Department for Transport

March 2012

New Roads and Street Works Act 1991 Street Works Qualifications in England - A Consultation

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1. Introduction

1.1 The purpose of this consultation is to invite views on proposals to scrap the requirements for street works operatives and their supervisors to hold specific qualifications that are prescribed in law.

1.2 These proposals are being put forward as part of the Government's Red Tape Challenge initiative, which seeks to identify excessively burdensome or unnecessary regulations and remove them from the statute book, or revise them to make them less burdensome.

1.3 The consultation pack comprises:

- This consultation paper
- A consultation-stage Impact Assessment (Annex A)
- A pro-forma for responding to the consultation (Annex B); and
- A copy of the government's Consultation Criteria (Annex C).

1.4 The consultation is likely to be of particular interest to street works operatives and supervisors, highway authorities, street works undertakers and their contractors, street works training providers, and representatives of road users, but responses are invited from any interested party. The deadline for responses is 31 May 2012 and full details of how to respond can be found in Chapter 4 below.

1.5 This consultation is in two parts. Part A sets out two proposed options for change and invites comment on proposals, and Part B deals with the Legislative Reform Order (LRO), which is one method the Government is considering for making the proposed changes.

1.6 This consultation and the Government's proposals would apply to England only. Legislative proposals for street works qualifications elsewhere in the United Kingdom would be a matter for the devolved administrations.

2. Part A - Issues for Consultation: Proposed Changes

The current arrangements

2.1 S.67 of the New Roads and Street Works Act 1991 (NRSWA) requires that every street works site has a NRSWA qualified operative on site, and in most cases a NRSWA qualified supervisor. Works carried out on behalf of highway authorities do not have to have NRSWA qualified operatives and supervisors – the local authority and its contractors can decide what training workers need to carry out their jobs.

2.2 NRSWA qualified supervisors and operatives will have passed an assessment as set out in the Street Works (Qualifications) Regulations 2009 covering aspects of excavation, reinstatement and safety at sites. This assessment will have been registered with the Street Works Qualification Register (SWQR), which will issue a card. Since April 2009 supervisors and operatives have also been required to pass a reassessment every five years, and to reregister that reassessment with the SWQR.

2.3 These requirements are in addition to the statutory safety code of practice, which details how sites should be signed, lit and guarded, and the statutory Specification for the Reinstatement of Openings in Highways, which sets out how roads should be reinstated after works. Non compliance with these codes of practice is evidence of an offence. In addition, health and safety legislation puts duties on employers to safeguard their employees and members of the public.

Why is the Government considering changing the current arrangements?

2.4 The Government considers the current arrangements to be problematic for two reasons:

2.5 Firstly, given that there are statutory codes of practice regulating safety and reinstatement standards, requiring certain prescribed qualifications in addition is an example of the layering of regulations. While the standards are regulated, it is unnecessary to also regulate how individuals choose to equip themselves to meet the standards. The Government feels that those closest to a problem are best placed to solve it – in this case, that those carrying out works, or employing them, are best able to judge what training might be appropriate to enable an individual to meet important safety and reinstatement standards.

2.6 Secondly, there are several problems with the way the system is working at present. For example, qualifications modules are insufficiently tailored to the needs of individuals, the cost to businesses and individuals of compliance with the system is far greater than envisaged when reaccreditation was first introduced (a problem exacerbated by training providers' reluctance to allow operatives and supervisors to merely sit reassessment without purchasing training), and timing restrictions around assessment and reassessment are unnecessarily inconveniencing operatives and supervisors. These problems are set out in more detail from paragraph 2.20.

The two options the Government is considering

2.7 The Government is consulting on two options in this consultation paper. The first option is to scrap the requirement to hold NRSWA qualifications, enabling employers to decide for themselves how best to ensure their staff can meet their safety and reinstatement obligations under the two statutory codes of practice and health and safety legislation.

2.8 The second option is to retain the requirement to hold NRSWA qualifications, but to simplify the regulations.

2.9 The Government is minded to adopt the first option, on the basis that it would address both of the problems identified above. Although the second option would address some of the problems with the way the system works now, it would not address the 'layers' of regulation. Both options are described in more detail below.

