

# **Legal Services Regulation Reform in Scotland:**

## **Scottish Government response to the findings of the consultation analysis report**



6. The Chair of the review set out early in the report that the recommendations contained in the report were hers, and that although all of the panel members agreed with some of the recommendations, some members did not agree with all recommendations. A minority of panel members expressed significant disagreement with the primary recommendation:

“There should be a single regulator for all providers of legal services in Scotland. It should be independent of both government and those it regulates. It should be responsible for the whole system of regulation including entry, standards and monitoring, complaints and redress. Regulation should cover individuals, entities and activities and the single regulator should be a body accountable to the Scottish Parliament and subject to scrutiny by Audit Scotland.”

7. The Chair’s primary recommendation would be a departure from the current model which may be described as co-regulation but which can sometimes be perceived from a lay perspective as self-regulation.

8. The Scottish Government response to the Robertson report was published in June 2019<sup>5</sup>. Our analysis of the Robertson report established that while many of the recommendations were widely supported, the primary recommendation largely polarised the views of those in the legal and consumer landscape. As a result, the Scottish Government made the commitment to issue a public consultation based on the recombination’s made by the Robertson report, with the intention of seeking to build consensus on the way forward.

9. The Scottish Government worked collaboratively with stakeholders from the legal and the consumer perspective to design the consultation. In seeking to build agreement around proposals for reform the consultation contained two alternative viable models of regulation, in addition to the first model proposed by the Robertson report. The additional models on which views were sought included:

Model 2: A legal services market regulator, which would authorise and oversee the work of the legal professional regulators. It would monitor the supply of legal services and have a broad regulatory tool-kit to counter risks. It would act impartially to balance the interests of the sector with the consumer, and public interest.

Model 3: An enhanced accountability and transparency model, which would require all legal professional regulators to establish and delegate regulatory functions to an independent regulatory committee. In addition, it would place a greater emphasis on incorporating independence, transparency, and proportionate and risk-based accountability in existing structures.

## Consultation analysis

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<sup>5</sup> [Scottish Government response to the independent review by Esther A Robertson](#)

10. The independent consultation analysis was published on 8 July 2022<sup>6</sup>. A total of 158 substantive responses were included in the data analysis. Overall, 101 individuals and 57 organisations responded to the written consultation. In addition, over the course of the consultation eight focus groups were held with a mix of consumer and legal attendees<sup>7</sup>. Views from those focus groups were included in the analysis.

11. The analysis of the consultation responses shows that views were evenly split between support and opposition to the primary recommendation. However, there are many areas where there is broad agreement between stakeholders.

12. The analysis highlighted that all respondents, regardless of affiliation, shared as a common aspiration, the need for any future model to be transparent, open to public scrutiny and efficient to ensure that justice remains accessible to all.

13. The responses to the consultation have been invaluable in terms of how these recommendations might be implemented, and have shaped the key measures set out in this response that will form the basis for reform.

### **The need for robust legal regulation and reform of the current regulatory landscape**

14. The Robertson report set out that Scotland is home to a well-educated, well respected legal profession with a high degree of public trust, of which we can be very proud. However, there is significant potential for "market failure" in the provision of legal services whereby consumers either receive or perceive that they have received a poor service<sup>8</sup>. Consumers are less likely to make a well-informed purchasing decision when consuming legal services versus a typical purchasing decision, because:

- Consumers tend to use legal services infrequently and have limited ability to learn about legal products and service providers.
- Legal services, as well as the law itself, are extremely complex.
- Legal services are often purchased during traumatic or stressful circumstances.
- It is often the case that the same providers are responsible for diagnosing problems and offering and executing solutions.

15. In addition, the Robertson report identified an absence of a comprehensive baseline survey of consumers of legal services in Scotland. These conditions are not unique to the legal services industry however. For example, medical and financial sectors also have to overcome many of these factors. While these factors have the potential to lead to a number of poor outcomes for consumers, damaging the quality of the services they receive and/or increasing the costs of those services, effective regulation can guard against these and protect consumer interests.

