prepared for this instrument, setting out the options for clarifying the remit of the Care Quality Commission’s “Gatekeeping” function. Since the Commission already have their “Gatekeeping” powers through the 2008 Act, and there is already coordination between these inspectorates, we anticipate no additional costs and small benefits.

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

## **11. Regulating small business**

The legislation does not apply to small business.

## **12. Monitoring & review**

12.1 The provisions of this instrument aim to achieve better regulation by reducing duplicate inspections.

12.2 The Department of Health retains a sponsorship role in respect of the Care Quality Commission and will monitor and review the Commission carrying out its functions.

12.3 The Care Quality Commission will be responsible for implementing the gatekeeper function and will be able to give any necessary further guidance to staff on its operation.

## **13. Contact**

Carolyn Parkinson at the Department of Health (telephone 020 7972 5149 or e-mail [carolyn.parkinson@dh.gsi.gov.uk](mailto:carolyn.parkinson@dh.gsi.gov.uk)) can answer any queries regarding the instrument.

## Summary: Intervention & Options

<b>Department /Agency:</b> <b>Department of Health</b>	<b>Title:</b> <b>Impact Assessment of Gatekeeping: The Care Quality Commission (Specified Organisations etc) Order 2010</b>	
<b>Stage:</b> Final/Implementation	<b>Version:</b> 1.4	<b>Date:</b> 22 February 2010
<b>Related Publications:</b> Health and Social Care Act 2008		

### Available to view or download at:

[http://www.opsi.gov.uk/acts/acts2008/ukpga\\_20080014\\_en\\_1](http://www.opsi.gov.uk/acts/acts2008/ukpga_20080014_en_1)

**Contact for enquiries:** Carolyn Parkinson

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

This impact assessment sets out the options available for clarifying the remit of the Care Quality Commission's (CQC) "Gatekeeping" function, as set out in the Health and Social Care Act 2008 (Section 66 and Schedule 4).

Intervention is necessary to perform two functions – firstly to clarify which health and adult social care organisations are within the Gatekeeping remit of CQC and secondly, to specify instances where a notice may not be given to an inspectorate to stop an overly burdensome inspection or one that is poorly timed.

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

To ensure that the specific public sector inspectorates act in a reasonable and proportionate way when scheduling visits and inspections and that where multiple inspections are necessary, they are undertaken in the most coordinated and least burdensome manner.

The intended effect is that the extent of CQC's Gatekeeping powers are clear to health and adult social care providers and to the public sector inspectorates, including CQC itself.

### What policy options have been considered? Please justify any preferred option.

Option 1 - do nothing. The Care Quality Commission already has its Gatekeeping powers through the Health and Social Care Act 2008. The "do nothing" option would mean no clarification of CQC's remit.

Option 2 - Introduce secondary legislation to provide necessary clarification.

The preferred option is Option 2 - to introduce secondary legislation.

Please see the Evidence Base for further justification of the preferred option.

### When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The policy will be reviewed as part of a larger review of the implementation of the Care Quality Commission within three years.

### **Ministerial Sign-off** For final proposal/implementation stage Impact Assessments:

***I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.***

Signed by the responsible Minister:

**Mike O'Brien**.....**Date: 24<sup>th</sup> February 2010**

## Summary: Analysis & Evidence

**Policy Option: 2**

**Description: Introduce secondary legislation to clarify the Gatekeeping remit of the Care Quality Commission**

<b>COSTS</b>	<b>ANNUAL COSTS</b>		Description and scale of <b>key monetised costs</b> by 'main affected groups' As CQC received the Gatekeeping powers through the 2008 Act and already works with the other inspectorates, we would not anticipate any additional costs involved with this proposal.	
	<b>One-off</b> (Transition)	<b>Yrs</b>		
	<b>£ 0</b>			
	<b>Average Annual Cost</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Cost (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised costs</b> by 'main affected groups' The only identifiable cost of this policy is the process of enacting it in law. As this is a central cost, it is not generally included in Impact Assessments, and therefore is not included.				

<b>BENEFITS</b>	<b>ANNUAL BENEFITS</b>		Description and scale of <b>key monetised benefits</b> by 'main affected groups' There is already coordination between these Gatekeeping inspectorates, this order is merely clarifying their role in law; therefore, we would expect any benefits to be small and have not attempted to quantify them.	
	<b>One-off</b>	<b>Yrs</b>		
	<b>£ 0</b>			
	<b>Average Annual Benefit</b> (excluding one-off)			
	<b>£ 0</b>		<b>Total Benefit (PV)</b>	<b>£ 0</b>
Other <b>key non-monetised benefits</b> by 'main affected groups' It is anticipated that there would be increased coordination between regulators. There should also be increased clarity for providers, as well as some small reduction in administrative burden.				