Rationale for scrapping the NRSWA qualification requirements

2.10 This is the first of the two options the Government would like to hear views on.

2.11 If the requirement for these specific mandatory qualifications was removed, the Government anticipates several benefits:

- individual employers would have the flexibility to decide what training was appropriate for specific roles, and could train their staff in what they needed to know, rather than what is mandated by Government (as neither funds nor time would be taken up training staff in unnecessary topics.) The fact that the industry is working on a new 'Safe Digging' initiative, which seeks to ensure staff have additional training over and above the NRSWA training, underscores the fact that NRSWA training is frequently not sufficient;

- requiring operatives and supervisors to hold NRSWA qualifications (or any other qualification) effectively restricts the market and stifles competition and innovation in provision of street works training. If employers were able to choose the training they felt appropriate, without Government intervention, a more diverse market for training is likely to result. It would also be likely to be more competitive, which would drive training costs down for the sector;

- without the requirements, the space could also be created for the sector as a whole to develop new qualifications, perhaps using a recognised framework such as National Vocational Qualifications or apprenticeships, which could lead to an increased professionalisation of the sector. It would also enable the sector to change the content and structure of any qualifications much more readily, because they would no longer need to persuade the government to amend regulations.

2.12 It is important to note that removing the requirement for operatives and supervisors to hold registered NRSWA qualifications would not prevent them from doing so. It would simply give them more choice and flexibility. It is quite possible that some street works operatives, particularly those who work on short-term contracts and move frequently from employer to employer, will continue to wish to hold the qualifications currently mandated under NRSWA, and to register those qualifications on the SWQR, a means of demonstrating their competence to new employers.

2.13 Removing the requirement to hold NRSWA qualifications would require changes to the New Roads and Street Works Act 1991. The Government would either need to use a Bill or a Legislative Reform Order (LRO) to make these changes, so Part B below asks some specific questions about the LRO.

Q1: Do you agree that those working in the sector should have more flexibility to decide the training that is appropriate for them and their employees? Why / why not?

Fit of the NRSWA qualifications

2.14 These questions are about how well the content of the NRSWA qualifications fits what operatives and supervisors do in their jobs. Please only answer if you are a street works operative or supervisor who takes NRSWA qualifications, or are writing on behalf of an organisation whose employees take NRSWA qualifications.

Q2: How good a fit are the NRSWA qualifications for the work you / your employees carry out? Would you say they cover:

a. **much more than you need to know for your work**

b. **a bit more than you need to know for your work**

c. **exactly what you need for your work**

d. **a bit less than you need for your work**

e. **much less than you need for your work**

f. **some extra things and don't cover some things that you need for your work**

Q3: Do you have any extra training on safe excavations, signing / lighting / guarding and reinstatement, in addition to the training required to pass NRSWA assessment / reassessment (an example might be toolbox talks)?

If the current regime were no longer mandatory

2.15 Please only answer if you are a street works operative or supervisor who takes NRSWA qualifications, or are writing on behalf of an organisation whose employees take NRSWA qualifications.

Q4: If NRSWA qualifications were no longer mandatory, would you still choose to take them / ensure your staff took them, or would you choose to have different training? Why? Do you think different training would cost more or less than training for the NRSWA qualifications, and if so, how much?

Q5: Would you still register your / your employees' qualifications with the street works qualification register if it were no longer mandatory to do so? Why?

Proposed simplifications of the Street Works (Qualifications of Supervisors and Operatives) Regulations 2009

2.16 This is the second of the two options. The Government is currently minded to scrap the requirement for NRSWA qualifications, but if following consultation it takes a different view, believes there would be a strong case for improving the operation of the regulations. As they stand they are too complex and prescriptive, resulting in unintended consequences. Some proposed amendments to the regulations are set out below.

2.17 This option would only require amendments to secondary legislation, so there would be no need for a legislative reform order.

Q6: Do you agree that the current regulations are too complex and prescriptive?

2.18 At the moment, operatives and supervisors must hold several units in different topics in order to hold a valid qualification. This means some operatives hold units on topics they never use, perhaps because one aspect of the work is contracted out to a third party.

Under the current rules, while reinstatement is being carried out, there must be at least one person on site who holds the operative's qualification in reinstatement. In order to get that qualification, an operative must pass units in Signing, Lighting and Guarding, reinstatement with the specific kind of material at that site, and location of underground apparatus.

Chris is an expert in reinstatement using concrete slabs, but is not qualified in signing, lighting and guarding. Mike is an expert in signing, lighting and guarding, but is not qualified in reinstatement.
Neither of them can hold the reinstatement module, and so if just these two people are on site, no reinstatement work can be carried out – although between them they have all the necessary skills.