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<sup>6</sup> [Legal services regulation reform: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/consult/FR/2022/07/08/11)

<sup>7</sup> 32 attendees took part in the focus groups in total.

<sup>8</sup> Alongside the Robertson review, a report on legal services in Scotland was produced by Europe Economics that considers these issues in more detail.

16. The role of legal services are central to the protection of human rights and freedoms, playing a vital role in upholding the rule of law and providing access to justice.

17. Legal services contribute to the social value of Scotland. There is significant diversity in the types of legal services people access, often in times of distress or vulnerability. Legal services support individual's wellbeing, promote their continued contribution to society and help to prevent the escalation of problems. Legal services also support a range of commercial matters affecting many different types of organisations, from small businesses to multi-national corporations.

18. In this regard, the Legal Services (Scotland) Act 2010, in section 1, sets out a regulatory objective of "protecting and promoting the public interest".

19. The public interest concerns 'objectives and actions for the collective benefit and good of current and future citizens in achieving and maintaining those fundamentals of society that are regarded by them as essential to their common security and well-being, and to their legitimate participation in society. There must be a public interest in ensuring that the basic needs of all citizens are satisfied'<sup>9</sup>.

20. Effective and proportionate regulation has an important role to play in ensuring that the legal profession in Scotland continues to be regarded as one of the best in the world and is able to grow and thrive, to meet the needs of Scotland's citizens.

21. Ensuring that Scotland is able to maximise the benefits that a strong and independent legal sector represents is a priority for the Scottish Government. It is widely agreed that there are some elements of the current regulatory regime that could be significantly improved, current restrictions which may inhibit competition and the complex complaints system are key areas.

22. Reform of legal service regulation will seek to modernise the existing regulatory framework and provide a proportionate approach which supports growth and competitive provision in the legal services sector whilst placing consumer interests firmly at its heart, aligning with the principles of the Robertson report. This also links with the following Scottish Government National Performance Framework outcomes<sup>10</sup>:

- We grow up loved, safe and respected so that they realise their full potential.
- We live in communities that are inclusive, empowered, resilient and safe.
- We are creative and their vibrant and diverse cultures are expressed and enjoyed widely.
- We have a globally competitive, entrepreneurial, inclusive and sustainable economy.
- We are well educated, skilled and able to contribute to society.

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<sup>9</sup> [Mayson, Legal services regulation and the public interest](#)

<sup>10</sup> [National Performance Framework | National Performance Framework](#)

- We have thriving and innovative businesses, with quality jobs and fair work for everyone.
- We respect, protect and fulfil human rights and live free from discrimination.
- We are open, connected and make a positive contribution internationally.
- We tackle poverty by sharing opportunities, wealth and power more equally.

23. Legal services reform also aligns with the aims set out in The Vision for Justice in Scotland document (2022)<sup>11</sup>, which sets out Justice Priorities for this parliamentary session:

- We have a society in which people feel, and are, safer in their communities.
- We have effective, modern person-centred and trauma-informed approaches to justice in which everyone can have trust, including as victims, those accused of crimes and as individuals in civil disputes.
- We address the on-going impact of the COVID-19 pandemic and continue to renew and transform justice.

24. The legal sector contributes over £1 billion to the Scottish economy each year and is responsible for over 20,000 high value jobs. It is not only an economic generator in its own right but a profession that is critical to Scotland's other key sectors - Financial Services, Oil and Gas, Renewables, Science and Technology. Both the sector and the Scottish Government are working together to ensure the sector makes its maximum possible impact in a competitive global market.

### **Next steps**

25. In developing a position, the Scottish Government has engaged extensively with key stakeholders along with the public consultation exercise. This engagement has culminated in careful consideration of a wide range of views by Scottish Ministers.

26. This engagement has led us to consider that the following key aims should underpin a revised model for the regulation of legal services

**Firstly, to implement a modern, forward-looking model for legal services regulation, which will build on the existing framework.** This should allow for a proportionate approach that seeks to balance and deliver the key priorities of all stakeholders. The existing regulators should retain their regulatory functions, with a greater statutory requirement to incorporate independence, transparency and proportionate and risk-based accountability within regulatory approaches. Evidence of improvements in the way in which legal services are regulated and how the legal complaints system operates in Scotland must be gathered.

