Health and Safety Executive

Understanding the impact of business to business health and safety ‘rules’
Abstract

This paper explores perceptions of health and safety ‘rules’ and their effects both on businesses (particularly SMEs) and the health and safety system. They persist despite significant Government attention to perceptions of health and safety burden under its better regulation agenda.

Health and safety ‘rules’ are obligations imposed not by Government regulation, but by businesses or business intermediary organisations. They are variously described by interested parties as ‘blue tape’, ‘business to business burdens’, ‘private sector regulation’ and similar terms. This review will refer to them as health and safety ‘rules’.
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Executive summary

Introduction

Health and safety ‘rules’ are obligations imposed by businesses or business intermediary organisations, not by Government. This paper reviews recent HSE work exploring perceptions of them, and their effects both on businesses (particularly SMEs) and the health and safety system more widely. They persist despite significant Government attention given to perceptions of health and safety burden under its better regulation agenda. Our work suggests that further attention to regulation – narrowly defined as what Government does – is unlikely to offer a solution.

In undertaking this work, HSE sought to develop its understanding of:

- The scale of the issue;
- How and where ‘rules’ are manifesting in ‘the system’;
- The key systemic drivers behind the burdens this can create;
- Their impact on business, and on perceptions of health and safety burdens; and
- Impacts on the health and safety system as a whole.

This review brings together a body of findings from a wide range of research and stakeholder engagement conducted during 2017/18. The broader context for the review is HSE’s Strategy Helping Great Britain Work Well and the Government’s Industrial Strategy.

Key findings

Evidence from the insight research (quantitative and qualitative) showed that health and safety burden isn’t a problem for the majority of businesses (70%), and most feel that the policies and procedures they have to have in place are sensible and proportionate relative to the risks within their business.

However, a substantial proportion of SMEs do report a considerable health and safety burden, reporting that:

- The policies and procedures they have to have in place are excessive and disproportionate (39%);
- There is no real link between what they have to do for health and safety and actually keeping employees safe (35%).

Furthermore, 39% of businesses reported feeling that taking responsibility for health and safety just feels like more and more paperwork, with no obvious health and safety benefit.
Sources of burdens

SMEs’ policies and practices are subject to a wide range of rules, which cumulatively outrank the impact on them from regulation and enforcement.

Rules arise from a number of sources:

- Insurers’ requirements and the wider fear of civil litigation emerged as key drivers;
- In procurement, the use of accreditation (or conformity assessment) schemes and verified standards such as ISO 45001 has value, but their use for assurance purposes needs to be proportionate and context-sensitive, especially when used in relation to low-risk activities;
- Since ‘system management’ verified standards can come across for SMEs with the force of regulation (especially where imposed through the supply chain), greater involvement of SME end users in their development is important;
- The overall value of third-party advice to duty holders can be compromised where a segment of the market delivers advice that is neither tailored to the user nor (in some cases) even competent. Maintaining and improving standards in this area is key.

In particular, for ‘directed’ SMEs operating in more complex environments such as supply chains, health and safety rules play a significant role in driving bureaucracy and other business costs that may not be adding value to health and safety on the ground. For SMEs dealing with multiple health and safety rules, regulation can seem “somewhat beside the point”. They also told us that “compliance with regulation can seem insufficient”. The problems are compounded for most SMEs because HSE is not a ‘go to’ source of advice, and “only appears as a distant regulatory body”.

HSE also has concerns about some of the quality assurance controls that support the use of rules. Effective deployment of/response to them requires concomitant governance, monitoring and audit. These provide assurance at organisation level to ensure businesses aren’t missing risks, overestimating competence or misjudging how effective operational controls are.

Our research found that rule makers and those who impose them are not always held to account for the burdens they impose, nor is the value that they may add critically evaluated. More often than not, rules tend to be blurred with ‘red tape’, and reported as such. Government is then charged with driving improvements, even when something other than regulation has been identified as the source of the problem.

This skews perception of ‘regulatory’ burdens and may limit government’s ability to effect change via regulatory reform. It is unlikely that HSE’s work on better regulation will deliver the outcomes we want to see if we can’t shift wider practice in the health and safety system. Future debate around burdens should include consideration of these rules. We also consider there is merit in research focussing on other sources of rules businesses have to follow.
beyond health and safety. This will help government as a whole gain a clear picture, both of what is really driving businesses’ practice on the ground, and perceptions of the burdens that can arise from the use of rules. It could also help identify concerted action to tackle problems.

What next?

HSE now has a much greater understanding of what is influencing duty holder practice, the impact of these various drivers, and their interaction with the Government regulatory regime. This presents us with a significant opportunity to work with and through the system to drive evidence-driven improvements to tackle the key challenges – including in HSE policies and practice.

Rules can lead duty holders to take positive and proportionate action on health and safety. We welcome this – and recognise that rules and the intermediaries behind them are essential components of the system. We want to work with others in the system to tackle disproportionate practices where they exist, and help businesses struggling with unnecessary burdens.

Businesses see a continuing role for HSE in challenging poor practices (i.e. using our voice to influence where we can) and have been supportive of HSE scrutiny in this area. Recently-published HSE guidance on navigating the rules will be an important component in driving reform, and in giving businesses the confidence to dispense with unnecessary paperwork. We will also continue to have a role as exemplar.

However, no one organisation in the system has all the levers to influence change, and some of the remaining issues will require joined-up action. Key will be developing a system-wide understanding of what good/proportionate use of rules looks like, with examples of good/bad practice. Sharing our understanding of this with health and safety professionals at the ‘sharp end’ of putting it into practice with the SMEs most affected by the current rules culture will also be important.
Why the focus on health and safety rules?

The health and safety system in Great Britain has evolved over many years. Regulators like HSE and Local Authorities are key actors in it, setting and enforcing standards that duty holders must meet. Many others also have a part to play, including: the professional bodies and their members supporting duty holders’ compliance, who can enhance performance; standard-setting and accreditation bodies; machinery, equipment and materials suppliers; contracting organisations procuring goods and services from suppliers; trade associations; the insurance industry; and both the criminal and civil branches of the legal profession.

HSE’s strategy for the system, Helping Great Britain Work Well (HBGWW), recognises that:

“Successful organisations understand that sensible and proportionate risk management is integral to delivering their business… supports growth, enables innovation and protects an organisation’s most vital asset, its people.”

…and has as one of its aims:

“…a common understanding of what proportionate health and safety looks like.”

Promoting proportionate risk management remains a corporate priority for HSE. It’s therefore essential that HSE understands business perceptions about the regulatory system and proportionality, and crucially, what is driving those perceptions.

Slaying “the health and safety monster”

‘Health and safety’ has in recent years been subject to two major reviews aimed at tackling perceived disproportion in the regulatory system and its impact on health and safety outcomes.

These reviews, the first conducted by Lord Young and the second by Professor Ragnar Löfstedt, led to targeted regulatory reforms, but generally confirmed that the Health and Safety at Work etc. Act 1974 (HSWA), and the supporting regulatory framework, were fit for purpose. HSWA’s outcome-focused regulatory framework was overall seen to be modern, risk–based, and generally supported by the business world. Further to these reviews the 2014 Triennial Review of HSE noted ‘nearly universal praise and support for HSE’ and its regulatory regime.

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1 Helping Great Britain Work Well (HSE, 2016)
2 HSE Business Plan, 2019/20
3 Common Sense, Common Safety, (Lord Young of Graffham PC DL, 2010)
4 Reclaiming Health and Safety for all: An independent review of health and safety legislation (Professor Ragnar Löfstedt, 2011)
5 Triennial Review Report: Health and Safety Executive (Martin Temple, 2014)
Why perceptions of burdens persist

Despite these reviews and many years of reform under the better regulation agendas including the Red Tape Challenge\textsuperscript{6}, research has shown that while most Small and Medium Enterprises (SMEs) support the spirit of health and safety regulation (recognising its role as an enabler of growth and innovation), some continue to find a lack of proportionality burdensome in their experience of health and safety.\textsuperscript{7}

Recent insight research for HSE on stakeholder perceptions of the organisation (the ‘Audience Measures’ report)\textsuperscript{8} asked about proportionality and the extent to which messaging in the UK health and safety system is coherent and unified. Stakeholders, business leaders and MPs responded as follows:

Figure 1: Stakeholder views on proportionality

<table>
<thead>
<tr>
<th></th>
<th>In GB, health and safety regulation is proportionate (% agree)</th>
<th>In GB, health and safety regulation is proportionate (% who strongly agree)</th>
<th>There is a coherent, unified message about health and safety in GB (% who agree)</th>
<th>There is a coherent, unified message about health and safety in GB (% who strongly agree)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Stakeholders</strong></td>
<td>44%</td>
<td>35%</td>
<td>34%</td>
<td>20%</td>
</tr>
<tr>
<td><strong>Business leaders</strong></td>
<td>59%</td>
<td>30%</td>
<td>49%</td>
<td>22%</td>
</tr>
<tr>
<td><strong>MPs</strong></td>
<td>45%</td>
<td>11%</td>
<td>Did not ask MPs</td>
<td>Did not ask MPs</td>
</tr>
</tbody>
</table>

The relatively low figures reported under ‘strongly agree’ suggest that we have not yet achieved the strategy aim on proportionality set out above, or coherence in messaging about health and safety in Great Britain.

However, an accumulating body of evidence suggests that the burdens cited by business are not necessarily driven by regulations, but rather by third party factors, i.e. health and safety ‘rules’, including the fear of civil action.

Better regulation and the Industrial Strategy

HSE’s strategy for the health and safety system (HGBWW) is well aligned with the Government’s Industrial Strategy, which notes that:

\textsuperscript{6} Health and safety – the Red Tape Challenge (Cabinet Office web archive, 2015)
\textsuperscript{7} SME Communications Research (HSE 2016); and BEIS Business Perception Survey (2016)
\textsuperscript{8} Audience measures (HSE, 2018 (publication due 2020)).
“The right business environment demands a regulatory system responsive to not only today’s economy but to the future economy as well. We are committed to this aim.”

“We are determined to have the right support for small businesses. Smaller businesses, without the clout of scale, can suffer disproportionally from heavy-handed regulation and bureaucratic excess. They can also find themselves exposed to detrimental behaviours – intentional or otherwise – by larger businesses that are their suppliers and customers.”

This work clearly demonstrates the contribution HSE can make to the Industrial Strategy’s commitments to build

“a more comprehensive evidence base on the impact of regulation”

and to

“ensure that the government makes the most of all its policy levers to achieve success.”

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10 Ibid.
What we sought to explore

HGBWW and the Industrial Strategy give impetus to HSE’s work exploring in more detail questions about how and why these burdens arise; the extent of their impacts; and possible actions to mitigate these.

By bringing greater transparency to where and why SME burdens are arising, HSE can play a more active and targeted role in tackling them.

In undertaking this work, HSE sought to develop its understanding of:

- The scale of the issue;
- How and where ‘rules’ are manifesting themselves in ‘the system’;
- The key systemic drivers behind the burdens this can create;
- Their impact on business, and on perceptions of health and safety burdens; and
- Their impact on the health and safety system as a whole.

This review brings together a body of findings from a wide range of research and stakeholder engagement:

- HSE insight research including: Understanding Business to Business Burden (2018); Audience Measures (2018); SME communications research (2016);
- HSE investigation of the role of third party advice through a YouGov survey and interviews and workshops with HSE and Local Authority inspectors (2017);
- engagement with a range of business bodies including health and safety professionals, trade associations, insurers, SMEs and larger contracting bodies, solicitors and auditors;
- desktop review of over 80 government, business and academic surveys and reports; and
- desktop reviews of relevant press coverage, marketing material and websites.

In particular, this report draws heavily on HSE’s research Understanding Business to Business Burden (2018). For ease of reference throughout this document it is hereafter referred to as “the insight research”.

While the research considered the role of businesses and organisations of all sizes, the research into burdens arising from rules was focused on SMEs, in line with the emphasis on this category of businesses in HGBWW and the Industrial Strategy.
Key themes

The evidence gathering was framed around 4 key themes:

- Civil law;
- The insurance market;
- The supply chain, including the role of management standards and accreditation (or conformity assessment); and
- The role of 3rd party advisers, and in particular health and safety consultants, including consideration of the quality of the advice in the market.

These themes are explored in detail in the key findings section.
Setting the context

Health and safety law

To set the ‘rules’ in context, it is important to first understand the basis of British health and safety law: the Health and Safety at Work etc Act 1974 (HSWA). The Health and Safety Executive and Local Authorities are responsible for most enforcement of work-related health and safety legislation in Great Britain.

HSWA clearly places responsibility on those who create risks to ‘own’ or manage them. This applies whether the risk owner is an employer, self-employed or a manufacturer/supplier of articles or substances for use at work. Whatever the corporate status, each risk owner must implement a range of actions to manage them.

The Act is outcome focused, not prescriptive in nature. The duty holder does not have to remove all risks, but must do everything ‘reasonably practicable’ to protect people from harm. What the law requires here is what good management would lead employers to do anyway: that is, consider the risks and take sensible measures to reduce them. The duty holder is not required to remove risks where the time, trouble and effort required to do so would be grossly disproportionate.

In addition to criminal law obligations as set out by HSWA, employers also have a duty of care under civil law. Neither HSE nor Local Authorities enforce this. Instead, if someone has been injured or made ill through employer negligence they may be able to make a claim for compensation.