**Key Assumptions/Sensitivities/Risks** CQC already have the Gatekeeping powers and we do not anticipate any risks or sensitivities involved in clarifying this policy. CQC, the other inspectorates and the other government departments have all been involved. Given the scale of the anticipated costs and benefits, it would not be proportionate to try to create estimates that are more precise.

Price Base Year	Time Period Years	<b>Net Benefit Range</b> (NPV) £	<b>NET BENEFIT</b> (NPV Best estimate) £
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What is the geographic coverage of the policy/option?		England		
On what date will the policy be implemented?		09 April 2010		
Which organisation(s) will enforce the policy?		Department of Health		
What is the total annual cost of enforcement for these organisations?		£ not applicable		
Does enforcement comply with Hampton principles?		Yes		
Will implementation go beyond minimum EU requirements?		No		
What is the value of the proposed offsetting measure per year?		£ not applicable		
What is the value of changes in greenhouse gas emissions?		£ not applicable		
Will the proposal have a significant impact on competition?		No		
Annual cost (£-£) per organisation (excluding one-off)	Micro <b>0</b>	Small <b>0</b>	Medium <b>0</b>	Large <b>0</b>
Are any of these organisations exempt?	No	No	N/A	N/A

<b>Impact on Admin Burdens Baseline</b> (2005 Prices)		(Increase - Decrease)	
Increase of	£ 0	Decrease of	£ 0
		<b>Net Impact</b>	<b>£ 0</b>

Key: Annual costs and benefits: Constant Prices (Net) Present Value

## Introduction

Voluntary arrangements between inspectorates have sought to coordinate inspection programmes and manage their impact upon organisations in the health and adult social care sector. Such efforts have helped to constrain unwarranted inspection but have not proved effective enough to remove the problem of uncoordinated inspection programmes and their increasing demands. A “Gatekeeper” function protects organisations from such pressures.

The Health and Social Care Act 2008 (Section 66 and Schedule 4) sets out the Care Quality Commission (CQC) as the Gatekeeper for providers of health and adult social care services.

This Impact Assessment sets out the options available for clarifying the remit of the Care Quality Commission.

## Background

The Gatekeeping powers derive from a cross-government agreement to reduce the burden of uncoordinated visits and inspections. There are similar clauses in regulations governing the other public sector inspectorates, which are as follows:

- The Audit Commission for local authorities
- Ofsted for education and children’s services
- The criminal justice inspectorates for the criminal justice services:
  - 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

As a last resort, where collaboration has failed and where CQC considers a proposed inspection by one of these regulators would impose an unreasonable burden on providers, it can serve a notice on that regulator requiring them not to carry out that inspection at that time, or alternatively, to carry it out in a different way.

The aim of this Gatekeeping policy is to ensure that these inspectorates act in a reasonable and proportionate way when scheduling visits and inspections and that where multiple inspections are necessary, they are undertaken in the most coordinated and least burdensome manner. The policy objective is not to stop inspections happening, but to encourage behaviour that is reasonable and proportionate when scheduling visits and inspections and to seek better coordination regarding their timing.

Gatekeeping provides a clear solution for reaching a decision on inspection where a joint approach cannot be agreed between the inspectorates.

## Rationale for intervention

Intervention is necessary to perform two functions – firstly to clarify which organisations are within the Gatekeeping remit of CQC and secondly, to specify instances where a notice may not be given to an inspectorate to stop an inspection.

### Clarifying organisations within CQC’s remit

All organisations or services that are registered with CQC as a provider of a regulated activity will be gatekept by CQC. However, it has already been specified in other secondary legislation that some of these services are gatekept by another Gatekeeper. For example, adult care homes can be provided by a local authority and would be registered with CQC as a provider of adult social care services. However, local authorities are already gatekept by the Audit Commission and since a service cannot be gatekept by two inspectorates, local authorities must be excluded from CQC's remit.

Secondary legislation is therefore required to specify which organisations and services are within and outside of the Gatekeeping remit of CQC.

The services for which clarification of the CQC's Gatekeeping role is needed are:

- Prisons
- Contracted out prisons
- Young offender institutions
- Remand centres
- Removal centres
- Short-term holding facilities
- Local authorities.

CQC already works closely with most of the inspectorates listed above. Specifically, CQC already has plans to coordinate the following work over the next few years:

- 50 integrated (joint) inspections per year of safeguarding and looked after children (IsLAC) with Ofsted.
- 20 "Core Case inspections" per year of Youth Offending Teams with Ofsted and Her Majesty's Chief Inspector of Probation for England and Wales
- joint inspections between the Care Quality Commission, the Audit Commission, Ofsted and the justice inspectorates triggered as a result of Comprehensive Area Assessments
- 104 prison inspections per year where the Care Quality Commission collect bespoke information from the Primary Care Trusts (PCTs) on the commissioning arrangements, which will be fed into the inspections led by Her Majesty's Chief Inspector of Prisons
- 8 inspections per year of police authorities in England with Her Majesty's Chief Inspector of Constabulary and Her Majesty's Chief Inspector of Prisons.