2.19 If the Government decided not to scrap NRSWA qualifications, we would propose to amend the regulations to allow operatives and supervisors to hold individual units, and not need to hold several to be qualified.

This would mean that reinstatement using concrete slabs could be carried out on a site with Chris and Mike together, as between them they have all the skills required. At another site, Steven, who holds both units, could be the qualified operative on site.

Q7: Do you agree that the regulations should be amended to allow operatives and supervisors to hold individual units, rather than needing to have several? If relevant, how much money do you think this could save you / your organisation?

2.20 At the moment, operatives and supervisors must be reassessed and reregister their qualification every five years, in a one year window of between six months before and six months after their qualification expires. This means that if they choose to be reassessed earlier, they cannot register their qualification and ultimately have to re-take it within their window. This discourages operatives and supervisors from updating their qualifications more regularly, and the Government proposes to amend the regulation so that they can be reassessed at any time before the expiry of their qualification (five years after the last registration.)

John took his qualification in February 2007, but didn't then work on the road until 2011. He sat reassessment in February 2011 to be sure his knowledge was up to date, but because his reassessment window didn't start until September 2011, he could not register his reassessment and had to re-sit reassessment again between September 2011 and September 2012.

Under the new rules, he would be able to register his reassessment in February 2011 and would not have to re-sit. He would then be due reassessment by February 2016.

2.21 At the moment, operatives and supervisors must be reassessed and reregister no later than six months after their qualification expires. After this six month period, they must be assessed from scratch. The Government sees no reason why assessment should be required after this six month period, and proposes to amend the regulations to enable operatives and supervisors to simply be reassessed when they wish to regain their qualification.

2.22 The effect of these two changes would be that qualifications of operatives and supervisors would become invalid five years after their last registration with the SWQR, unless reassessment and re-registration had taken place at any time since the last registration. Once a qualification became invalid, only reassessment and re-registration would be required for the operative or supervisor to hold a valid qualification again. Until such time as re-registration had occurred, the operative or supervisor could not act as the 'NRSWA qualified operative / supervisor', but could continue to work.

Luke took his qualification in April 2008. He was supposed to sit reassessment between October 2012 and October 2013, but he misses the deadline by a few days. He will now have to sit full assessment as if he had never had a qualification.

Under the new rules, his qualification would expire in April 2013, but he would only have to sit reassessment when he wanted to regain his qualification, whenever that was.

Q8: Do you agree that the regulations should be amended to allow operatives and supervisors to be reassessed on their units earlier than six months before their expiry date, if they choose to do so? If relevant, how much money do you think this could save you / your organisation?

Q9: Do you agree that the regulations should be amended to end the need for operatives and supervisors who have missed their reassessment 'window' to be assessed from scratch? If relevant, how much money do you think this could save you / your organisation?

2.23 Taken together, these three amendments would prevent the problem currently experienced by many operatives and supervisors, where if they do not take their units at the same time, they must re-take some sooner

than five years after they were first registered, as they would be able to take some earlier or later to get them all registered at the same time, or continue to retake individual units at different five-year intervals.

Q10: Do you have any further simplifications you would suggest for the regulations? What problem would they solve? Please include data if possible.

Option Preference

Q11: Please rank the two options (giving the sector the flexibility to decide training, simplifying the regulations) and 'leave the system as it is' in order of preference.

Impact Assessment

2.24 At Annex A is an impact assessment considering the costs and benefits of changing the legislation to allow those in the sector to determine training requirements and of simplifying the Street Works (Qualifications) Regulations 2009.

Q12: Do you agree with the assumptions made in the impact assessment?

Q13: Do you have any additional data you feel would be helpful for further impact assessments?

Anything Else?

Q14: Is there anything further you wish to add on either of the proposals?

3. Part B - Issues for Consultation: Legislative Reform Order (LRO)

3.1 The Government is also consulting on the use of the Legislative Reform Order if it decides to repeal s.67 of the New Roads and Street Works Act 1991. The LRO is a way of changing primary legislation, but it has certain conditions attached as it is not subject to the same scrutiny by Parliament as a Bill. If it were decided to simplify the regulations, the Act would not need to be amended, so the questions below apply only to the proposal to allow those in the sector freedom to determine appropriate training.