HSWA and the duty of care under civil law apply across the economy. Unsurprisingly therefore, health and safety is consistently reported as one of the main areas of regulation that businesses, particularly small businesses, have to engage with.

\[11\] HSE regulates only in Great Britain, not the entire United Kingdom. In Northern Ireland workplace health and safety is regulated by HSENI. Certain areas of risk or harm directly or indirectly related to work activity are covered by legislation other than the HSW Act and are not dealt with by HSE. These include consumer and food safety, marine, railway, and aviation safety and most aspects of environmental protection.
The potential for health and safety to act as both an enabler and barrier to business is therefore significant.\textsuperscript{13}

\textsuperscript{12} Regulation Returned – What small firms want from Brexit (FSB, 2017)

\textsuperscript{13} The term ‘significant’ should be read as carrying its everyday meaning only, and not as implying \textit{statistical} significance. Where statistical significance is inferred, we use the term ‘statistically significant’.
Key findings

Scale of the issue

Evidence from the insight research (quantitative and qualitative) showed that health and safety burden isn’t a problem for the majority of businesses (70%), and most feel that the policies and procedures they have to have in place are sensible and proportionate relative to the risks within their business.

However, a substantial-proportion of SMEs do report a considerable health and safety burden, with other research reports into the issue citing between 15% and 50% experiencing a considerable burden.

As shown in figure 3 below from our insight research, SMEs report that:

- The policies and procedures they have to have in place are excessive and disproportionate (39%);
- There is no real link between what they have to do for health and safety and keeping employees safe (35%).

Figure 3: Disproportionate and excessive burdens

Furthermore, 39% of businesses reported feeling that taking responsibility for health and safety just feels like more and more paperwork with no obvious health and safety benefit.

Reports of these levels of burdens have over time understandably informed a focus on what Government can do to reduce regulatory burdens i.e. the red

14 There is a discrepancy between the 70% figure presented here and the results in Figure 3. The survey questions were not directly linked, so it is possible that businesses responded positively with regards to proportionality initially but responded differently when asked the specific questions in Figure 3.

15 Understanding Business to Business Burden (HSE, 2018)


17 Ibid.
tape agenda. However, our work suggests this is far from being the sole source of the problem.

Figure 4: Health and safety bureaucracy

In particular, SMEs reported finding health and safety burdensome when what they were having to do (or felt they had to do) seemed simply to repeat what they had already done, over the top and/or lacking in any real link to keeping people safe.

Amongst the 30% of SMEs who agree to some extent that health and safety places a big burden on their business, the main sources are the time it takes, the cost it imposes and completing the paperwork requirements of external bodies.

The direct burden of understanding, interpreting, complying and keeping up to date with health and safety regulation is reported at 23% (cumulatively). But a wide range of other sources of business burdens clearly have an influence too, both individually and cumulatively.

Evidence from the qualitative research indicates that the direct costs associated with health and safety tend to be accepted as part of doing business. It is the opportunity cost associated with ‘lost time’ for running the business that is the more significant factor.

A note on directed and autonomous SMEs

Research conducted with SMEs in 2016 identified that SMEs fall into one of two categories: autonomous or directed. This earlier finding was borne out in the insight research too, with evidence about the burden from rules manifesting differently in each category.

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20. Ibid.
21. From the quantitative analysis of burdens, it is not possible to unpick whether it is regulation or rules that are driving these factors. The following sections explore the qualitative evidence.
23. *SME Communications Research* (HSE, 2016)
Autonomous SMEs

Autonomous SMEs are largely independent when it comes to policies and procedures. Accountability sits within the SME, and on the shoulders of the person deemed responsible for health and safety within the organisation. Knowledge and expertise are highly variable depending upon the background of the person responsible, as well as their inclination to engage with the topic. In addition, the approach taken within these SMEs is also highly variable, ranging from those who take it very seriously to those who are somewhat cavalier. These SMEs tend to be less confident that they are ‘getting it right’, as they are not being overseen/checked by anyone.

Directed SMEs

Directed SMEs are answerable to one or more external bodies when it comes to health and safety, including clients and customers (including local authorities funding bodies). These bodies can and do make demands on the SME, and SMEs experience the need for compliance with these as mandatory.

In our insight research sample, approximately 30% of businesses are autonomous and 66% directed (see figure 5 below). Both autonomous and directed SMEs exist across all sizes and sectors.

Figure 5 – Autonomous vs Directed SMEs

Directed SMES are more prevalent in Entertainment, Arts & Recreation (70% strongly agree) and Construction (60% agree strongly); they are least prevalent in Agriculture, Forestry & Fishing (38% strongly agree), Manufacturing (41% strongly agree) and Professional, Scientific & Technical (41% strongly agree).

Directed SMEs are less prevalent amongst those with 50+ employees (44% strongly agree) but otherwise spread evenly across all sizes of SME.
Burdens by sector and size\textsuperscript{24}

In the insight research sample, business sectors\textsuperscript{25} (both directed and autonomous) reporting that they felt more burdened are (% agreeing strongly that health and safety places big burden on their business):

- Agriculture & Forestry (29% strongly agree);
- Construction (27% strongly agree);
- Administration & Support Services (26% strongly agree);
- Accommodation & Food Services (25% strongly agree);
- Transportation & Storage (24% strongly agree);
- Wholesale & Retail; (25% strongly agree); and
- Repair of Motor Vehicles (25% strongly agree).

SMEs with 5-9 employees feel more burdened than larger businesses (25% strongly agree).

In addition, a proportion of businesses (39%) say that the policies and procedures they have to have in place feel excessive and/or that there is no real link between what they have to for H&S and what they need to do to keep employees safe (35%).

The sectors in which SMEs were more likely to feel that the policies and procedures they had to have in place were excessive and disproportionate were:

- Accommodation & Food Services (30% strongly agree);
- Transportation & Storage (29% strongly agree);
- Construction (28% strongly agree);
- Information & Communications (27% strongly agree);
- Finance & Insurance (27% strongly agree); and
- Administration & Support Services (26% strongly agree).

In this sample, SMEs with 5-9 employees also were more likely to feel that the policies and procedures they had to have in place were excessive and disproportionate.

The sectors in which SMEs were more likely to feel there was no real link between what they had to do to satisfy others’ demands and what they need to do to keep employees safe were:

- Agriculture & Forestry (27% strongly agree);
- Wholesale & Retail; Repair of Motor Vehicles (27% strongly agree);
- Transportation & Storage (25% strongly agree); and

\textsuperscript{24} Understanding Business to Business Burden (HSE, 2018)

\textsuperscript{25} Not all industry sectors in GB, or all business areas within each Standard Industry Code were sampled. The published summary report Understanding Business to Business Burden (HSE, 2018) provides detail on the research methodology.
• Real Estate (25% strongly agree).

From the qualitative element of our insight research, it appears that the need to evidence compliance with requirements can become divorced from the reality of working practices ‘on the ground’. It is not that a focus on rules leads to practices becoming unsafe (or if already unsafe, deteriorating further), but that evidencing requirements can become a somewhat separate work stream which fails to influence practice in the direction of improvements that may be necessary, or even urgent.

**Does it matter?**

HSE has not sought to quantify the economic impact arising from these burdens, but it’s useful to place the headline findings in the context of the SME contribution to the UK economy.\(^{26}\)

- In 2017, total employment in SMEs was 16.1 million and the combined annual turnover of SMEs was £1.9 trillion;
- SMEs accounted for at least 99.5% of the businesses in every main industry sector.

So, even at the lower end of the ranges of businesses reporting burdens, this represents a significant proportion of the UK economy affected by potentially disproportionate impositions, and millions of workers that HSE’s strategy aims to protect through proportionate and effective risk management. The insight research reports that 29% of SMEs spend at least one day a week on health and safety and that time spent increases with the number of employees; 25% of SMEs with 2-4 employees report spending at least 1 day a week on health and safety; this rises to 57% in SMEs with 50 plus employees.

These burdens *can* act as a drag on innovation, productivity and growth – key aspects of the UK Industrial Strategy\(^{27}\) to which HSE as a regulator must have regard under the Small Business Enterprise and Employment Act 2015.

**International comparison**

Direct international comparisons have been hard to come by. However, a report from Deloitte Australia\(^{28}\) pointed to the potentially significant impact that such rules can have on the economy as a whole – when the costs of compliance (for all forms of business-to-business obligation, not just health and safety) are evaluated.

Deloitte’s 2014 report titled “Get out of your own way: Unleashing Productivity”, cites the following annual costs of ‘compliance’, comparing the

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\(^{26}\) *Business population estimates for the UK and Regions* (Department for Business Energy and Industrial Strategy, 2017)

\(^{27}\) *Industrial Strategy – building a Britain fit for the future* (Department for Business Energy and Industrial Strategy, 2017)

\(^{28}\) *Get out of your own way: Unleashing Productivity* (Deloitte Australia, 2014)
impact of what the report terms “public sector rules” and “self-imposed rules and regulations”:

- $94 billion to administer and comply with public sector rules
- $155 billion to administer and comply with self-imposed rules and regulations

This raises the possibility that, in Great Britain, the impact from rules could extend well beyond just the health and safety sphere.

At a cross-Government level, understanding which rules influence business perceptions and activity is a vital precursor to focussing efforts on better regulation.
Sources of health and safety rules and their impact on business

The quantitative aspect of the insight research looked at the impact from various sources of health and safety rules. The content of policies and practices that SMEs have in place are subject to a wide range of influences, only one of which is legislation.

As shown in figure 5 below, client requirements and insurance companies (alone) have almost as much impact as legislation, though the latter is the single biggest influence.

Consultants have at least some impact for around half (49%) of SMEs.

Figure 6: Overall impact on policies and procedures of the business from all sources – total sample29 [NB: all but the two sources unshaded in left-hand column are ‘rules’ rather than Government regulation]30

*This (liased only) on the possibility of civil liability by an employee. Had customers and members of the public been included this figure may have been different

29 Understanding Business to Business Burden (HSE, 2018)
30 The insight research focused on the role of Local Authorities in imposing rules (e.g. in procurement), however it is possible that some organisations also responded in the quantitative survey (figure 6) in terms of LAs’ roles as health and safety regulators.
Figure 7 below presents the same data as Figure 6 on the sources of impact, but by sector. It shows how, in addition to regulation and enforcement, health and safety rules reach right across the economy.

**Figure 7: Overall impact on policies and procedures by sector**

<table>
<thead>
<tr>
<th>Source of Impact</th>
<th>Health &amp; Safety legislation</th>
<th>H&amp;S requirements of our clients</th>
<th>Possible action being taken against my business by HSE</th>
<th>Insurance company</th>
<th>Possibility of being sued by an employee</th>
<th>H&amp;S requirements to third party when tendering for contracts</th>
<th>Local Authority</th>
<th>Advice/guidance provided by H&amp;S Consultant and/or Supply Chain Assurance Consultant</th>
<th>Accreditation Scheme(s) we belong to</th>
<th>Trade Association(s) we belong to</th>
<th>Other H&amp;S related standards/schemes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Base N</td>
<td>312</td>
<td>196</td>
<td>309</td>
<td>309</td>
<td>312</td>
<td>309</td>
<td>309</td>
<td>309</td>
<td>309</td>
<td>309</td>
<td>309</td>
</tr>
<tr>
<td>% “A big impact”</td>
<td>50%</td>
<td>42%</td>
<td>45%</td>
<td>65%</td>
<td>58%</td>
<td>45%</td>
<td>51%</td>
<td>65%</td>
<td>42%</td>
<td>39%</td>
<td>11%</td>
</tr>
<tr>
<td>% “Has some impact”</td>
<td>48%</td>
<td>43%</td>
<td>41%</td>
<td>50%</td>
<td>42%</td>
<td>41%</td>
<td>49%</td>
<td>34%</td>
<td>43%</td>
<td>38%</td>
<td>14%</td>
</tr>
<tr>
<td>% “Has little/no impact”</td>
<td>26%</td>
<td>33%</td>
<td>26%</td>
<td>4%</td>
<td>15%</td>
<td>4%</td>
<td>29%</td>
<td>15%</td>
<td>24%</td>
<td>11%</td>
<td>29%</td>
</tr>
</tbody>
</table>

It is clear from the results that businesses from the majority of sectors sampled feel a significant impact from a wide range of health and safety rules (often more than one), and that they cumulatively outrank the impact from regulation and enforcement.\(^{32}\)

In addition to the burdens associated with individual sources, stakeholder feedback suggests that there is a significant amount of general ‘noise’ in the system that can leave businesses feeling that it is hard to keep up with what’s required of them. This can in turn be amplified by marketing and communication within the health and safety system.

**Drivers of duty holder action**

The significance of the role of health and safety rules was also echoed in results from our research looking specifically into 3rd party advice (i.e. health and safety consultancy).

Businesses were asked about their primary and secondary drivers for action on health and safety, and their use of 3rd party advice. This reported that health and safety rules outrank regulation as a driver of duty holder action:

\(^{31}\) *Understanding Business to Business Burden* (HSE, 2018)

\(^{32}\) It also seems reasonable to suspect that the figure for the fear of being sued might have been higher had it been scoped to include the possibility of being sued by a member of the public as well as an employee.
Figure 8: Ranking of rules and regulation as driver for duty holder action

<table>
<thead>
<tr>
<th>Primary</th>
<th>Secondary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Health and safety rules</td>
<td>22%</td>
</tr>
<tr>
<td>Regulation/Enforcement</td>
<td>19%</td>
</tr>
<tr>
<td>To improve the business’s health and safety standards</td>
<td>14%</td>
</tr>
</tbody>
</table>

This is important for understanding the drivers of business burdens, as the cost of 3rd party advice is often cited as significant. For example, the Federation of Small Businesses report Regulation Returned: what small firms want from Brexit (2017) notes that:

“...where smaller firms have identified specific ‘types of regulation’ (e.g. employment law, workplace health and safety, etc.) as creating the biggest barriers to running their business”

one of the main consequences of these barriers is the additional costs associated with buying in external advice.

How do businesses get their information?