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<sup>11</sup> [The Vision for Justice in Scotland - gov.scot \(www.gov.scot\)](http://www.gov.scot)

**Secondly, to reform legal services regulation in key areas.** A more risk-based and proportionate system for legal complaints should be implemented, while incorporating improvements that have been consulted on separately<sup>12</sup>. There should be greater protections for consumers, particularly through entity and title regulation. There should be reduced restrictions in respect of legal business structures, to encourage competition and innovation in the legal sector and support Scottish legal firms, to place them on an equal footing with counterparts within the UK and other jurisdictions. To improve the consumer journey and consumer choice for legal service users, consumer interests should be placed at the heart of regulation, while incorporating appropriate checks and balances that deliver a balance between the independence of the legal profession with their duty to work in the public interest.

### **Further aspects of the regulation of legal services that should be a feature of a new regulatory model**

#### The Lord President and the Court of Session

27. The Lord President and the Court of Session should maintain responsibility for prescribing the criteria and procedure for admission to the legal professions, the approval of changes to practice rules in relation to the legal professions, and retain an overarching role in the regulatory framework, protecting the independence of the legal profession.

#### The regulatory objectives and professional principles

28. The analysis of the consultation responses indicates support for the introduction of a modern set of regulatory objectives and professional principles that should apply to all branches of the legal profession, and support an increased focus on quality assurance, continuous improvement and proportionate risk-based regulation. While also incorporating the Better Regulation Principles, Consumer Principles & the Human Rights (PANEL) Principles throughout its areas of responsibility. The Regulatory Objectives should:

##### Support

- the constitutional principle of the rule of law
- the interests of justice

##### Protect and promote

- the public interest
- the interests of consumers
- the independent legal professions
- maintain adherence to the professional principles
- encourage equal opportunities and diversity within the legal profession,
- access to justice, including choice, accessibility, affordability and understanding of services by consumers

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<sup>12</sup> [Complaints against lawyers and legal firms in Scotland: consultation - gov.scot \(www.gov.scot\)](http://www.gov.scot)

- innovation and competition within the provision of legal services, to support and promote sustainable legal services and future growth
- collaboration with other regulators, the legal profession, and legal consumers
- accountability to those served by regulation

Embed

- a modern culture of prevention, quality assurance, continuous improvement and compliance, through an agile, risk based, efficient & outcomes based approach to regulation
- the Better Regulation Principles, Consumer Principles & the Human Rights (PANEL) Principles throughout its areas of responsibility<sup>13</sup>.

29. The Professional Principles should:

- Uphold and support the rule of law and the proper administration of justice,
- Offer accountability in protecting the public and consumer interest,
- Act with independence (in the interests of justice),
- Act with integrity,
- Act in the best interests of their clients (and keep clients' affairs confidential),
- Maintain good standards of work,
- Where exercising before any court a right of audience, or conducting litigation in relation to proceedings in any court, comply with such duties as are normally owed to the court by such persons.
- Meet their obligations under any relevant professional rules, and act in conformity with professional ethics.

A modern regulatory framework designed to adapt to changes in the legal services market

30. Building on the existing framework a two-tier system for legal service regulators would allow for a proportionate and risk-based approach while allowing the framework to adapt to change in the market and address concerns that the landscape is complex and difficult to understand. The framework should continue to be funded by those regulated as it is now.

31. First tier regulators would be those regulators with a significant membership or whose members provide largely consumer-facing services.

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<sup>13</sup> **Better Regulation Principles:** proportionate, consistent, accountable, transparent, targeted.

**Consumer Principles:** access, choice, information, education, safety and quality, protection of economic interests, fairness and equity, redress, sustainability, privacy and representation.

**Human Rights (PANEL) Principles:** Participation, Accountability, Non-discrimination and Equality, Empowerment and Legality.

32. In this tier, regulatory functions would be required to be delegated to an independent regulatory committee comprised of legal and non-legal members, chaired by a non-legal member. The regulator would be required to ensure that the regulatory committee is sufficiently resourced in the exercise of its regulatory functions. A register of members would require to be publicly available.