What can be delivered by Legislative Reform Order?

3.2 Under section 1 of the Legislative and Regulatory Reform Act 2006 (LRRA) a Minister can make a LRO for the purpose of 'removing or reducing any burden, or overall burdens, resulting directly or indirectly for any person from any legislation'.

Section 1(3) of the LRRA defines a 'burden' as:

- a financial cost;
- an administrative inconvenience;
- an obstacle to efficiency, productivity or profitability; or
- a sanction, criminal or otherwise, which affects the carrying on of any lawful activity

3.3 Each proposal for a LRO must satisfy the following preconditions:

- Non-Legislative Solutions – A LRO may not be made if there are non-legislative solutions which will satisfactorily remedy the difficulty which the LRO is intended to address. An example of a non-legislative solution might be issuing guidance about a particular legislative regime. The Department for Transport considers that non-regulatory solutions would not be effective here, as the aim is to enable those in the sector to determine training requirements. They are currently prevented from doing so by s.67 of the New Roads and Street Works Act 1991 (NRSWA), and so the proposal is to repeal it.

- Proportionality – The effect of a provision made by a LRO must be proportionate to its policy objective. A policy objective might be achieved in a number of different ways, one of which may be more onerous than others and may be considered to be a disproportionate means of securing the desired outcome. Before making a LRO the Minister must consider that this is not the case and that there is an appropriate relationship between the policy aim and the means chosen to achieve it. The Department considers that repealing s.67 of NRSWA is the only way to achieve the policy aims.

- Fair Balance – Before making a LRO, the Minister must be of the opinion that a fair balance is being struck between the public interest and the interests of any person adversely affected by the LRO. It is possible to make a LRO which will have an adverse effect on the interests of one or more persons only if the Minister is satisfied that there will be beneficial effects which are in the public interest. The Department considers that the proposal could adversely affect the Scottish Qualifications Authority (who operate the Street Works Qualification Register) and the organisations which currently provide training and qualifications for NRSWA qualifications. However, for any loss of revenue to these organisations, there is an equivalent benefit for the employers or individuals who are no longer incurring those costs. The proposals would free up resources currently expended on NRSWA training, which could be put to more beneficial use (which might be different forms of training).

- Necessary protection - A Minister may not make a LRO if he considers that the proposals would remove any necessary protection. The notion of necessary protection can extend to economic protection, health and safety protection, and the protection of civil liberties, the environment and national heritage. The Department considers that no necessary protection would be removed, as statutory safety and reinstatement standards, as well as health and safety legislation, would remain.

- Rights and freedoms - A LRO cannot be made unless the Minister is satisfied that it will not prevent any person from continuing to exercise any right or freedom which they might reasonably expect to continue to exercise. This condition recognises that there are certain rights that it would not be fair to take away from people using a LRO. The Department considers that no rights or freedoms would be removed by this proposal.

- Constitutional Significance– A Minister may not make a LRO if he considers that the provision made by the LRO is of constitutional significance. The Department considers that the proposal does not have constitutional significance.

3.4 It should be noted that even where the preconditions of section 3 of the LRRA are met, a LRO cannot:

- Remove burdens which fall solely on Ministers or Government departments, except where the burden affects the Minister or Government department in the exercise of regulatory functions;

- Confer or transfer any function of legislating on anyone other than a Minister; persons or bodies that have statutory functions conferred on or transferred to them by an enactment; a body or office which has been created by the LRO itself;

- Impose , abolish or vary taxation;

- Create a new criminal offence or increase the penalty for an existing offence so that it is punishable above certain limits;

- Provide authorisation for forcible entry, search or seizure, or compel the giving of evidence;

- Amend or repeal any provision of Part 1 of the LRRA;

- Amend or repeal any provision of the Human Rights Act 1998;

- Remove burdens arising solely from common law.

Q15: Are there any non-legislative means that would satisfactorily remedy the difficulty which the proposals intend to address?

Q 16: Are the proposals put forward in this consultation document proportionate to the policy objective?

Q17: Do the proposals put forward in this consultation document taken as a whole strike a fair balance between the public interest and any person adversely affected by it?

Q 18: Do the proposals put forward in this consultation document remove any necessary protection?

Q19: Do the proposals put forward in this consultation prevent any person from continuing to exercise any right or freedom which he might reasonably expect to continue to exercise, as explained in paragraph 3.3 above? If so, please provide details.