In addition to the question of what drives duty holder action, it’s also worth considering how duty holders access information on health and safety. It seems that, as with the other drivers of action, 3rd parties play a major role as workers and employers are much more likely to get their information from non-HSE sources:

Figure 9: Sources of information on health and safety

<table>
<thead>
<tr>
<th></th>
<th>Any HSE source</th>
<th>Any non-HSE source</th>
</tr>
</thead>
<tbody>
<tr>
<td>All employers</td>
<td>33%</td>
<td>76%</td>
</tr>
<tr>
<td>All workers</td>
<td>33%</td>
<td>80%</td>
</tr>
</tbody>
</table>

17% of employers and 9% of workers only use HSE sources, compared with 59% of employers and 55% of workers that only use non-HSE sources.

These findings appear to suggest that the combination of health and safety rules and third parties’ roles are having a very direct impact on what businesses are being asked to do, and how to do it.

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33 Blue tape research into 3rd party advice (HSE, 2017)
34 Regulation Returned: what small firms want from Brexit (FSB, 2017)
35 The other consequences are reported as: Costs that derive from carrying out required monitoring, recording and reporting; difficulties in applying regulation that has been poorly designed for its purpose; problems of interpreting complex or inconsistent language.
36 Audience Measures (HSE, 2018 [publication due in 2020]). Note that some employers and workers will be using both HSE and non HSE sources, so the figures presented here do not equal 100%.
Regulation - or something else?

Overall, the quantitative evidence presented above suggests that health and safety rules play a very significant role in driving business action on health and safety, and cumulatively a greater role than the one played by regulation and enforcement, in part because they impact businesses far more regularly than interaction with the regulator.

To set in context the analysis in the following sections of this report, it is important to recognise that the majority of businesses do not feel burdened by health and safety. This suggests that, on the whole, health and safety rules are playing a valuable role in the health and safety system (or are neutral).

However, as a significant proportion of SMEs report health and safety burdens and a lack of proportionality, it is important to unpick how and where health and safety rules might be contributing to this. While the quantitative data outlined above provides clear evidence of the reach and impact of rules, on the question of burdens the qualitative evidence points to variability, with more significant burdens in some areas than others. The following analysis is therefore primarily focussed on those aspects of the rules that appear to be contributing most to disproportionate business burdens and the reasons for this. The impact from these rules is explored by theme in the following sections.
Civil law

Context

Civil law imposes a duty of care on organisations (as legal persons) and individuals doing anything that could foreseeably harm others. When one person injures another, either intentionally or by negligence, a court may award money (‘damages’) under civil law to the injured party to compensate them for the costs, pain and suffering caused by the person who injured them.

Previous reviews of health and safety, particularly Professor Löfstedt’s *Independent review of health and safety: Reclaiming health and safety for all*³⁷ have highlighted the significant role that fear of civil litigation plays in creating burdens and driving disproportionate activity in the health and safety system.

The scary monster in the corner

Despite claims rates falling overall,³⁸ our insight research shows that the fear of being sued persists as a powerful force influencing businesses. The fear of possible civil litigation is a driver of activity in many businesses; almost three quarters (74%) of SMEs in the sample agreed that a lot of what they do is to protect themselves from being held liable for any accident or injury that occurs to an employee or member of the public.

Figure 10: Fear of civil litigation as driver for action³⁹

The fear of civil litigation is a driver of activity across the majority of industry sectors (61% strongly agree), although it is less of a driver of activity in SMEs with more than 50 employees (only 50% strongly agree).

The qualitative element of the insight research concluded that being held liable for a serious incident was perceived as having potentially catastrophic consequences for the SME; essentially it was felt it could mean the end of the business.

While it is certainly not the only reason businesses engage with health and safety (duty of care drives sound practices in many businesses), it can be the *scary monster in the corner of the room*; and as such can influence both their

³⁷ *Reclaiming Health and Safety for all: An independent review of health and safety legislation* (Professor Ragnar Löfstedt, 2011)
³⁸ *An analysis of the UK personal injury market* (Weightmans, Market Affairs Group, 2017)
³⁹ *Understanding Business to Business Burden* (HSE, 2018)
actual policies and practices and also, very strongly, the lengths they go to ensure all the ‘paperwork’ is in place.

Someone must be liable?

While some stakeholders suggest that the new sentencing guidelines\(^{40}\) for health and safety offences under criminal law could be driving an increased sense of fear in the system (see below), our insight\(^{41}\) found that, *almost without exception*, it was the possibility of civil litigation that businesses mentioned spontaneously as a driver of activity in their business.

Many SMEs stated the ‘fact’ that we are all living and working in an increasing litigious society. Many SMEs share the view that we are living in a culture where there is no longer such a thing as a straightforward accident: responsibility for any incident leading to harm therefore can or must be assigned somewhere; someone is to blame and can or must be made to pay.

Many SMEs can cite an example of where a business has been sued; whether this was successful or not, it heightens the sense of litigation as a possibility.

We also know that media coverage has tended to reinforce the fear felt by businesses, and this has been described in some of the Myth Buster cases reported to HSE (see below).

Overall, the insight reported that, as a result of the fear of civil action, duty holders can be quite heavily engaged in the process of protecting themselves and their business from the potential impact of a civil litigation. This can influence both their actual policies and practices and also, very strongly, the lengths they go to ensure all the ‘paperwork’ is in place – regardless of whether it reflects any actually-implemented policy. For SMEs this paperwork can thus become a work stream in itself: not one that is *necessarily* pursued at the expense of the management of health and safety, but one that can drive the sense of bureaucratic burden. The aim is to ensure that in the event of an incident, the duty holder is not the one held to account.

Impacts by business type

Impacts appear to differ for more ‘autonomous’ SMEs compared to ‘directed’ SMEs (see above) operating in supply chains or other more complex, multipartite arrangements.

The insight found that in the more autonomous SMEs (i.e. those not operating in supply chains or subject to clients’ demands), fear of litigation is a very immediate threat with potentially catastrophic consequences. The overall cost, both in terms of the time and cost involved in defending the action and the potential penalties associated with a civil action found against them, was

\(^{40}\) *Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences – Definitive Guidelines* (February 2016)

\(^{41}\) *Understanding Business to Business Burden* (HSE, 2018)
perceived as potentially fatal for the business. This drives a need for evidence/documentation and sense of emotional burden.

The evidence/documentation was felt to be necessary to ensure they could demonstrate that they had done everything necessary to safeguard those involved, so policies and procedures were documented, risk assessments done, accidents recorded, staff training done and logged, and so on. This was perceived as minimising the chances that a court would decide against them and also maximising the chances that the insurance company would pay out in the event of a court action going against them.

**Emotional or practical burden?**

The sense of an emotional burden was driven by the fear that the duty holder would be found lacking in the event of an incident. This was especially strong amongst those who were less confident, and it could far outweigh the burden of practical work necessary to manage health and safety.

Uncertainty around what the ‘rules’ were also led to difficulties in determining what was sufficient to ensure the duty holder was ‘covered’ and so cease further activity to manage health and safety.

Previous research work *(SME Communications Research 2016)*\(^{42}\) conducted for HSE reported that some SMEs find it hard to know when they have ‘done enough’.

The 2018 insight research reported, in this context, that SMEs tended to err on the side of caution; doing more rather than less, if there was doubt. The more confident/experienced duty holders tended to be more pragmatic, believing they had taken reasonable steps to minimise the risks and so protect themselves in the event of an incident.

There was little evidence that fear of litigation was driving excessive health and safety ‘on the ground’ activity in autonomous SMEs, but it appeared to be working to ensure that practices were rigorously reviewed, monitored and recorded. While robust paperwork was seen as essential for claims defensibility, the main burden was the emotional one.

It is not clear how far ‘emotional burden’ translates into what businesses commonly report in purely quantitative surveys as ‘regulatory burden’, which is often viewed in more practical terms (i.e. level of paperwork, time, activities required and so on). Insight research can help disentangle these two things.

**SMEs in more complex environments**

Things get more complicated and potentially more burdensome for ‘directed’ SMEs involved in supply chains, or operating in more complex environments - for example, organisations relying on local authority funding.

\(^{42}\) *SME Communications Research* (HSE, 2016)
As a result of the fear of civil litigation, and the potential costs (financial or reputational) associated with an accident or claim, contracting organisations push health and safety requirements down the supply chain (or as part of other requirements).

These can be onerous – and are recognised as such by some of the contracting bodies with whom we have engaged. However, simpler alternatives are harder to define, with individual contracting bodies typically attempting to push their own bespoke systems as the answer.

They are often accompanied by significant administrative requirements as contracting or directing bodies (e.g. further up the supply chain) feel the need to ‘cover themselves’ and so to be able to ‘prove’ that the SMEs under their control have committed to following the “correct” procedures. The role of the supply chain is dealt with in more detail below.
The role of insurers

Context

Insurance brokers and companies, and underwriters, act as gatekeepers to the civil litigation system. Through a combination of proactive and reactive steps (pricing new or emerging risks, responding to claims and case law), they exercise a dynamic market supervision role, continually refining cover and therefore the system’s exposure to risk.

In his report *Reclaiming Health and Safety for All*, Professor Löfstedt identified insurer requirements as a driver for improved workplace health and safety compliance – though as a factor for only 27% of respondents, the influence of insurers was very much less of a driver than the existence of legal obligations. Nevertheless, Löfstedt identified some insurer behaviours as potentially a key driver of health and safety burden – in particular, the way they (and the wider claims handling system) apply the Ministry of Justice’s Pre-Action Protocol (see below). What results is often referred to in the media as a ‘claims culture’, usually associated with the perception that this is at epidemic levels and rising.

In response to Löfstedt, the Association of British Insurers produced *Health and Safety for the Voluntary and Business Sector – Key principles*. This set out what a proportionate approach to managing risk should look like for insurance companies.

A 2010 report from Policy Exchange noted that few insurers will inspect premises or assess the risk management strategies of clients or potential customers. Premiums tend instead to be linked to the insurance industry’s – usually conservative – opinions as to the level of risk associated with a particular activity, and not an organisation’s specific risk profile.

Scale and nature of impact

Our insight research indicated that insurers had a 74% net impact on businesses’ approaches to health and safety, and a big impact for 40%.

In the retail sector, our research into 3rd party advice suggested that insurance alone is almost as significant a driver for duty holder action as Government regulation (14.5% -v- 16%). However, insurers are also generally seen as a positive source of advice/information.

There is little evidence from HSE’s insight research to suggest that insurance companies are directly driving a focus on rules by making specific additional risk prevention-related requests of SMEs. However, a ‘compliance’ paper trail appears to result: stakeholder evidence did cite some vivid examples that appeared to lack proportionality. Taken together, these two pieces of

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44 *Blue tape research into 3rd party advice* (HSE, 2017)
Evidence may suggest duty holders appear to accept a certain amount of burden as a price worth paying if it means they can successfully demonstrate (to insurers and civil courts) that they have taken reasonable steps to discharge the duty of reasonable care under civil law.

However, from HSE’s perspective, such an approach has the potential to be ‘tick-box’ and disproportionate, with (perhaps nugatory) paperwork the cornerstone.

In our research into 3rd party advice, 14% of businesses using third party advice for their ‘ competent person’ assistance used an insurer’s/ bank’s consultancy/advice services. This research also showed that businesses using banks or insurance companies for health and safety advice tend to be less engaged – health and safety is seen more as a formality, part of a larger package and individuals appear somewhat distanced from the process. However, we found only anecdotal evidence of insurers pushing their own consultancy services as an inducement to reduce renewal premiums.

Proportionality in insurer practice

Despite the Key Principles document, we have heard a range of stakeholder views about the potentially unhelpful effects of insurer demands post-incident. In some cases, insurers may over-engineer solutions to problems:

- A large UK grower of salad crops, operating 50 large farms covering 90,000 hectares, faced a claim from an employee who had sprained his ankle in a field. The insurance underwriter asked for the company’s ‘written risk assessment for holes in fields’, something the company didn’t possess. As a result, the claim was settled, and further claims followed.

- Following an accident in an office where an employee injured tendons in his wrist trying to catch a cup falling from a kitchen cupboard, an insurer advised the business to assess the risk of cups falling from cupboards, to fit signage warning of this risk, and to train staff in how to remove cups from cupboards safely.

It was unclear to the businesses concerned that these measures would add anything to their effective management of risks – while the reputational risks to the health and safety system from an ‘elf ’n’ safety gone mad’ approach will be apparent. However, businesses’ relationships with insurers are asymmetric - a refusal to do as the insurer asks may (businesses surmise) result in cover being withdrawn. Such nervousness can translate into disproportionate action, as evidenced for example by a number of the cases referred to HSE’s Myth Buster Challenge Panel. There is also the risk that over-engineered systems

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45 Blue tape research into 3rd party advice (HSE, 2017)
46 We found no UK evidence of insurers reducing insurance premia for organisations certified to a management standard, as is apparently the case in Italy (see I dati Inail sull’efficacia dei SGSL per ridurre gli infortune (Osservatorio Accredia, 2012).
47 Myth busters Challenge Panel findings (HSE 2018)
perceived as unnecessary or ineffective in practice will fall into disuse and may by association discredit more needed risk controls.

Insurer good practice

We have nevertheless encountered some insurer good practice:

- HSE has worked extensively with an insurer whose business is mainly in the lower-risk and voluntary sectors, as they seek to simplify and make more proportionate their health and safety advice and guidance for their customers; and

- HSE has also met with a large commercial insurer, taking a more risk-based approach with some of its larger insureds. It has signalled a willingness to dispense with paperwork risk assessments where other methods can provide effective assurance that risks are well-managed. Clearly, such an approach can work for a large business, but may not be transferable to the volume SME market where purchase of insurance (often a loss leader) is more automated and insurer direct engagement in seeking improvement correspondingly less.

