



INFRASTRUCTURE AND CAPITAL INVESTMENT COMMITTEE

AGENDA

7th Meeting, 2016 (Session 4)

Wednesday 24 February 2016

The Committee will meet at 9.30 am in the Adam Smith Room (CR5).

1. **Subordinate legislation:** The Committee will take evidence on the Procurement (Scotland) Regulations 2016 [draft] and related statutory instruments from—

Keith Brown, Cabinet Secretary for Infrastructure, Investment and Cities, Alasdair Hamilton, Policy Manager, Scottish Procurement and Commercial Directorate, Susan Duncan, Policy Manager, Scottish Procurement and Commercial Directorate, and Mark Richards, Solicitor, Scottish Government.

2. **Subordinate legislation:** Keith Brown (Cabinet Secretary for Infrastructure, Investment and Cities) to move—

S4M-15451—That the Infrastructure and Capital Investment Committee recommends that the Procurement (Scotland) Regulations 2016 [draft] be approved.

3. **Inquiry into the circumstances surrounding the closure of the Forth Road Bridge:** The Committee will take evidence from—

Derek Mackay, Minister for Transport and Islands, Scottish Government;

Roy Brannen, Chief Executive, Mike Baxter, Director for Finance and Analytical Services, and Wayne Hindshaw, Chief Bridge Engineer, Transport Scotland.

4. **Subordinate legislation:** The Committee will consider the following negative instruments—

The Public Contracts (Scotland) Amendment Regulations 2016;

The Water and Sewerage Services Licences (Cross-Border Applications)
(Scotland) Order 2016.

5. **Inquiry into the circumstances surrounding the closure of the Forth Road Bridge (in private):** The Committee will consider the evidence heard to date.

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Clerk to the Infrastructure and Capital Investment Committee
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The Scottish Parliament
Edinburgh
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The papers for this meeting are as follows—

Agenda item 1 and 2

Procurement Regulations Affirmative SSI Cover Note	ICI/S4/16/7/1
PRIVATE PAPER	ICI/S4/16/7/2 (P)

Agenda Item 3

Forth Road Bridge Inquiry Cover Note	ICI/S4/16/7/3
PRIVATE PAPER	ICI/S4/16/7/4 (P)

Agenda Item 4

Public Contracts Amendment Negative SSI Cover Note	ICI/S4/16/7/5
Water and Sewerage Services Negative SSI Cover Note	ICI/S4/16/7/6

Infrastructure and Capital Investment Committee

7th Meeting, 2016 (Session 4), Wednesday 24 February 2016

Subordinate Legislation

Title of instrument

[The Procurement \(Scotland\) Regulations 2016 \[draft\]](#)

Type of instrument

Affirmative

Laid date

18 January 2016

Minister to attend the meeting

Yes

SSI drawn to the Parliament's attention by Delegated Powers and Law Reform Committee

Yes

Reporting Deadline

6 March 2016

Procedure

1. The Infrastructure and Capital Investment (ICI) Committee has been designated as lead committee for this instrument and is required to report to the Parliament.

2. Under Rule 10.6.1 (a), these regulations are subject to affirmative resolution before they can be made. It is for the ICI Committee to recommend to the Parliament whether these draft regulations should be approved.

3. The Cabinet Secretary for Infrastructure, Investment and Cities has, by motion S4M-15451 (set out in the agenda) proposed that the Committee should recommend the approval of this statutory instrument. The Cabinet Secretary will attend in order to speak to and move the motion. The formal debate on the motion may last for up to 90 minutes. Ahead of the formal debate (as part of an earlier agenda item), there will be an opportunity for members to ask questions of the Cabinet Secretary and his officials on the background to and purpose of this instrument.

4. At the end of the debate, the Committee must decide whether or not to agree the motion, and then report to Parliament accordingly. Such a report need only be a short statement of the Committee's recommendations.

Purpose

5. This instrument is part of a number of instruments laid by the Scottish Government to enact changes to public procurement in Scotland. Specifically, the instrument makes further provisions about regulated contracts, dynamic purchasing systems, general duties and specific duties under the Procurement Reform (Scotland) Act 2014 ("the Act").