33. Regulatory functions would include the regulation of members providing legal services in relation to any matter of professional practice, conduct or discipline, including:

- (a) setting standards for admission and ongoing training of members,
- (b) handling complaints about members,
- (c) making regulatory rules
- (d) complying with the requirements imposed on the regulator (for example, in relation to keeping a register of members).

34. The regulatory committee should set its own governance structure, priorities, and strategy. It should oversee arrangements for a client compensation fund. It should operate independently of the regulator's governing body. It would be required to consult on this work with the regulator's governing body and key stakeholders.

35. The regulatory committee would be required to prepare a report on the exercise of its functions as soon as practicable after the end of each reporting year, to be laid in the Scottish Parliament and published online. In doing so it would be required to consult with the regulator and other stakeholders such as the Lord President and a statutory Consumer Panel.

36. The work of regulatory committees should become subject to Freedom of Information in exercising administrative regulatory authority. This aligns with a number of other professional regulators subject to FOI legislation, such as the General Teaching Council for Scotland, the General Medical Council and the Scottish Social Services Council.

37. Second tier regulators, would be those regulators whose membership is less consumer facing or more specialist in nature in terms of the legal work undertaken, and whose membership is comparably less in number.

38. In this tier, it would be considered disproportionate to the size and lack of direct consumer contact for such regulators to delegate to a regulatory committee. Second tier regulators would however be required to publish its regulatory regime, to produce an annual report which will be published on its website, and keep a register of members which would be publicly available. It would also need to ensure relevant professional indemnity insurance arrangements are in place

39. The Scottish Ministers would be required to specify the tier to which a new regulator is designated, or following any change in circumstance change a regulator's designated tier.

40. In adopting a risk based and proportionate approach, consideration would require to be given to the following points, which would also accommodate any new entrants to the sector:

- The type and range of legal services that are to be regulated,
- whether the legal services are to be provided directly to members of the public,
- the number of legal services providers that the regulator regulates (or is likely to regulate).

### Standards, Monitoring & Reporting

41. In building on the position in the Legal Services (Scotland) Act 2010<sup>14</sup>, first tier regulatory committees would be required to lay an annual report before the Scottish Parliament in respect of performance and compliance with the regulatory objectives. Second tier regulators would be responsible for publishing corresponding information in a transparent way.

42. In producing an annual report, legal services regulators would require to demonstrate in a proportionate way how the regulatory objectives are adhered to, set out their strategic regulatory priorities for the next year, and summarise the cost of carrying out their regulatory functions. In addition, they would require to summarise their professional indemnity and compensation fund arrangements, including associated decisions regarding claims. Furthermore, they would also be required to set out whether they considered that their tiered categorisation has changed, or would be likely to change in the next year.

43. While Ministers are clear in their understanding of the need for independence in the legal profession, there remains a need for regulation to operate in the public interest as well as that of the legal profession. Therefore, there should be a process for intervention by Scottish Ministers in the light of concerns being raised on how and whether regulators are delivering their regulatory objectives and the operation of regulation in relation to public interest. In the event of a failure to regulate in the public interest or to adhere to the regulatory objectives, Scottish Ministers should be able to investigate this aspect of a regulator's performance. This could be in response to:

- A request from a Committee of the Scottish Parliament following a regulator's annual report.
- Evidence submitted by an organisation representing legal services consumers such as Consumer Scotland or the Competition and Markets Authority.

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<sup>14</sup> Section 36 of the 2010 Act sets out that an approved regulator of licenced legal service providers (alternative business structures) must review their own performance, and send a report on the review to the Scottish Ministers annually. The report should consider the approved regulator's exercise and compliance with its regulatory objectives, the operation of its internal governance arrangements, and its compliance with any performance targets or actions that may have been directed by the Scottish Ministers. In addition, the report must contain a copy of its annual accounts in relation those functions

44. Alongside this ability to investigate, a process for applying sanctions would also be necessary. This approach would require appropriate safeguards<sup>15</sup>.