While our experience with the niche insurer may not be transferable to the more mainstream Employers Liability (EL)/Public Liability (PL) market, it has nevertheless resulted in the company making a commitment under HGBWW, which could prove an effective signal to others. The company’s revamped website is also an effective advert for straightforward guidance from an insurer on practical steps lower-risk, and volunteer-dominated, organisations can manage health and safety using their own resources.

While the market for employing SMEs is dominated by a few large providers, it remains the case that scope for taking a different approach is probably limited. EL/PL has historically been a loss-leader, and insurers will be unlikely to invest effort into an insured without significant benefits in terms of reduced risk exposure.
Managing claims

Defending a claim

In addition to this fear of civil action, feedback from stakeholders involved in the claims system has also highlighted the role played by some of the formal mechanisms that comprise the civil claims system – and how these might be contributing to the ‘requirement’ for businesses to demonstrate compliance via extensive and sometimes disproportionate record keeping.

The role of the Pre-Action Protocol

Pre-action protocols (PAPs) explain the conduct and set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. This includes the exchange of sufficient information to:

- Understand each other’s position;
- Make decisions about how to proceed; and
- Try to settle the issues without proceedings.

For workplace accidents, the relevant disclosure list at Annex C to the Pre-Action protocol\(^{48}\) provides indicative sources of information to meet the above three objectives. While these are extensive lists and by no means all the documentation listed is required under health and safety statute law, HSE’s view is that they should be used proportionately. In an article for *Journal of Personal Injury Law* in 2011, HSE’s former Chair Judith Hackitt wrote:

“A number of businesses have made clear to HSE and to ministers that the Woolf list, originally intended to identify a range of documents some of which may be referred to or required as evidence in the event of a claim, has become a list of documents which companies perceive they have to have in their entirety if they are ever to have a chance of defending a claim. This is seen as adding significantly to the burden of documentation and bureaucracy, but not to real improvement in safety or protection of employees or the public.”\(^{49}\)

The practice direction for the Pre-Action Protocol states that such documentation:

“...must not be used by a party as a tactical device to secure an unfair advantage over another party”\(^{50}\)

However, solicitors handling civil claims have reported that *any gap* in the paperwork described in the relevant disclosure list is used by claimants or

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\(^{48}\) Pre-Action Protocol for personal injury claims (Ministry of Justice, 2017)


\(^{50}\) Practice Direction – Pre-Action Conduct and Protocols (Ministry of Justice, 2017)
their agents, regardless of relevance, to drive towards hardened positions and in some cases to force premature out-of-court settlement. Stakeholders have suggested that this is particularly prevalent with lower cost claims management businesses, who pursue this tactic to their advantage. This can increase the drive towards premature settlement, as insurers look for certainty in controlling their costs even when they don’t accept liability in principle.

It was also suggested that the health and safety competence of claims handlers in lower costs businesses may be contributing to misuse of the PAP. Evidence for this is difficult to assess with HSE at arms’ length from the issue, but the Chartered Institute of Legal Executives has confirmed that no specific health and safety training is required for paralegals undertaking this work.

This recent feedback echoes earlier similar findings from the Löffstedt review which noted that…

“…there is evidence that the associated standard disclosure [within the Pre-Action Protocol] lists in particular are being applied inappropriately and claims are not being defended if all the paperwork is not in place. Employers are also being advised to keep large numbers of records in case they are taken to court. All of this leads to an emphasis on generating paperwork for every possible risk.”

Stakeholders describe the PAP as “the backbone” of the civil claims system, so its potential misuse is significant. As noted above, it was a systemic driver for health and safety bureaucracy when Professor Löffstedt’s report was published. The situation does not appear to have changed since 2011, despite Lord Jackson’s reforms to the civil justice system.

Does paperwork provide cover?

It is important to recognise that with the PAP operating as described above, a ‘comprehensive’ paper trail can form the basis of a defence against civil claims. So despite claims rates falling overall, businesses are understandably very wary of these (low probability) potentially high impact events. As such the paperwork is part of the assurance that business seek.

However, the situation (as ever) is not straightforward. Stakeholders from the insurance, prosecution and defence fields have noted that businesses can equally come unstuck in the case of an incident if paperwork overstates actual practices on the ground. This points to the need to maintain focus on active risk management, and on proportionate and realistic record keeping as a tool for controlling the organisation’s significant risks.

Summary

It is clear that businesses’ awareness of their legal duty of care and the associated fear of civil action can act as important drivers for keeping them

51 And prosecution by HSE or Local Authorities for breaches of health and safety law.
focussed on managing health and safety. However, it is also clear that the burdens (emotional and practical) can be substantial.

When considering the impacts on SMEs, we can see civil law as both a major direct driver of health and safety activity for businesses in itself, and also a broader systemic driver that is influencing the rest of the health and safety system, in particular in the supply chain. This underlines the need for leadership and concerted action across the health and safety system to tackle both symptoms and underlying causes, including greater transparency about the differing objectives of the criminal and civil law regimes.

The supply chain (and more complex SME relationships) are dealt with in more detail below.
The supply chain and external bodies’ requirements

Context

HSE of course recognises the importance of seeking supply chain assurance. It is often an effective way of demonstrating legislative compliance and good business practice on health and safety – which should in turn reduce the likelihood of health and safety incidents and supply chain disruption.

It is therefore perhaps unsurprising that the supply chain is a significant source of business impacts from health and safety rules, for example via: clients’ requirements (including tender requirements), standards and accreditations. Overall, client requirements have at least some impact on policy and procedures for 73% of SMEs from our insight research sample, and a big impact for 46%.  

As noted earlier, the more complex the environment in which SMEs operate, the greater level of burdens from health and safety rules; the FSB reports that 77% of small businesses within the UK are part of supply chains, so the need for proportionate and effective health and safety assurance is significant.

A source of disproportionate obligations?

Ensuring good practice down the supply chain is understandably, and rightly, hugely important to contracting bodies, be they private sector companies or public sector bodies, such as Local Authorities.

Contracting bodies are highly cognisant of the threat a significant breach poses to their reputation and commercial position. The drivers for this are complex but include: fear of civil action (the need to ensure that they aren’t the ones liable); the need to protect the reputation of the business; desire to signal ‘best in class’ status; and, of course, assurance against disruption in the supply chain. This sense of threat can lead contractors to feel justified in imposing requirements on subcontractors and taking steps to ensure any subcontractors they use meet certain (often extensive) standards/criteria. Indeed, such expectations with respect to subcontractors are currently embedded in the expectations of procurement frameworks, for example the system that operates for work-based learning contracts in Wales.

Our insight research reported that these burdens were most commonly felt in the construction sector, but Local Authorities also seem to play a significant role. LAs have at least some impact on policy and procedures for 54% of SMEs and a big impact for 26%. It is evident that Local Authority impositions

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52 Understanding Business to Business Burden (HSE, 2018)
53 Chain Reaction – Improving the Supply Chain Experience for Smaller Firms (FSB, 2018)
54 Unpicking the roles that LAs play as both a regulator, buyer and funding body is challenging, and it is likely that the quantitative evidence captures elements of all three roles. However, the qualitative evidence and stakeholder feedback tended to emphasise the role played by LAs in their capacity as a contracting/funding body.
are demanding for SMEs, whether the LA is exercising a contracting body role, e.g. within the construction sector; or a funding body role, e.g. in the provision of care homes for the elderly or facilities for young people.

SMEs tendering for work from Local Authorities are generally required to demonstrate that they hold particular accreditations and standards. There appears to be little/no flexibility in approach, and SMEs have to determine whether it is commercially worth it for them to acquire what is requested. In addition, requirements across Local Authorities are inconsistent, so SMEs can find themselves having to meet slightly different requirements when tendering for different contracts.

SMEs report\(^{55}\) that:

\[
“Customers, clients and supply chains are often more severe critics of business and can demand standards higher than the regulators.”\(^{56}\)
\]

This can lead to practical business burdens and a skewing of business perceptions of regulation:

\[
“Owner-managers of growth SMBs recognise the costs and burdens of compliance with regulatory requirements....

Apart from negative views about public sector contracts, the overwhelming attitude is positive towards regulation.”\(^{57}\)
\]

The lack of proportionality in requirements can include for example: requirements for accreditations or standards even for very low risk/value goods or services,\(^{58}\) a widespread failure to make use of mutual recognition (the so-called ‘deemed to satisfy’ (DTS) provision) between accreditation schemes, with a lack of robust mechanisms for monitoring adherence to this key principle of SSIP schemes,\(^{59}\) or deviation from the standard question sets that SSIP schemes use. These can act as barriers to SME involvement:

\[
“Compliance with regulations costs money – ISO requirements and so on…. Government says it wants to give more work to SMEs but
\]

\(^{55}\) Note – comments not limited to health and safety burdens but illustrates the role played by non-regulatory drivers.
\(^{56}\) Regulation and small business growth: case studies from North West England, BEIS Research Paper 11 (Cumbria University, Frank Peck, Gail Mulvey, Keith Jackson, 2018). Note - this research used the term Small and Medium Businesses, hence the SMB acronym.
\(^{57}\) Ibid.
\(^{58}\) Though we have noted the Scottish Government’s guidance on this, supported by the requirement in the Procurement (Scotland) Act 2014 for pre-qualification requirements to be ‘relevant, proportionate and not overly burdensome’. The guidance specifically makes health and safety questions optional for tenders below £50,000.
\(^{59}\) See Unstacking the Deck: Balancing the Public Procurement Odds (FSB, 2017) for a recommendation that the Crown Commercial Service’s Mystery Shopper Service be given enforcement teeth to remedy this.
invitations to tender have massive scores for health and safety and only big corporates can respond to this.\(^{60}\)

This can lead to either burdens that businesses have to bear in the hope (but not guarantee) of winning business, or lead them to choose not to submit bids for work. This could be a barrier to business growth for SMEs who don’t have the capacity to navigate the burdens, particularly those associated with public procurement contracts.

This could in turn narrow the supplier base for contracting bodies, leading them to miss out on competent, competitive and high-quality suppliers.

Public procurement and growth

This issue of burdens arising from public sector procurement is significant, particularly in light of central government’s aspiration to spend £1 in every £3 of its procurement budget with SMEs by 2022.

However, wider public procurement has a long reach, and its influence on SMEs extends accordingly. For example:

- The Government reports that in the most recent (2015/16) figures, it spent £5.6 billion directly with small businesses, or £12.2 billion when sub-contracts to small businesses from larger suppliers were taken into account;\(^{61}\) while
- The FSB reports that the UK public sector as a whole spends over £200 billion on goods and services from third parties;\(^{62}\) and
- The Tussell Index of UK Public Procurement (2017)\(^{63}\) reports that on average SMEs won contracts worth £2.6bn per month from June 2016-May 2017; with 6 out of 12 regions issuing at least 33% of their award value directly to SMEs over the same period.

It is clear public procurement plays a significant role as a procurer for SME goods and services. As the FSB succinctly put it:

“Each year, as such a large and prominent customer in the economy, the government has a pivotal role to play in demonstrating what it is to be a good client.”\(^{64}\)

It appears in light of the evidence that public procurement practice could play a more supportive role via more proportionate application of health and safety rules.

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\(^{60}\) Regulation and small business growth: case studies from North West England, BEIS Research Paper 11 (Cumbria University, Frank Peck, Gail Mulvey, Keith Jackson, 2018)
\(^{61}\) New changes to encourage small businesses to apply for government contracts (Cabinet Office, 2018)
\(^{62}\) Ibid.
\(^{63}\) Tussell Index of UK Public Procurement – May 2017 (Tussell, 2017)
\(^{64}\) New changes to encourage small businesses to apply for government contracts (Cabinet Office, 2018)
Driving up standards?

It is furthermore not clear that these sometimes disproportionate, perhaps ‘gold plated’, burdens enable commensurate levels of assurance. As noted earlier, while there is little evidence to suggest that SMEs meet these supply chain impositions at the expense of health and safety on the ground, it does appear that meeting requirements of rules has become a somewhat separate work stream with limited relevance to, or influence on, actual practice.

Feedback from stakeholders has raised consistent concerns around the duplication of requirements, about paperwork overstating the controls in place, the costs of associated consultancy support to gain accreditation and the role of auditors in ensuring quality and proportionality. These issues are considered in more detail in the sections below on accreditation, management standards, and quality assurance in the supply chain.

Small business exemptions and procurement

There is also a question about how far supply chain requirements are sympathetic to the exemptions that exist within the regulatory framework for very small and micro businesses. For example, the law states that if you have fewer than five employees you don’t have to write down your health and safety policy or the significant findings from risk assessment.

HSE does not have any clear evidence about how health and safety rules are interacting with this exemption, or the robustness of any monitoring systems in place to ensure adherence to the proportionality principle that guidance calls for.65 However, given the paperwork and evidence requirements embedded within rules, despite some evidence of good practice there is a risk that micro businesses may find it challenging to meet these requirements without having to go beyond what the law requires.

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65 See e.g. ‘Tenders not covered by the Public Contracts Regulations 2015’ in Public procurement policy - Directives, regulations, policies and guidance relating to the procurement of supplies, services and works for the public sector (Crown Commercial Service, 2018).
Management standards

The context

Health and safety management standards (as distinct from product safety standards, which are not discussed here) can provide organisations with a structured framework for the management of health and safety.

HSE’s own health and safety management ‘standard’ (HSG 6566) was originally designed to help high hazard or complex organisations comply with their statutory duties. In such situations, a clear process-based approach helps ensure effective risk management. HSG65 was then further developed to help other organisations that might benefit from this approach. It became a tool for businesses to use on a voluntary basis if they felt that it might help them manage their risks. It is freely available and not a regulatory requirement for business. It was not designed as a certification scheme, so does not attract costs associated with audit and certification – or give the tangible evidence of ‘compliance’ that this can provide.