Whilst this gives an indication of the joint work that has been planned, due to the changing nature of CQC's registration regime, work is still needed between the inspectorates to understand the full range and scale of this coordinated work.

### **Clarifying instances where a notice may not be issued**

In addition to the need for clarification over the Gatekeeping remit of CQC, it is also necessary to clarify in which instances CQC may not issue a notice to another inspectorate regarding that inspection.

Should CQC consider that a proposed inspection by one of the other inspectorates would impose an unreasonable burden if carried out in that way or at that time, they must issue a notice to the inspectorate requiring the inspection not to be carried out or not in that way. However, secondary legislation is required to specify instances in which a notice may **not** be issued.

The specified instances where CQC may not issue a notice to another inspector relate to inspections where rapid action by an inspectorate is considered essential, such as in the case of protecting vulnerable adults or children.



## **Policy Options**

### **Option 1 - do nothing**

CQC already has its Gatekeeping powers through the Health and Social Care Act 2008. The “do nothing” option would mean that there would be no clarification of the organisations within CQC’s remit. This could cause confusion for some types of provider who now have two regulators identified in legislation as their Gatekeeper. Nor would instances be specified when a notice may not be given by CQC to stop an overly burdensome inspection or one that is poorly timed.

### **Option 2 – Introduce secondary legislation**

Introduce secondary legislation to clarify which organisations are within the Gatekeeping remit of CQC and to specify instances where a notice may not be given to an inspectorate.

This option would be achieved through the laying of a statutory instrument, which would perform two functions: (1) to specify the organisations within CQC’s remit, and (2) to specify any instances when a notice may not be given.

(1) The specified organisations are English NHS providers and a person, other than an English local authority, who is registered as a provider of regulated activities with CQC. Services such as those provided in a prison, etc are not included.

(2) A limited number of cases are specified where CQC may not give a notice to another inspectorate regarding their proposed inspection. The principle behind these is that vulnerable children or adults could be at risk if the inspectors were not able to undertake a rapid inspection.

## **Costs**

As CQC received the Gatekeeping powers through the 2008 Act and already tries to work with the other inspectorates, we would not anticipate there being any additional costs involved with this proposal.

## **Benefits**

### ***- Increased coordination between regulators***

The Health and Social Care Act 2008 imposes a duty on CQC to coordinate inspections and visits by the specified inspectorates. From time to time, CQC must prepare an inspection programme - a document setting out what inspections it proposes to carry out. The other Gatekeeping inspectorates, as listed above, are also expected to set out their proposed schedule of inspections; the sharing of these schedules should facilitate joint planning and collaborative working to remove uncoordinated or overlapping inspections and visits.

Specifying the Gatekeeping functions in secondary legislation will ease this process of coordination and provide clarity between inspectorates over which organisations are within their Gatekeeping remits. It has not been possible to quantify these savings, as the way in which CQC works with other inspectorates has changed so much recently, that it is impossible to disaggregate savings specifically due to this measure.

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. We therefore would expect any monetary benefits to be very small for the inspectorates.

**- *Increased clarity and reduced administrative burden to providers***

This Order will also clarify for health and adult social care providers themselves as to which inspectorate is their Gatekeeper, particularly where there is an overlap.

With better coordinated inspections, we would expect there to be some benefits to providers through less time having to be spent preparing for the inspections. However, as there is already coordination between these Gatekeeping inspectorates, and this order is merely clarifying their role in law, we would not anticipate this benefit to be substantial.

It should be noted that the change in registration regime will not necessarily mean that what has been done in previous years will be the same as for future years. It is therefore difficult to quantify the exact benefits in advance.

**Administrative burden**

We would expect this order to reduce the administrative burden to providers but, as already explained above, we would expect the impact of this reduction to be very small and therefore have not attempted to quantify it.

**Sensitivities, risks and assumptions**

CQC, the other public sector inspectorates and the other government departments have all been involved in the development of this Order. As CQC already have the Gatekeeping powers and this Order merely clarifies their remit, we do not anticipate any risks or sensitivities involved with this. Given the scale of the anticipated costs and benefits, it would not be proportionate to try to create estimates that are more precise.

**Specific impact tests**

In the light of the equality criteria used and of the evidence reviewed, significant adverse impact on equality is unlikely, but positive impact is also unlikely. Therefore, an Equality Impact Assessment has not been prepared.

Given the small impact of this policy as a whole, it has not been considered necessary to prepare specific impact tests for the other categories.

**When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?**

The Gatekeeping policy will be reviewed as part of a larger review of the implementation of the Care Quality Commission within three years.

## Specific Impact Tests: Checklist

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	Yes	No
Carbon Assessment	Yes	No
Other Environment	Yes	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No