#### Greater flexibility in respect of alternative business structures

45. We agree on the need to liberalise alternative business structures (ABS), removing restrictions which under the Legal Services (Scotland) Act 2010 currently require such firms to operate for ‘fee, reward or gain’<sup>16</sup>, and which require to have a minimum ownership of 51% by regulated professionals<sup>17</sup>.

46. This would allow greater flexibility in respect of ABS, to address concerns that Scottish legal firms are at a competitive disadvantage compared to other jurisdictions.

47. The Competition and Markets Authority (CMA) market research report on legal services in Scotland<sup>18</sup> set out that there is limited empirical information available on the impact of ABS, though there has been recent evidence from the experience in England and Wales. It stated that the ABS framework in England and Wales differs in some respects to the framework in Scotland and is less restrictive. The CMA report highlights that in England and Wales the legislation allows for the ownership of an ABS to be completely open, subject to meeting certain suitability requirements, and that ABS are available to the non-profit sector. Since ABS were introduced in England and Wales in 2007, almost 1,300 ABS have been established. These include non-profit ABS. The CMA view that the adoption of ABS in other jurisdictions illustrates that they have an important role to play in breaking down the regulatory restrictions on business models, with little apparent downside. It has also been reported that the Solicitors Regulatory Authority in England and Wales view that there is little evidence that non-lawyer ownership has increased professional risk<sup>19</sup>.

48. Our view is that liberalisation should allow for:

- Employee and community ownership of ABS legal entities.
- Greater potential for outside investment into ABS, to address concerns that the Scottish legal sector is at a competitive disadvantage compared to other jurisdictions.
- Third sector organisations to directly employ legal professionals to undertake what is currently reserved activity, such as court proceedings.

#### Entity regulation

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<sup>15</sup> Currently section 38 of the Legal Services (Scotland) Act 2010 sets out a range of measures which the Scottish Ministers may take in relation to an approved regulator of licenced legal service providers (alternative business structures) if they consider it to be appropriate in the circumstances of the case, should their performance fall below the standard that would normally be expected. The Lord President's agreement is required for the taking of any of the measures available, except in imposing a financial penalty.

<sup>16</sup> [Legal Services \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2010/10/section/38)

<sup>17</sup> [Legal Services \(Scotland\) Act 2010 \(legislation.gov.uk\)](https://legislation.gov.uk/ukpga/2010/10/section/38)

<sup>18</sup> [Research report - Legal services in Scotland \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414442/research-report-legal-services-in-scotland.pdf)

<sup>19</sup> [Law firm ownership “completely irrelevant” to risk, says SRA director - Legal Futures](https://www.lawfirm.com/news/law-firm-ownership-completely-irrelevant-to-risk-says-sra-director-legal-futures)

49. Consumers often presume and expect that their legal services are regulated at an entity level (as a legal business as a whole), which is not necessarily the case. From the perspective of the client, their contract is with the legal business and the client places expectations on that entity. However, the current legal framework for the regulation of the legal profession in Scotland places the emphasis on regulating the individual solicitor. The consultation analysis indicates that the majority of respondents (80%) agreed that entity regulation should be introduced.

50. A revised regulatory model should provide for entity regulation of legal businesses which will allow for regulation that centred on the public interest and protection of the consumer, and will bring forward many recognised benefits.

51. Entity regulation should not replace or dilute the regulation of individual legal professionals, to ensure the strongest of consumer protections a hybrid approach will provide increased efficient and effective regulation – both from the consumer and the solicitor perspective. This would provide proportionate risk based and appropriately targeted regulation.

#### Title regulation

52. It is a criminal offence for any person to pretend, wilfully and falsely, to be a 'solicitor'. There are no such restrictions around the use of the term 'lawyer' or 'advocate'. A common expectation of consumers is that anyone who refers to themselves as a 'lawyer' should be suitably qualified and regulated to do so. This is reflected in Law Society of Scotland polling, which indicates that 86% of respondents believe that there should be restrictions on who can call themselves, or advertise as a lawyer<sup>20</sup>. The term 'advocate' has a wider connotation, and can be used to describe a person who talks on behalf of someone else.