The growing role of standards

Over time, standards bodies such as BSI and ISO have further developed management standards. These have increasingly adopted a common approach to management systems across a range of topics, including quality and environment. The most recent health and safety management system is ISO 45001.

Management standards play a significant role for businesses. They can be specified by contracting bodies/clients as a minimum standard that suppliers bidding for contracts must meet. Embedding standards within tender requirements (for example PAS 91, the framework for conformity assessment scheme question sets under the SSIP umbrella) is one way contracting bodies seek assurance from their supply chain, including (but certainly not limited to) ‘cover’ against the risk of being found liable, as described earlier.

As regulatory requirements only set minimum compliance criteria, standards can also work as a demonstration of ‘best in class’ status for businesses that wish to aim higher. They can also enable of cross-border trade, since standards like ISO 45001 are globally recognised.

For businesses67 of all sizes?

However, while standards can play a role as business enabler, this growing role for management standards can also contribute to business burdens for SMEs, particularly as they are increasingly and explicitly pitched as a tool for business of any size, including small and or low risk businesses.

66 Managing for health and safety HSG65 (HSE, 2013)
67 The standard uses ‘organization/s’ throughout instead of ‘business/es’.
Adopting ISO 45001 in full (necessary if the organisation wishes to obtain certification) will require a business to go beyond what health and safety law requires, and can lead to additional direct and indirect costs, including: the purchase of the standard and associated training; time and effort associated with implementation (including the documentary requirements); possible costs from sourcing external advice; and the costs of auditing and certification.

Our insight research shows that 14% of businesses (rising to 24% for SMEs with 50-249 employees) report a big impact from having to implement health and safety standards/schemes alone, regardless of the cumulative effects of other aspects of rules.

Because the standard is now being pitched as suitable for businesses of all sizes, such impacts may increase in significance. Meanwhile, the Federation of Small Business report Chain Reaction: Improving the supply chain experience for smaller firms\footnote{Chain Reaction – Improving the Supply Chain Experience for Smaller Firms (FSB, 2018)} finds that overall (beyond just health and safety):

- 66% of smaller suppliers hold at least one kind of verified standard;\footnote{Not limited to health and safety.}
- On average, smaller businesses hold four separate certified standards, with that number increasing with the size of business; and
- Across all sectors, the average cost of these standards for smaller suppliers is more than £2,800 a year.

These costs are a significant source of business burdens and perceptions of them.\footnote{The figures in the FSB report approximately cancel out the benefits presented for standards in a piece of research for BSI: The Economic Contribution of Standards to the UK Economy (CEBR, 2015).} Stakeholders have reported having to get certification to these standards “to survive”, while the FSB report that 75% of smaller suppliers hold standards “simply because they are required to by their customers or insurance companies”.

While standards bodies themselves helpfully acknowledge that certification is not necessarily the most appropriate goal for all SMEs, client/customer requirements obligating this can effectively mandate this approach. For example:

> “Personally I don’t think we will implement 45001 as we feel as a company it doesn’t concern us. But we have a feeling that our customers will enforce this on us.”\footnote{Top 5 Takeaways From The Future Of ISO 45001 Conference (Effective Software, 2016)}

In this sense, standards have the weight of regulation for those SMEs, with the associated costs effectively imposed rather than adopted as a voluntary commitment. For smaller, lower risk businesses this can represent potential additional ‘regulation’ beyond what is required for compliance with the law. While SME-focused guidance on proportionate implementation may be one solution, it will only be useful if appropriately simple and user-tested before
publication; and if clear in indicating those aspects of implementation that go beyond legal compliance.

Practice in larger contracting organisations

We have also heard from a very large contracting body (well above the SME threshold but not quite at the top of the supply chain) about how they too feel compelled to seek certification in order to win business. They in turn cascade the requirement through their supply chains. Yet they too have spoken about how their actual business controls for health and safety, and supplier scrutiny, are little impacted by the standard: it appears to be a somewhat separate paperwork exercise.

Benefits for business

In addition to the benefits that management standards can provide in terms of international trade and to contracting bodies (for example, the sense of ‘cover’ that it provides against the fear of civil litigation), certified standards can bring benefits to some smaller businesses. The FSB reports 72 that:

“Oh of those that do hold standards, around two fifths believe they help to differentiate themselves from competitors (43%) or help to improve the quality of their service or products (39%).”

However, it is also clear that a number of stakeholders have significant concerns around how standards are developed and applied. For example, the FSB reports that:

“It is clear that standards currently do not fulfil their potential and can create net costs to smaller businesses. This is usually due to their complexity, the time and costs required (often involving consultants), or their lack of interoperability, 73 despite many standards covering the same areas.” 74

It is important to note here that while businesses do have concerns, standards (as with other health and safety rules e.g. conditions from insurers, or other supply chain requirements) are not subject to the better regulation scrutiny required for Government regulation, for example: impact assessment, scrutiny by Parliament/Regulatory Policy Committee, post-implementation review etc.

In addition, there seems to be little transparent evidence that the increasing ‘push’ of management standards towards businesses of all sizes is necessarily a response to rising risks or falling health and safety standards for those businesses. Within government, developing options for potential regulatory intervention would normally only follow from such evidence.

72 Chain Reaction – Improving the Supply Chain Experience for Smaller Firms (FSB, 2018)
73 Annex SL of ISO 45001 now operates to a common standard to aid interoperability with other ISO standards, such as 14001 and 9001 so may lead to improvements for SMEs.
74 Chain Reaction – Improving the Supply Chain Experience for Smaller Firms (FSB, 2018)
Standards in operation

While HSE considers that management standards can work as a valuable tool for businesses that engage with them positively and willingly, there are grounds for concern around how they are used by businesses that have the standards imposed on them and have limited in-house capacity to implement what’s required. One user of standards reported that they are:

“…almost impossible for an SME to implement without external advice or dedicated internal resource.”

Stakeholders have raised concerns about how standards can operate in practice, citing the rise of “parallel” health and safety and safety systems i.e. one described in the documentation required for certification; and the other that operates in practice as a tool for managing health and safety day to day.

Stakeholders critical of standards have referred to them as:

“…a case of emperor’s new clothes” and “…a refuge for organisations who are not seeking to get to the bottom of risk in their business.”

Our insight research found that in construction at least, accreditation and certification appear to embody health and safety rules required by the supply chain, with little evidence they drive real improvement to practices ‘on the ground’.

Management standards and assurance

Successful and effective implementation of controls and processes required by health and safety management standards should provide businesses and their customers with assurance that robust systems are in place for managing health and safety. For businesses certified against the standard, this should be supported by proportionate but rigorous audit and external verification. We heard evidence from inspectors that audit against ISO 18001 was, variously, overly critical of minor deviations found in what the inspector judged an otherwise effective management system; or too paper-based to pick up ineffective application of risk controls in practice.

In addition to the stakeholder concerns noted earlier, a desktop review of the eighteen firms listed in a health and safety media article as the ‘top’ health and safety prosecutions for 2017 shows that seven of those appear to have held certification to the then-current British Standard 18001, at least for parts

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75 First ten companies achieve conformity to the new international standard for occupational health and safety (BSI Press Release, 2018)
76 Stakeholder feedback.
77 ISO 45001 – Standard Questions (Healthandsafetyatwork.com, 2018)
78 “Certification” can be read here as “management standards”.
79 Understanding Business to Business Burden (HSE, 2018)
80 Top OSH prosecutions of 2017 (shponline, 2017)
of their business. Health and safety failures can of course occur in any business, but the effective implementation (and auditing and certification) of these standards should mean that the types of systemic failure that lead to successful prosecutions are rare.

These figures perhaps serve to emphasise the need for management standards to be used as tools in support of active risk management rather than evidencing a desktop process that may look effective but is not put into robust practice on the ground. Those involved in auditing and certification should provide the necessary, and competent, external assurance that the processes set out are being applied effectively in practice. The challenge for auditor competence may well increase over time: ISO management standards (e.g. for environment, quality and health and safety) increasingly follow a common format, requiring expertise across a range of areas where the business operates an integrated business management system.

Summary

Management standards can help underpin or drive up standards of health and safety for businesses that have the capacity to implement them effectively. However, HSE has concerns that they may provide false assurance when they are adopted as ‘parallel’ health and safety systems, as described earlier. If used by businesses, their application needs to be proportionate, and auditing and certification (if appropriate) context-sensitive.

However, as noted earlier, HSE considers that a formalised management system approach (whether HSG65 or ISO 45001) is not necessarily the most appropriate model for all businesses, particularly small and/or low risk ones.

While we recognise that they may be useful for organisations looking for assurance from SMEs in their supply chains, HSE would like them to be used proportionately. For example, we would like procurers/larger contracting organisations to consider if the type and size of business and complexity of the risks of the work being tendered justify the need for potential suppliers to get formal certification against a standard. Many organisations should be able to demonstrate their approach to risk management without implementing a standard or being certified against it.

Those contracting bodies that do decide to oblige potential suppliers to certification against a standard should note that smaller, perhaps less-complex organisations and/or those with less hazardous operations may hold less extensively-documented information as they tailor their compliance with this standard to their own circumstances.

In addition, HSE also considers that more could be done to address business concerns around burdens and quality, which may in turn relate to the issues

81 Prosecutions taken in line with HSE’s Enforcement Management Model will have considered this type of systemic failure as a factor in determining whether there is a case for prosecution.
highlighted earlier about their effectiveness. But despite calls for Government to act on standards, for example:

“…to reduce unnecessary costs to UK businesses and help ensure that smaller suppliers have a standards regime that enables them to play their full role in increasing productivity, employment and consumer benefit”\textsuperscript{82}

management standards, in particular ISO standards, are developed independently of formal government scrutiny. While government can seek to influence as one voice among many, it is the ‘standards community’ that drives their development and ultimately needs to provide the leadership to ensure their quality, proportionate implementation, and review/revision against these criteria as appropriate.

HSE has worked closely with standards makers to encourage better engagement with end-user businesses and consistent application of better regulation principles. The approaches now being considered by the UK committee drafting guidance to support implementation of ISO 45001 could help to address some of the concerns around quality and burdens cited above. However, these principles need to drive deeper and spread wider across that community.

\textsuperscript{82} Regulation Returned - What Small Firms Want from Brexit (FSB, 2017)
Accreditation (or conformity assessment)

Context

The accreditation market started out in the construction sector. The Construction Design and Management (CDM) Regulations 2015 require anybody who employs or engages a supplier to carry out construction work to take reasonable steps to ensure that that supplier has the necessary skills, knowledge and experience to fulfil that role. If that supplier is an organisation, this is a requirement to demonstrate organisational capability.

While standards such as ISO 45001 are primarily a descriptive tool against which organisations can gauge their own compliance, accreditation is primarily a contract with a third party to assess compliance against a more narrowly-defined set of criteria. Prequalification assessment ('accreditation') by a 3rd party can therefore be a useful tool for suppliers and contractors when tendering, particularly for higher risk activities.

Accreditation schemes operating under the Safety Schemes in Procurement (SSIP) umbrella are almost all judged (usually via desk-top audit) on core criteria originally agreed with HSE and derived from Publicly Available Specification 91 (otherwise known as PAS 91). These core criteria describe what it means for a construction business to comply with basic health and safety law. It is important to add, though, that all schemes (whether part of SSIP or not) have subsequently developed additional non-health and safety criteria, for examples on measures to combat modern slavery or bribery. Scheme questionnaires can thus be very extensive, and inconsistent with each other.

HSE neither owns, regulates nor endorses any individual accreditation scheme. The law does not require accreditation, and it is only one way of meeting prequalification standards when tendering for contracts. For example, PAS 91 sets out a pre-qualification question set on health and safety, among other topics, which reflects the core criteria. Suppliers can use it as a self-assessment route, while clients/contracting authorities can use it via (for example) an SSIP scheme to get a measure of independent verification.

For construction work, certification against a scheme alone is not sufficient proof of organisational capability for work on site. Only project-specific scrutiny can provide robust assurance of this.

Expansion of the market

Our insight research shows that accreditation schemes have at least some impact for 41% (see figure 6 on page 20) of SMEs and a big impact for 19% (see figure 7 above). Beyond construction (34%), sectors in which SMEs were

83 With the exception of Constructionline, which does not carry out its own health and safety assessments to the SSIP Core Criteria.
experiencing big impacts above the 19% average for the total sample were:

- Information & Communications (20%);
- Real Estate (24%);
- Education (36%); and
- Human Health and social work (23%).

No sectors reported below 11% for a ‘big impact’. These figures clearly illustrate that the accreditation market has extended well beyond the construction sector where it originated.

Given that 3rd party accreditation was established to deal with high risks within construction, HSE has concerns that it can, when not applied appropriately (e.g. to low risk goods and services), lead to disproportionate burdens for suppliers. Stakeholder examples of this extension of the market include:

- a long-time gardener at a block of flats being told that, after many years of service, he needed to gain accreditation to continue in his role; and
- an office stationary supplier subject to accreditation requirements.

While it is difficult to say with absolute certainty that these requirements are always disproportionate or unjustified, it is difficult to imagine that evidence of competence for these services could not have been sought via other, less costly and less bureaucratic means than 3rd party accreditation.

**Accreditation and growth**

SMEs, particularly in the construction sector, reported that in order to tender for commercial work or to work as a subcontractor, they need to hold particular accreditations. They obtain these in order to open up commercial opportunities that would otherwise be closed them.

SMEs described making a decision about whether or not they wished to tender for the type of work that required accreditation, balancing commercial opportunity against the time, cost and inconvenience needed to obtain and retain the accreditation. However, it appears from the insight research that some SMEs decide that they are more comfortable not crossing over into that world, with its potential benefits.