Q 20: Do you consider the provisions of the proposal to be constitutionally significant?

What level of parliamentary scrutiny is appropriate for this proposal?

3.5 The Minister can recommend one of three alternative procedures for Parliamentary scrutiny dependent on the size and importance of the LRO. The negative resolution procedure is the least onerous and therefore may be suitable for LROs delivering small regulatory reform. The super-affirmative procedure is the most onerous involving the most in-depth Parliamentary scrutiny. Although the Minister can make the recommendation, Parliamentary Scrutiny Committees have the final say about which procedure will apply.

- Negative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if neither House of Parliament has resolved during that period that the LRO should not be made.

- Affirmative Resolution Procedure – This allows Parliament 40 days to scrutinise a draft LRO after which the Minister can make the LRO if it is approved by a resolution of each House of Parliament.

- Super-Affirmative Resolution Procedure – This is a two-stage procedure during which there is opportunity for the draft LRO to be revised by the Minister. This allows Parliament 60 days of initial scrutiny, when the Parliamentary Committees may report on the draft LRO, or either House may make a resolution with regard to the draft LRO. If, after the expiry of the 60 day period, the Minister wishes to make the LRO with no changes, he must lay a statement. After 15 days, the Minister may then make a LRO in the terms of the draft, but only if it is approved by a resolution of each House of Parliament. If the Minister wishes to make material changes to the draft LRO he must lay the revised draft LRO and a statement giving details of any representations made during the scrutiny period and of the revised proposal before Parliament. After 25 days, the Minister may only make the LRO if it is approved by a resolution of each House of Parliament. Under each procedure, the Parliamentary Scrutiny Committees have the power to recommend that the Minister not make the LRO. If one of the Parliamentary Committees makes such a recommendation, a Minister may only proceed with it if the recommendation is overturned by a resolution of the relevant House.

3.6 The Department for Transport believes that the affirmative resolution procedure should apply if option 1 were to be taken forward by means of an LRO. This view is informed by the anticipated nature and scale of adverse impacts that the proposals would have on some organisations, which are judged to be sufficient to warrant the affirmative procedure, but not sufficiently large or widespread to justify the amount of Parliamentary time involved in the super-affirmative procedure.

Q 21: Do you agree that the affirmative resolution procedure should apply to the scrutiny of this proposal, if it were to be taken forward by means of an LRO? If not, why not?

4. Next Steps

4.1 After the consultation has closed, the Department will consider the responses, and analyse the impacts of the policy in more detail. If we decide to scrap the need for NRSWA qualifications, we may use a Legislative Reform Order, and the qualifications would be likely to cease being mandatory in early 2015. If we decided to amend the regulations, changes could come into effect in late 2013.

How to Respond

4.2 You are invited to respond to the questions using the questionnaire response form at Annex B, which is provided on the website in a separate word document. Once completed the questionnaire can be emailed to streetworks.qualifications@dft.gsi.gov.uk or printed and returned by post to:-

4.3 Street Works Qualifications Consultation

Zone 3/26
Department for Transport
Great Minster House
33 Horseferry Road
London SW1P 4DR

4.4 The consultation period will run until 31 May 2012. Please ensure that your response reaches us by the closing date. If you would like further copies of this consultation document, it can be downloaded from www.dft.gov.uk. An electronic (MS Word) version of the response template can be found at the same web address. Please contact the street works team at the e-mail address below, or via the Department for Transport enquiry line (0300 330 3000), if you would like to receive a copy in an alternative format.

4.5 When responding, please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of a larger organisation please make clear whom the organisation represents and, where applicable, how the views of your members were gathered.

What will happen next?

4.6 Following the closure of this consultation on 31 May 2012, the Department for Transport will consider all of the representations submitted and publish a summary of them and its conclusions on our website at www.dft.gov.uk within three months of the consultation closing.

Freedom of Information

4.7 This consultation has been produced in accordance with the principles of the Government's "Code of Practice on Consultation" (see Annex C).

4.8 Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the Freedom of Information Act 2000 (FOIA) or the Environmental Information Regulations 2004.

4.9 If you want information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

4.10 In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we will take full account of your explanation, but we cannot give an assurance that confidentiality can be

maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

4.11 The Department will process your personal data in accordance with the Data Protection Act (DPA) and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.