53. While noting the support for like for like protection for both titles, the consultation analysis shows that there are notable and legitimate reasons to take the title of lawyer while not being included on the roll or subject to regulation. Like for like protection may have unintended consequences, in respect of legal academics, in-house lawyers and those who practice religious law, for example.

54. In taking a targeted and risk-based approach, we view that it should become an offence to falsely pretend to be a 'lawyer' or 'a member of the Faculty of Advocates' in order to provide legal services to the public for a profit.

#### Legal Tech

55. Technology and innovation can benefit consumers and the sector. It can provide easier, more intuitive access to services, as well as supporting the future of the economy. Like in other sectors it is increasingly a source of challenge and new opportunity, and as such should be given proportionate regulatory scrutiny.

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<sup>20</sup> Savanta ComRes interviewed 1,000 Scottish adults online between 26 October and 10 November 2021. Data were weighted to be representative of key demographics including age, gender and region. See: <https://comresglobal.com/polls/law-society-of-scotland-solicitors-polling/>

Regulators should have flexibility in their regulatory powers to promote the use of Sandboxes to promote innovation in the provision of legal services.

#### Definition of legal services and reserved activity

56. The Robertson report recommended that a definition of legal services should be set out in primary legislation. The consultation analysis shows that most respondents (88%) agreed that there should be a definition of legal services. We will consider how a definition of legal services could be applied to Scotland in terms of reform.

#### The legal complaints system

57. The Scottish Legal Complaints Commission (SLCC) paper Reimagine Regulation<sup>21</sup> raised concerns that the statute underpinning the legal complaints system is too restrictive and unable to act in a proportionate and risk-based way, adding undue cost and time to the legal complaints process for consumers and legal professionals. The Robertson report agreed with this assessment.

58. The Robertson report set out that the complaints system should allow the regulator to adopt a risk-based approach to intervene where systemic issues are identified and where there has been a failure to meet standards.

59. The analysis of the consultation responses supports the view that the legislation which underpins the complaints structure should be more flexible and proportionate. We agree that the Commission and regulators should have more flexibility and the ability to act in a proportionate way in considering discipline and legal complaints.

60. We also consider that a single gateway for complaints should continue and that there should be additional oversight of complaints handling by regulators, with the ability to direct regulators on the way in which they deal with complaints about the conduct of legal professionals.

61. The current funding model should continue, paid by a levy and in consultation with the legal profession.

62. In terms of increasing transparency, there should be a requirement for all legal services regulation tribunals to publish judgments in respect of complaints regarding professional misconduct, with the intention of increasing public confidence.

#### The cost of the regulatory framework

63. The Robertson report set out that the global cost of the new regulatory system should not be more than the cost of the current system. The system should be financed by a levy on practitioners as is the current arrangement, and also on entities under the proposed model.

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<sup>21</sup> [reimagine-regulation-slcc-priorities-for-a-consultation-on-legal-services-regulation-v100.pdf](https://www.scottishlegalcomplaints.org.uk/reimagine-regulation-slcc-priorities-for-a-consultation-on-legal-services-regulation-v100.pdf)  
([scottishlegalcomplaints.org.uk](https://www.scottishlegalcomplaints.org.uk))

64. The Scottish Government is mindful of the cost of the regulatory framework, and view that there is scope to provide for a more efficient framework which will lead to improvements in the way in which legal services are regulated and how the legal complaints system operates.

## **Conclusion**

65. We have one of the best legal professions in the world, however improvements to the regulatory structure and delivery are needed to further support access to justice in modern Scotland. We want a modern, forward-looking legal services regulation framework for Scotland that will best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.

66. The Scottish Government has committed to developing a Bill on the regulation of legal services and will continue to engage with stakeholders representing the consumer and legal perspective taking that forward.



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The Scottish Government  
St Andrew's House  
Edinburgh  
EH1 3DG

ISBN: 978-1-80525-357-0 (web only)

Published by The Scottish Government, December 2022

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS1212003 (12/22)

W W W . g o v . s c o t