**Proliferation**

In addition to the potential for imposition of these requirements on providers of low risk goods and services, proliferation of accreditation schemes (the SSIP framework alone has 27 registered members)84 drives business burdens in other ways. Contracting bodies often demand accreditation to a preferred scheme, even though all schemes under SSIP are equivalent for health and safety. This can mean SMEs sometimes have to hold multiple accreditations if

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84 List of SSIP Forum Members (SSIP, 2018)
they are bidding for work from various contracting bodies. This can lead to significant burdens. One SME reported:

- holding 5 separate accreditations costing in total £2465 annually in application and certification fees alone; and that
- if it had to adopt just the most complex accreditation (as a single requirement) this would save an estimated 8-10 days per year of administration time and a couple of days of management time (plus registration fees).

Contracting bodies can also demand that suppliers hold ‘at least one’ accreditation – which could drive the acquisition of additional scheme accreditations in case one alone isn’t ‘competitive’ compared to other suppliers.

Accreditations also appear to risk the potential lack of linkage between paperwork required and the active management of health and safety on the ground that we noted above for management standards.

It seems that, as with management standards, while accreditations are required for tendering and contracting purposes (as is often the case for management standards, too), there are other more powerful drivers for taking action on health and safety, principally fear of civil litigation.

SSIP and non-SSIP affiliated schemes

As noted earlier, by no means all accreditation schemes operate under the SSIP umbrella. However, while HSE remains engaged with SSIP governance and quality control structures, it does not do so for schemes outside that framework. These tend to be initiated by individual larger contractors.

HSE continues to support the SSIP scheme, welcoming the steps taken in recent years with regard to standardisation, monitoring and enforcement of its terms of reference for member schemes.

Schemes operating outside the SSIP umbrella are not accountable for either adherence to the core criteria or mutual recognition. As noted, deviation in evidence requirements is a significant source of burden that businesses bear in the hope, but not guarantee, of winning work. This means that the scope for additional burdens from these schemes and divergence from the principle of proportionality is, over time, greater than for those operating under SSIP.

Accreditation and assurance

Consultants have spoken candidly about simply generating the paperwork for their clients to enable them to gain accreditation, without visiting the business or focussing on the specific risks associated with that business.
This sentiment that accreditation is just a ‘tick box exercise’ has been echoed by stakeholders, and is reflected in a quote from a medium-sized construction business in the insight research, for example:

“…CHAS, SafeContractor – it’s just paperwork and we have everything…. We can ring the Consultant to tell him what paperwork to send then can tick it off… There are loads of people on site who are not working to these standards…”  

This focus on generation of paperwork (often developed by consultants) can create systems that look effective but fail to address key risks on the ground.

An example of this potential for false assurance was observed during an HSE inspection of one manufacturing business that held 3 separate, current health and safety accreditations. Despite this apparent assurance of competence and good practice, an inspection highlighted long-term, persistent manual handling issues arising from how the work was organised, with staff off work due to back injuries. In this case, multiple 3rd party accreditations had failed to identify, challenge or remedy these issues. Improvement notices were issued by the HSE inspector.

Such potential for false assurance is not supporting either suppliers or contractors. It could lead to supply chain disruption for contractors, while the supplier’s outlay on accreditation may not deliver on-the-ground improvement or improved organisational capacity on risk management.

**Savings – the evidence**

SSIP can help contractors and suppliers navigate the burdens associated with the proliferation of accreditation schemes. SSIP enables mutual recognition between schemes, particularly within the construction industry (the so-called ‘deemed to satisfy’ principle (DTS)).

For health and safety pre-qualification criteria, this means that:

- as a buyer, you can ask for evidence of accreditation to any one of the SSIP member schemes; and
- as a supplier, you should only need to be accredited to one of the SSIP member schemes.

If a contracting body insists on accreditation to its preferred scheme, suppliers can apply to be accredited to the scheme through SSIP. Suppliers should be able to do this by submitting the same health and safety evidence, to the same standard as for its existing scheme, under the DTS provision.

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85 *Understanding Business to Business Burden* (HSE, 2018)

86 Contracting bodies may have a duty to determine a broader range of criteria than just health and safety. For example, by enquiring about quality or environmental management. Arrangements for mutual recognition under the SSIP Forum relate only to health and safety.
Mutual recognition can deliver significant savings to both procurers and contractors; figures compiled by SSIP highlight more than £65 million of savings to clients, other buyers and suppliers in one year alone.  

In excess of 57,000 suppliers are currently registered with an SSIP Member Scheme. The portal provides an easy way to find out if a supplier holds valid certification with an SSIP member scheme. Inclusion of a supplier on the portal confirms compliance with the SSIP Core Criteria. However, more could be done to spread the word about the benefits of mutual recognition, including across public/private sector contracting bodies. This would reduce compliance costs and burdens for businesses unaware of the DTS provisions chasing full multiple accreditation. HSE has published new guidance for SMEs on this, but stakeholders across the health and safety system also need to do more to raise awareness about mutual recognition.

Summary

HSE recognises the value that accreditation has in the health and safety system. It can help organisations demonstrate organisational competence for the first stage of a procurement process - tendering. This is particularly valuable to businesses operating in construction – for which accreditation was originally designed. But crucially, as 3rd party accreditation is based largely on a desk top audit, it is not a substitute for project-specific scrutiny at a subsequent stage and appropriate on-site controls once work is underway.

However, while still primarily a tool for the construction sector, it is also clear that accreditation has extended across the economy as contracting bodies seek greater levels of ‘cover’ and supply chain assurance. HSE recognises that, when applied effectively and proportionately, it can deliver benefits for the first stage in procurement. However, it is also clear that it can have significant adverse business impacts, particularly for smaller suppliers.

As with management standards, HSE believes it is vital that lessons about the need for proportionate use of accreditation are applied – particularly beyond the construction sector and in respect of low-risk activities. Contractors should consider if the risks associated with the goods and services that they are buying justify the need for 3rd party accreditation. For low risk tenders, businesses may well be able to demonstrate their capability in other ways - for example via their health and safety policy, risk assessments, health and safety record and evidence of skills and competence.

Where accreditation is sought, mutual recognition should be used more widely. Ideally, all contractors seeking evidence of accreditation should ask for

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87 SSIP savings to Industry in 2018 reach 65 million (SSIP news, 2018)
88 This information is accessible via the free SSIP web portal.
89 A position reinforced by the Crown Commercial Service guidance – see e.g. ‘Tenders not covered by the Public Contracts Regulations 2015’ in Guidance Public procurement policy - Directives, regulations, policies and guidance relating to the procurement of supplies, services and works for the public sector (Crown Commercial Service, 2018).
certification to ‘any one of the schemes under the SSIP umbrella’, rather than a requirement to conform to one ‘preferred’ scheme.

HSE guidance on proportionate use of accreditation and more effective application of the mutual recognition/DTS principle aims to set the tone for improvements. Overall, though, it appears that the accreditation market could do more to ensure that accreditation doesn’t risk providing false assurance and isn’t viewed as just a ‘tick box exercise’. Where accreditation of suppliers is sought, auditing should be proportionate, but robust enough to ensure they have the organisational capacity to manage risks effectively in practice. The skills, knowledge and experience of scheme assessors and auditors (and how they are matched to the business seeking accreditation) is key to ensuring that 3rd party accreditation is delivering the assurance business is seeking.
The picture in the devolved administrations

Our evidence has included consideration of the landscape in England, Wales and Scotland.

We have begun to explore\(^90\) with the devolved administrations their arrangements for overseeing proportionality in procurement. In Scotland, the Procurement (Scotland) Act 2014 places a duty on contracting authorities to ensure that the demands they make on suppliers at pre-qualification stage are ‘relevant, proportionate and not overly burdensome’. Supporting guidance distinguishes, by contract value, what contracting authorities may ask on supplier health and safety performance. Unlike in England, this includes guidance in relation to low-value (< £50K) contracts and those between this value and the thresholds the Public Contracts Regulations 2015 set for more detailed supplier declarations. The Scottish Government has arrangements in place to monitor adherence to these principles and their effectiveness.

The 2018 BEIS Business Perception Survey singled out businesses in Wales as particularly burdened by the need to get to grips with regulation (not limited to health and safety regulation), perceptions of the burden increasing, and recourse to third party advice to help navigate it\(^91\) (not solely in procurement).

The Wales-specific Supplier Qualification Information Database (SQuID) contained some potentially disproportionate impositions on suppliers in respect of health and safety.\(^92\) Though guidance on its use is still available on the Value Wales website, it has now been replaced by a system that aligns closely with that in England. However, we heard evidence that, in one sector (work-based learning provision), impositions are onerous and contracting authorities’ monitoring of compliance with them may be ineffective. We continue discussions with the Welsh Assembly Government on this.

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\(^90\) Primarily via desktop research.

\(^91\) Business Perception Survey (BEIS, 2018)

\(^92\) Including, for example, a statement that firms employing fewer than 5 may be required by contracting authorities to have a written health and safety policy, despite the Employers’ Health and Safety Policy Statement (Exception) Regulations 1975 specifically excluding them from this requirement.
3rd party advice

Context

The law requires employers to have a competent person to help them meet their health and safety duties. A competent person is defined as someone with the necessary skills, knowledge and experience to manage health and safety. Formal qualification is not prescribed by the law.

Employers can appoint (one or a combination of) the following to act as their competent person:

- Themselves;
- One or more of their workers; or
- Someone from outside their business

In many cases, employers will be able to deal with health and safety in-house. The law states that where a business has a competent person in-house that person should be used in preference to someone external.93

Employers and staff will know their workplace better than anyone else, so are likely to be well placed to understand the key risks associated with the work - and how to reduce them.

However, HSE recognises that 3rd party advice or health and safety consultancy is a large and essential part of the health and safety system, particularly for businesses facing complex health and safety risks.

But even when a business seeks 3rd party advice, it remains responsible for the risks it creates. So, the role of the consultant in building the capacity of the duty holder to manage their risks on a day to day basis is key.94

Size of the market

The health and safety consultancy market has grown significantly in the last 30 years. As the Policy Exchange noted in 2010:

“In the early 1990s the Institution of Occupational Safety and Health (IOSH) had just 6,000 members. Today its membership stands closer to 36,000, with at least 3,500 of them working in the UK as dedicated health and safety consultants (both employed and self-employed).”95

This growth in the health and safety consultancy market led the Government’s Better Regulation Executive to conclude that:

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93 Management of Health and Safety at Work Regulations 1999 (regulation 7(8))
94 HSE’s former Chair Judith Hackitt has observed ‘Competence is the ability for every director, manager and worker to recognise the risks in operational activities and then apply the right measures to control and manage those risks.’ (HSE website)
95 Health and Safety – reducing the burden (Policy Exchange, 2010)
“It is one of the fastest growing business to business sales sectors in the UK with services to SMEs a key growth area.”

As of 2018, IOSH’s Annual Report and Accounts confirm that they have more than 47,000 members in over 130 countries, indicative of a clear market for health and safety consultancy at home and abroad. However, IOSH is of course only one professional body, and reviews from two ‘state of the market’ reports indicate a large market. Together, they suggest that total revenues in the third-party health and safety advice sector were approximately £1.2bn for 2015/16. This is considerable, but IT and general management consultancy markets have revenues an order of magnitude bigger, or more.

The market has been growing about 1.7% in real terms over the last few years. This growth may have been mostly ‘bounce-back’ from a period of reduced revenues during the recession. Estimated annual revenue growth for 2016 to 2021 is around 2.5%.

These revenues point to a large and growing industry providing a significant level of services to business across the economy, including via:

- Compliance assistance: around £400m;
- Occupational hazard evaluation: around £340m;
- Health and safety training: around £210m;
- Implementation of best practice: around £120m; and
- Other: around £92m.

The main purchasing sectors are:

- Construction and utilities firms: about 36%, or around £420m;
- Manufacturers: about 25%, or around £290m;
- Health and care service providers: about 14%, or around £170m;
- Transportation & storage services: about 12%, or around £130m; and
- Other: about 13%, or around £150m.

Overall rates of consultancy use

Our research into 3rd party advice reported that 31% of businesses had used 3rd party advice within the last 3 years. The 2018 BEIS Business Perception Survey reports that on average 53% of business use external health and safety advice.

96 Improving outcomes from health and safety (BERR, 2008)
97 IOSH Annual Report (IOSH, 2017)
99 Methodological differences may account for differing valuations, but IBISWorld and Plimsoll estimates are in the same ballpark.
100 Blue tape research into 3rd party advice (HSE, 2017)
101 Business Perceptions Survey (BEIS, 2018)
The two reports\textsuperscript{102} give differing figures for the size of businesses using 3rd party advice:

- Our research into 3\textsuperscript{rd} party advice indicates that it is mostly used by medium to large businesses – reporting that only 15\% of businesses with fewer than 50 employees use a 3rd party.

While

- The 2016 Business Perception Survey reports that over 50\% of all business sizes use external advice, apart from micro businesses, for which the figure is (35\%).

The following section looks at the role of 3rd party advice in the health and safety system.

\textsuperscript{102} Note - these reports are not directly comparable due to the variation in the SME samples used.
3rd party advice: driver and symptom?

Our research explored the role that 3rd party advice plays as both a driver (i.e. a source of disproportionate health and safety rules/practices); and as a symptom of these rules (i.e. a response to the way other health and safety rules or regulation are driving the use of consultants). It also explored the quality of the service that duty holders get.

Driver?