6. The instrument will come into force on 18 April 2016, to align with the coming into force of Regulations which give effect in Scots law to European Parliament

Directives 2014/24/EU; 2014/25/EU and 2014/23/EU which regulate the award of public contracts, utilities contracts and concession contracts respectively. The Committee formally considered a negative instrument implementing 2014/24/EU at its meeting on 3 February 2016 and will formally consider negative instruments implementing Directives 2014/25/EU and 2014/23/EU at a future meeting.

7. The Committee wrote to the Cabinet secretary regarding tax avoidance, following its consideration of the negative instrument implementing 2014/24/EU at its meeting on 3 February 2016. The letter from the Committee and the response from the Cabinet Secretary is attached at Annexe A

8. Following the Committee's scrutiny of the Procurement Reform (Scotland) Bill, the Cabinet Secretary for Infrastructure, Investment and Cities wrote to the Committee providing an update on the measures to be enacted and this is attached at Appendix B. A hard copy of the [policy note](#) providing a summary of the changes to public procurement rules in Scotland is also attached for members.

9. During consideration of the draft Procurement (Scotland) Regulations 2016 on 24 February, the Committee will have an opportunity to hear from Cabinet Secretary regarding this instrument and the full package of legislation relating to public procurement reform in Scotland.

Consultation

10. The Scottish Government carried out [a formal consultation](#) on the content of this instrument as well as how best to transpose the three EU Directives referenced above. Responses were [published on 10 August 2015](#), together with a [report analysing them](#). The [Scottish Government responded](#) to the outcome of that consultation on 17 December 2015.

Impact Assessments

11. An [Equalities Impact Assessment](#) of the likely impact of the package of measures concluded that the impacts of the changes to the procurement rules will, overall, be positive from an equalities perspective and that any negative impacts should be limited and mitigated by the actions of the Scottish Government, which include publication of statutory guidance and policy notes.

12. A [Business and Regulatory Impact Assessment](#) (BRIA) carried out on the package of measures concluded that the new public procurement rules in Scotland should ensure even more consistency both above and below the EU regulated values. This should, in turn, improve access for suppliers (including small and medium enterprises SMEs) to public contracts.

Consideration by the Delegated Powers and Law Reform Committee

13. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 2 February 2016 and agreed that it required to draw to the attention of Parliament a failure to follow proper drafting practice, largely due to the reader having to read either the explanatory note, or the statutory guidance to follow, or the Act (or all of these), to find an explanation of which types of contract or procurement the regulations apply to.

14. The report from the Delegated Powers and Law Reform Committee is available [here](#):

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/96352.aspx>

15. A hard copy of the regulations and accompanying documents, have been circulated with the papers for ICI Committee members. They are also available online here:

<http://www.legislation.gov.uk/sdsi/2016/9780111030868>

Jason Nairn
Assistant Clerk
February 2016

Appendix A

Letter from the Infrastructure and Capital Investment Committee to the Cabinet Secretary for Infrastructure, Investment and Cities to the, dated 18 February 2016**Public Contracts (Scotland) Regulations 2015 (SSI 2015/446)**

At its meeting on 3 February 2016 the Committee considered the above Regulations. While the Committee made no recommendations in relation to the instrument, it did agree to write to you to ask for a response to points raised by individual Members.

In particular, some Members raised concerns about the absence of any reference to tax avoidance in the Regulations and asked for clarification on why this is the case. The full transcript of the discussion can be found in the Official Report of the meeting:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=10359&mode=pdf>

As you are attending the Committee's meeting on Wednesday 24 February in relation to the Procurement (Scotland) Regulations 2016, which is part of the same suite of instruments, you may wish to answer these questions then. Alternatively, please feel free to write to the Committee in advance of that session.

Response from the Cabinet Secretary for Infrastructure, Investment and Cities to the Infrastructure and Capital Investment Committee, dated 19 February 2016

Thank you for your letter of 18 February 2016, regarding the Public Contracts (Scotland) Regulations 2015 (SSI 2015/446).

The committee has noted "concerns about the absence of any reference to tax avoidance in the Regulations". However, Regulation 58(3)(a) of the Regulations states:

"A contracting authority must exclude an economic operator from participation in a procurement procedure where, subject to paragraphs (5) to (7), the contracting authority is aware that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a judicial or administrative decision having final and binding effect in accordance with the legal provisions of the country in which it is established or in accordance with those of any of the jurisdictions of the United Kingdom".