Our insight research indicates that health and safety consultants and trade associations appear to be playing an important role in helping SMEs cope with the burdens that rules (and regulation) place on them. It found that consultants can reduce both the emotional and the administrative burden by providing expertise and guidance, conducting audits/inspections, preparing policy documents, producing risk assessments and helping SMEs achieve accreditation or implement systems against e.g. ISO 45001.

The evidence does not suggest businesses view consultancy as a driver of health and safety rules. Rather, they see it as playing a valuable role in helping them meet requirements of health and safety rules, and of regulations.

Symptom?

However, while not a direct driver of the rules, our desktop review of how consultants market their services highlights how this often plays to the fear of businesses (as described earlier) – something noted in Lord Young’s report Common Sense, Common Safety, in which he referred to “…a climate of fear compounded by the actions of some health and safety consultants.”

The following recent examples are not untypical:

“Did you know that some businesses don’t take health and safety seriously? There’s a word for them: liable.”

“There’s a long list of things to think of…”

Feedback from HSE and LA inspectors reported that 3rd party advisers were often seen to be serving to reinforce, rather than dispel, the view that health and safety is too hard for businesses to manage themselves.

This echoes findings from previous research. In 2010, a report from the Policy Exchange noted the view of the Risk and Regulation Advisory Council that:

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103 Blue tape research into 3rd party advice (HSE, 2017)
104 Common Sense, Common Safety (Lord Young of Graffham PC DL, 2010)
“...often the profusion of risk actors adds to the uncertainty and reduces small organisations’ confidence. Some risk actors act as risk mongers – by taking opportunities to inflate perceptions of risk...”.

Discussions with stakeholders, including those who work with large consultancy services, suggested dedicated sales teams play a prominent role in driving business. Our research into third party advice reported that cold calling accounted for 9% of the consultancy services ‘sourced’ by SMEs.

Feedback from stakeholders highlighted that sales teams are generally not well placed to determine if a specific business genuinely needs external support.

Former consultants reported being driven by sales pressure to tie low risk businesses into multi-year contracts even where their professional judgement might be that all the business needs is as one-off advice to get them ‘on the straight and narrow’ for managing health and safety in-house in the future.

Our research into 3rd party advice\(^\text{106}\) reported the following lengths of contract:

- 52% of businesses on multi-year contracts;
- 37% make a single one-off payment;
- Most popular contract lengths:
  - 39% 7-12 month
  - 20% 19-24 months
  - 19% 31-36 months
  - 7% on contracts over 48 months.

The use of multi-year contracts can be a business model that leads to reduced costs over the length of the contract. However, it is not clear that building duty holder capacity to manage health and safety is generally the aim for such long-term advice (and it is not, of course, a legal requirement). While the duty holder will always require a competent person, a lack of capacity-building might contribute to unnecessary and costly on-going duty holder dependency on external advice (particularly for low risk businesses), quite apart from failing to build its ability to manage its risks day to day.

Does competent advice support proportionality?

HSE recognises that some of the fear of litigation is legitimate (businesses do get sued and prosecuted after all, including by HSE) and that there is nothing to stop consultancy services marketing to target this. However, we do have concerns that particularly for small and low risk businesses, this promotion of and reliance on 3rd party advice may be at odds with HSE’s strategy aims for:

“a common understanding of what proportionate health and safety looks like”;

\(^{106}\) Blue tape research into 3rd party advice (HSE, 2017)
and the legal obligation to use ‘in house’\textsuperscript{107} competence where available.

We recognise, of course, that very few consultants will want to work themselves out of a job, and they are not legally required to build duty holder capacity - a conundrum that was recognised by inspectors who suggested that:

“Quite often 3rd party advisers could simply produce an easy-to-read risk assessment (maybe only two sides of A4) which is based on an extensive ‘walk-round’ of the business and an understanding of its specific hazards.”

But this may mean less business … if duty holders question why they’ve paid so much money for something so ‘simple’. This can drive 3rd party advisers to produce thick ‘glossy’ folders (often filled with irrelevant material – see the following section for more on this) for their clients.\textsuperscript{108}

While consultants would contend that the service they provide meets a demand – be it for emotional or more practical reassurance – these observations point up:

- a preference among some duty holders to be comfortable not necessarily developing or relying on their own competence with respect to health and safety; and
- a reluctance on the part of some consultants to develop the quality of their offer vis-à-vis duty holders – for example, moving away from simply providing risk assessments to a template in favour of working with duty holders to develop ways they can use to monitor their performance.

**Costs and quality**

**Sources businesses use**

HSE’s website states that the Occupational Safety and Health Consultants Register (OSHCR) is a reliable source of good-quality health and safety advice. This is a register of consultants who have met standards set by a health and safety professional body member of OSHCR.

Our research asked duty holders where they source 3rd party advice. It reported that the primary sources of advice were:

- A personal recommendation - 28%; and

\textsuperscript{107} Management of Health and Safety at Work Regulations 1999, regulation 7(8)
\textsuperscript{108} Blue tape research into 3rd party advice (HSE, 2017)
OSHCR - 27% (but that figure is influenced by larger companies – rising to 38% for businesses with 250+ employees). 109

While other sources of advice included:

- Another data base (e.g. IOSH) - 19%; and
- Cold calling by consultants - 9%.

Awareness and use of OSHCR was slightly higher than expected, as it is not actively marketed or promoted by its member bodies. However, it is clear from these results that OSHCR is not used (or known about) by the majority of businesses, particularly smaller businesses i.e. those least likely to have a dedicated/developed in house health and safety resource/team.

This research110 also pointed to a highly diverse 3rd party advice market; with businesses reporting using the following types of organisation for their 3rd party advice:

- 34% use a health and safety consultancy (i.e. company);
- 19% use independent health and safety consultant;
- 23% use trade association or representative organisation; and
- 14% use an insurance company or bank.

This points to the challenge facing those seeking advice - and to the difficulty involved in promoting acceptable quality standards among a wide range of providers (of many different sizes), covering a wide range sectors right across the economy.

Governance and quality controls

OSHCR is a voluntary register of consultants, admitted to the register provided they meet the standards of the professional body of which they are a member. OSHCR and its member bodies state on the OSHCR website a commitment to proportionality in their engagement with duty holders. HSE has not formally tested this – but has heard anecdotal evidence from HSE and LA inspectors that some consultants on the register provide a service that is either disproportionate or ineffective in highlighting duty holder non-compliance. We continue discussions with OSHCR on reforms that would introduce more robust quality assurance of member consultants’ work.

However, we note that not all of the industry’s professional bodies have consultant members, and the extent to which those bodies would apply similar quality assurance arrangements to the services they provide remains to be explored.

HSE meanwhile continues discussions with other professional bodies (particularly those providing specialist advice in discrete topic areas such as

109 Blue tape research into 3rd party advice (HSE, 2017)
110 Ibid.
noise and vibration or occupational hygiene controls) on how to ensure more robust quality control of their members’ activities.

**Delivery methods**

Businesses consistently report that the costs of, and need for reliance on, 3rd party advice is a burden or business barrier.\(^{111}\) Our research into 3rd party advice\(^ {112}\) point to the following costs:

- Median spend was £6K over a 3-year period, generally averaged to £2k per annum;
- Although over a quarter of big businesses (over 250 FTEs) pay over £50k over 3-year period.

However, while clearly not the norm, some businesses can be hit by particularly high costs for consultancy services. For example, one SME with 20 FTEs paid £37,000 over 3 years (representing nearly 3% of its payroll costs). At face value, it is difficult to see value for money here for the business concerned. There will probably be very few situations in which a business of this size would need such significant support.

Our research into 3rd party advice\(^ {113}\) also asked duty holders how they received their consultancy advice. It reported that:

- Only 45% of consultants visited the business site as part of the service; while
- Only 52% of consultants provided a handover, explaining exactly what the duty holder needed to do subsequently.

These two figures raise potential red flags to HSE about the quality of the service being delivered. Firstly, it can be difficult to identify key workplace risks properly if a consultant doesn’t visit the site as part of the service, while the lack of a handover raises concerns about what is being done to build the capacity of the duty holder to manage risks day to day.

Moreover, there were some weak signals in stakeholder survey interviews during our research into 3rd party advice\(^ {114}\) that more disengaged businesses might (wrongly) view use of consultants as a way of delegating or ‘outsourcing’ responsibility for managing health and safety. This echoes findings in HSE’s earlier insight research into SME Communications.

**Quality and confidence**

The evidence reports that businesses of all sizes use consultants. Even businesses confident in managing health and safety like to use consultants to:

\(^{111}\) Regulation Returned – What Small firms want from Brexit (FSB, 2017)  
\(^{112}\) Blue tape research into 3rd party advice (HSE, 2017)  
\(^{113}\) Ibid.  
\(^{114}\) Blue tape research into 3rd party advice (HSE, 2017)
keep them up to date; audit their business; generate in a cost-effective way the paperwork needed to achieve accreditation or certification.

Overall businesses have very high level of confidence in the advice that they get, and believe it helps secure legal compliance as a minimum.

**Views from inspectors**

Despite this high level of duty holder confidence, evidence from HSE and LA inspectors\(^\text{115}\) showed inspectors view consultancy advice as highly variable.

Their concerns were wide-ranging, but focussed on poorly-tailored generic advice that missed key risks; and the frequency with which consultants stray beyond their technical competence or sectoral expertise. Poor quality advice can range from the pointless to dangerous:

- Market leading consultancy services were repeatedly cited as delivering poor quality generic advice that delivered ‘under compliance’ for the duty holder and failed to address key risks. This advice tended to include the supply of large ‘glossy’ folders of blank risk assessment templates, the provision of irrelevant advice and no effective hand-over for the duty holder.

- Inspectors reported that it was common for 3rd party providers to be asked by companies they were working with to advise on matters outside of their competence and expertise. Yet rather than refusing the work, they tend to undertake it but to a poor standard. For example, “a food standards adviser who came to check the café at a swimming pool was asked to undertake a health and safety audit for the rest of the pool complex. This consisted of him just looking over the documentation. Consequently, the local authority ended-up prosecuting the leisure group for chemical leaks that involved five people being hospitalised.”

Inspectors reported that most ‘poor’ 3rd party advice they see makes the duty holder under-compliant rather than over-compliant; advice demanded or mandated by insurance companies seemed to be the exception – and appears to drive towards over-compliance or ‘tick-box’ compliance.\(^\text{116}\)

**What does it really deliver?**

Overall the difference between inspectors’ and duty holders’ perceptions points to a potentially significant gap between what duty holders believe they are getting and the actual quality of the advice that they may be receiving.

This gap is not surprising: duty holders are not necessarily well placed to know what good looks like (they have perhaps commissioned expert advice in

\(^{115}\) Ibid.  
\(^{116}\) See above ‘Insurance – does paperwork provide cover?’.
lieu of their own lack of in-house competence, or time after all); nor can they easily scrutinise or challenge the advice provided.

Duty holders do, however, believe that they have ‘purchased compliance’ or ‘covered themselves’ when using 3rd party advice.

**Summary**

As noted earlier, health and safety consultancy is an essential component of the system, particularly for the management of complex or significant risks. It is often a way for businesses to meet their regulatory duty to appoint a ‘competent person’ for the management of health and safety.

HSE recognises that there are large numbers of well qualified and experienced consultants, contributing effective and proportionate advice. However, it is also clear that parts of the consultancy market need to show more leadership to further professionalise in support of duty holders, in particular via the provision of focused and proportionate advice that is tailored to the needs of individual businesses and delivers compliance.

It is also essential that consultants do not stray beyond their competence, particularly when dealing with high risk activities. HSE will continue to take enforcement action against consultants when appropriate. However, the market also has a role to play in helping drive improvements, challenging poor practice and ensuring robust governance of the standards against which advisers operate – something HSE is also keen to see.
Some thorny cross cutting issues

HSE recognises that, while the evidence confirms that for some SMEs experiencing disproportionate burdens these rules loom larger for them than government regulation, this isn’t a clear-cut problem. There are some thorny cross cutting issues, including the following:

- **Proportionality is not defined** – it’s not necessarily easy to judge when you see it, and it will always be relative to the context of individual business. Outcome-based regulation, underpinned by the principles of “so far as reasonably practicable” and proportionality, provides businesses across the economy with flexibility and the possibility of tailoring their health and safety management to their circumstances. But one person’s disproportionate burden could look like the bare minimum of compliance to another. Annex 1\(^\text{117}\) provides one possible visual representation of proportionality in relation to health and safety rules – but is illustrative only.

- **Documentation and evidence** - paperwork still appears central to the way that businesses experience and ‘manage’ health and safety. Consciously ‘doing less’ paperwork without feeling that standards or ‘cover’ are being compromised clearly requires a level of confidence that not all businesses have.

- **No one body holds all the levers to drive improvements across the system** - these rules and their systemic drivers are beyond the scope of HSE’s powers to directly control. In the main, it is for businesses, particularly those with potentially large systemic roles, such as those at the top of supply chains, or designing/playing a role in implementing standards and accreditations, to address the challenges and issues. HSE is looking to bring greater transparency, and to highlight potential opportunities for improvement, encouraging key players in system to work towards greater proportionality and effectiveness in line with HGBWW.

- **Keeping up to date with regulation** - one common theme to emerge from the evidence is the challenge businesses have in keeping up to date with ‘regulatory changes’. However, for health and safety (apart from a very small number of niche industry changes), the major features of the regulatory landscape have remained largely unchanged for the last decade. This raises a challenge for HSE: how to provide supportive guidance and communication (given that this is often cascaded through intermediaries and rules) to businesses that both provides a degree of reassurance and doesn’t drive a sense that they are dealing with shifting regulatory requirements?

\(^{117}\) This Annex is intended as an aid for reading and understanding this document only and is not a formal HSE definition of proportionality or effective health and safety management.
- **Influencing wider research and debate** - it is clear from our desktop research that health and safety rules are more often than not blurred with government regulation in business surveys, reports and academic research, just as they are in the minds of duty holders. Research may highlight the adverse impacts health and safety rules can have – only to then make purely Government-facing recommendations. All of this skews perception of ‘regulatory’ burdens and may limit government’s ability to effect change via regulatory reform. It is unlikely HSE’s work on better regulation will deliver the outcomes we want to see if we can’t shift wider practice in the health and safety system. Some stakeholders have even expressed the view that rules have filled, and are likely to go on filling, any regulatory space arising from efforts to reduce red tape as the market both creates and responds to demand. It is therefore essential that any future debate around health and safety burdens includes consideration of rules. We also consider that there is merit in future research into business burdens focussing on the broader question of the rules that businesses have to follow – regardless of their source (as noted by the Deloitte study). Only by doing this will we be able to gain a clear picture of what is really driving business practice on the ground, and what government might be able to do about it.

- **Assessing the counterfactual** – these rules clearly play a very significant role in the health and safety system and have done for some time. It is therefore difficult to consider the counterfactual i.e. what business burdens or business health and safety practice would look like without them. However, this work is not about ‘getting rid’ of these rules; it is about recognising the role they play and promoting proportionate risk management within them.

- **Educating for proportionality** – work to improve the health and safety profession’s ability to identify and implement proportionate solutions for and with duty holders needs to go hand in hand with all of the above. Work is under way with HSE’s Science Division to develop training materials for this.
Conclusions

Burdens: regulations, rules – or both?

Our evidence has included consideration of the landscape in England, Wales and Scotland. Health and safety burden isn’t a problem for the majority of businesses - but a significant proportion of Britain’s 5.5 million businesses (99.5% of which are SMEs) continue to report significant and disproportionate health and safety burdens.

Despite significant simplification work under the better regulation agenda, HSE recognises that health and safety regulation can impose burdens on business and that SMEs in particular can find it hard to feel confident that they are compliant. We are continuing to tackle this in support of the Industrial Strategy. However, it is clear from our research that businesses are subject to a wide range of health and safety rules. And for some businesses, these can outweigh the influence of government regulation.

Rules can play an important role in supporting regulatory compliance, as they can drive businesses to keep on top of their management of health and safety. However, they can also impose emotional and practical burdens on businesses, which pose a risk to HSE’s strategy aims for proportionate risk management.

In particular, for ‘directed’ SMEs (page 6) operating in more complex environments such as supply chains, it is clear that health and safety rules play a significant role in driving bureaucracy and other business costs that may not be adding value to health and safety on the ground. For SMEs dealing with multiple rules, regulation can seem “somewhat beside the point”, and “compliance with regulation can seem insufficient.” This is compounded by the fact that, for most SMEs, HSE is not a ‘go to’ source of advice and “only appears as a distant regulatory body.”

In addition to the potential for rules to drive business burdens, HSE has concerns around some of the quality assurance controls in place supporting their use. Some businesses seem to believe it is possible to demonstrate ‘compliance’ via tick box generation of paperwork, without the associated governance, audit and control processes to provide assurance that they aren’t missing key risks, overestimating competence or misjudging the effectiveness of operational controls.

Overall, it seems that health and safety is a somewhat crowded field, where HSE regulation and enforcement acts as only one source of influence among many others. In addition, rule makers and those who impose them are not commonly held to account for the burdens that they impose, nor is the value that they may add critically evaluated. More often than not, health and safety

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118 Understanding Business to Business Burden (HSE, 2018)
119 Ibid.
120 SME Communications Research (HSE, 2016)
rules become blurred in research or surveys and tend to be reported as ‘red tape’ regulatory burdens. Government is then charged with driving improvements, even when regulation is not the source of the problem.
Synergies with regulation

Better regulation

What this research does is help us better understand the relationship between regulation and rules and how the health and safety system operates as a whole. Only by gaining this understanding can we work effectively to drive delivery of our strategy goal to promote proportionality and effective risk management that protects businesses, workers and the public; and influence the perceptions that can drive such behaviours.

First and foremost, if we want to promote proportionality in the health and safety system, we should look to be an exemplar. HSE is taking an active role on better regulation: modernising the regulatory framework to both maintain our high standards of health and safety protection and, where possible, to reduce costs for business.

Written risk assessment

Nor should we underestimate the synergies between regulation and rules. They do not exist in isolation from one another. For example, the legal requirement for written risk assessment often features in the rules set by third parties. While HSE sees a place for risk assessments focused on supporting active risk management (to be reviewed and updated if the risks or activities change), rules can drive a culture where risk assessment requirements are a paperwork-only exercise and are duplicated, repeated and updated even when the risk on the ground remains the same.

It is understandable, then, if businesses feel that what they are ‘required’ to do feels somewhat divorced from what they have to do ‘on the ground’ to keep people safe. And from a regulatory perspective, topping and tailing paperwork with a new date and signature is not a proxy for good risk management. HSE will remain focussed on what actions a business has taken to manage their health and safety risks.

Advice and guidance

We also need to be mindful as a regulator of how we might unwittingly contribute to the growth of additional rules. We have already noted how businesses feel that they are dealing with regularly changing regulatory requirements, but we also need to be very careful how materials intended to help and support can be interpreted by third parties. For example, we have heard from an insurer that translated an illustrative case study on HSE’s website (a business that decided to update its risk assessments on an annual basis) into a policy requirement for annual updates. HSE guidance thus becomes a ‘gold plated’ requirement, cascaded through the health and safety system to thousands of this insurer’s (largely low risk) clients.
HSE as adviser and enforcer

While the evidence clearly points to the fear associated with being sued, we heard from several (perhaps more informed) stakeholders that increased fines for health and safety offences following revision of the Sentencing Council guidelines is leading to greater anxiety (including among the ‘worried well’). It may be that, over time, this fear of prosecution may come to match the fear of civil action.

Businesses have suggested that revision of the Sentencing Guidelines and the introduction of Fee for Intervention (cost recovery) have led to a change in the relationship between HSE and the business community. However, it is not clear how representative this view is; and given what other surveys tell us about HSE being a distant regulatory body, not a ‘go to’ source of information, this view may be limited to the perspective of more informed duty holders with previous experience of HSE’s advisory role. Overall an independent review of FFI concluded that:

“...the negative impact of FFI is significantly less than might have been expected and generally inspectors and dutyholders continue to work well together in improving health and safety management.”

Although FFI factors in time spent with the business after the visit to address what needs putting right, HSE and LA inspectors consider that they no longer spend as much time with businesses, suggesting that they are now less able to provide advice and support to help build the capacity of the business to manage its risks.

We have also heard how, in the view of inspectors we spoke to, this time constraint has affected the role that inspectors tend to play in working with duty holders and their consultants where an inspector has identified concerns relating to the quality of the ‘competent’ advice being offered. Inspectors have cited examples where a business has been found to be in breach, in part due to poor quality advice, only for the business to return to that same consultant for the remedy. Where previously an inspector may have worked to bring the two parties together to address any shortfall in compliance, it appears that there may now be time constraints to such activity.

The Sentencing Council has recently reviewed the impact of the revised Sentencing Guidelines, noting an unanticipated increase in fines imposed on smaller organisations and individuals. The Council intends to investigate further the operation of the guideline and will consider whether any revision is necessary.

121 Fee for Intervention (FFI) - The First Eighteen Months’ Experience (The Independent FFI Review Panel, 2014)
122 Impact assessment for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences guideline (Sentencing Council, 2019)
What this all means for HSE and the health and safety system

HSE now has a much greater understanding of what is influencing duty holder practice and the extent of the impact of these drivers. This presents us with a significant opportunity to work with and through the system in an intelligent way to drive the improvements required to tackle the key challenges – including in HSE policies and practice.

HSE recognises that rules can lead duty holders to take positive and proportionate action on health and safety. We welcome the positive influence that rules have – and recognise that these rules and intermediaries are essential components of the system.

We want to work with others in the system to tackle the more disproportionate practices where they exist, and help businesses struggling with burdens.

Businesses tend to recognise the issues, and welcome HSE’s work in this area. They also tend to see a role for HSE in challenging poor practices (i.e. using our voice to influence where we can) and have been supportive of HSE scrutiny in this area.

Scope for action

While (as noted earlier) the rules and their systemic drivers are beyond the scope of HSE’s powers to directly control, we should use our influence as a prime mover in the health and safety system to promote the need for quality, proportionality and effective risk management.

But in doing so it is important to recognise that this:

*is not about:*

- ‘getting rid of standards or accreditation’ for example, or saying that consultants shouldn’t play a role in the health and safety system;

- getting in the way of businesses seeking to innovate to drive up standards; or

- HSE stamping out ‘best in class’ as informed risk management choice.

*is about*

- recognising the significant de facto ‘regulatory’ impact that these rules have on business, including how these interact with government regulation and our strategy goals;
• engaging with the system to drive the need for proportionate risk management – including in the design or operation of these rules where appropriate; and

• raising awareness of these issues across the health and safety system.

Advice and guidance

HSE communications and guidance is now available to help duty holders navigate the rules via advice on:

• How to source competent person assistance;

• Proportionate application and implementation of health and safety management systems - ISO 45001;

• Procurement, including the effective use of certification and accreditation schemes – and mutual recognition; and

• Implications of civil and criminal law regimes for duty holders’ paperwork.

This forms part of a wider reform of HSE’s website and guidance offer. We are working to ensure that our guidance offer is known about, accessible and understandable to businesses, particularly SMEs.

Influencing intermediaries

As noted earlier, while government is often tasked with addressing some of these issues, many of them are beyond government’s ability to control. We do not have the levers to effect direct change in the market, so we will work with and through intermediaries to try to drive improvements. We will look to build on the very positive engagement that we have seen on this agenda to date by:

• Enhancing transparency about the sources of H&S rules for those looking on with interest;

• Raising awareness and performance (including challenging disproportionate practices) so it helps duty holders focus their effort appropriately; and

• Brokering solutions third parties can deliver, e.g. through websites or guidance.
Active and effective risk management, including for e.g.:
- Sound use of competent person (internal or external);
- active risk management the priority with paperwork as an enabler;
- activities tailored to the specific circumstances of the business;
- effective use of standards and accreditation;
- procurement requirements matching the level of risk of the good/service; and
- use of health and safety controls to allow activities to occur safely.

Effective but sometimes excessive risk management and bureaucracy.
But this risks no added value from additional burdens, including:
- paperwork prioritised e.g. unnecessarily updating risk assessments, re-writing of policies;
- duplicating paperwork for different audiences/clients;
- use of complex management systems where a simple health and safety made simple approach might suffice;
- multiple and overlapping accreditations; and
- use of external advice for extra degree of assurance (especially for low risk businesses).

Over the top and/or ineffective approach, including for e.g.:
- paperwork that doesn’t match reality on the ground (including policies, risk assessments, evidence for accreditations or standards) - leading to false assurance;
- failure of (often costly) external advice;
- health and safety ‘too difficult’ to manage in house for even low risk businesses;
- Excessive/ onerous procurement requirements imposing burdens on SMEs; and
- Wasted resources with the associated opportunity costs.

The two inner circles could include aiming for ‘best in class’ as informed duty holder choice. We have excluded it from this diagram, which aims to illustrate only the potentially negative impacts associated with lack of proportionality, particularly where these are imposed by external parties.
Annex 2 - other potential issues

A range of other potential issues were raised by stakeholders or surfaced during our research but are not explored in detail in this paper. These include:

- The role of businesses’ compliance teams in driving requirements - "empire building".

- Enforcers – the rules community as having a role in this (as a quasi-regulator).

- Product standards – concerns that standards development is dominated by well established, well-resourced companies, skewing the market to their interests, which may act as a barrier to innovation, and smaller companies.

- Card schemes (i.e. individuals’ competence, as opposed to that of organisations).

- Auditor competence – the degree to which auditing skills are transferable between different technical/specialist areas, for example from quality to health and safety.

- Role and quality of non-accredited certification bodies.
Annex 3 - International comparison

Direct international comparisons have been hard to come by. However, one report from Deloitte Australia\textsuperscript{124} pointed to the potentially significant impact that such rules can have on the economy as a whole when the costs of compliance (beyond just health and safety) are evaluated.

Their 2014 report titled “Get out of your own way: Unleashing Productivity”, cites the following annual costs of ‘compliance’, comparing the impact of what they term “public sector rules” and “self-imposed rules and regulations”:

- $94 billion to administer and comply with public sector rules
- $155 billion to administer and comply with self-imposed rules and regulations

“All up, self-imposed rules cost $21 billion a year to administer, and generate a stunning $134 billion a year in compliance costs. When combined, the costs of administering and complying with public and private sector rules equate to a quarter of a trillion dollars a year.

Those dollars are massive. A cost saving of just 10 per cent of that total (without a net loss of the matching benefits of rules) would equal 1.6 per cent of national income, ranking its impact with some of the largest reforms Australia has ever seen.

Yet even those dollars are a considerable underestimate. Economists have long agreed that the biggest burden of rules and regulations comes because an excess of rules saps incentive, enterprise and innovation across our economy.”

\textsuperscript{124} Get out of your own way: Unleashing Productivity (Deloitte Australia, 2014)
Annex 4 – Evidence base

Primary HSE research:


- *HSE Audience Measures* (2018) by BMG Research for HSE (due to be published in 2020)

Desktop research:

Extensive desk-based research including scrutiny of over 80 reports, including government and business research, academic papers, blogs, press coverage.

Stakeholder engagement:

References in this report to views or comments made by stakeholders reflect over two years of stakeholder and policy engagement, including with: standards and accreditation bodies, trade associations, consultants and professional bodies, academics, businesses (large and SME), insurers, solicitors, other Government Departments and HSE staff.

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