If a business has been found not to have paid its tax, it must therefore be excluded from competitions, apart from in some very narrow circumstances – including where it has later paid that tax, plus any applicable fines and interest, or entered into a binding agreement to do so.

This provision is also replicated in The Concession Contracts (Scotland) Regulations 2016 and The Utilities Contracts (Scotland) Regulations 2016.

Furthermore, regulation 58(4) also allows public bodies to exclude a business where there is evidence short of such a finding that the business has failed to pay tax. Clearly, where there is not the certainty provided by an official finding, public bodies will need to be satisfied that the evidence before them is sufficient to allow them to act in this way, which is why exclusion on this ground remains at the discretion of the public body concerned.

I have also chosen to replicate this right for public bodies to exclude business from competition for non-payment of tax in the Procurement (Scotland) Regulations 2016.

I am, of course, happy to discuss this further when I appear before the Committee on 24 February.

Appendix B

Letter from the Cabinet Secretary for Infrastructure, Investment and Cities to the Infrastructure and Capital Investment Committee, dated 17 December 2015

Following my appearance before the Infrastructure and Capital Investment Committee on 17 June 2015, I undertook to update the committee on our plans to transpose the new European procurement Directives into Scots law.

I intend to lay regulations which transpose Directive 2014/24/EU on public procurement later this week. These will regulate most above-threshold public contracts awarded in Scotland. I intend to lay further regulations, transposing Directives 2014/23/EU and 2014/25/EU, on the procurement of concession contracts and utilities contracts respectively, in the new year. In order to give public bodies and businesses time to prepare for the changes these regulations will bring about, they will all take effect on 18 April 2016, the date by which all EU member States are required to have transposed these Directives.

In advance of that, I am today publishing the Scottish Government's response to the consultation exercise we undertook earlier in the year. I have attached a copy of that document, and will also make it available in SPICe.

You will recall that member States each have a number of choices to make about how they implement the Directives. That document sets out how the regulations will be brought forward in each area where we had a such a choice to make.

An analysis of all the responses we received as part of the consultation, which was published in August, showed that in very large part, those who responded to the consultation agreed with our proposals. It follows, therefore, that I intend, in very large part, to lay regulations which reflect those proposals.

The committee may be interested in my intended approach to transposition in three areas in particular.

Firstly, I will be taking strong action to tackle the issue of blacklisting of workers – a subject which has rightly received a great deal of attention.

The Directives set out several grounds on which a business may be excluded from bidding for public contracts. Until now, a contracting authority which wished to exclude a business that had blacklisted would have to rely on being able to demonstrate that it was guilty of grave professional misconduct.

The new Directive, however, introduces another ground on which contracting authorities may exclude a business from bidding for contracts. This is a broad ground, which covers situations when a business has breached its environmental, social or employment law obligations. By default, exclusion on this ground is at the discretion of the contracting authority, but member States have the option, when transposing the Directives, to go further, and to make this a mandatory ground for exclusion.

Blacklisting blights lives and has a significant impact on those affected. If blacklisting is still occurring, it must be stopped. For this reason, I have decided to use the flexibility the Directives give us to bring forward regulations which will make it a legal

requirement for public bodies to exclude businesses which have either been found to have committed an act prohibited under the Employment Relations Act 1999 (Blacklists) Regulations 2010, or which have admitted doing so.

This requirement will remain in force until either such time as the business has taken appropriate remedial measures, or a period of three years has elapsed since the blacklisting occurred (this is the longest period that exclusion on this ground is allowed for under the EU Directive). The remedial measures I refer to are that the business must prove that it has paid, or undertaken to pay, compensation in respect of any damage caused, clarified the facts and circumstances by actively collaborating with investigating authorities and taken concrete technical, organisational and personnel measures appropriate to prevent further offences or misconduct.

I will also bring forward regulations under the Procurement Reform (Scotland) Act 2014 to extend this requirement to lower-value regulated contracts.

Our scope for tackling blacklisting head-on in Scotland has been somewhat limited by the fact that the Scottish Parliament does not have responsibility for employment law. But by taking this action, we are going as far as we can to reform the part of the law in relation to blacklisting that we do have responsibility for. This also goes further than any other part of the UK has gone to make sure that those who blacklist do not win public contracts.

Secondly, the committee may also be interested to know that I do not intend, for now, to take up the option to allow public bodies to reserve certain categories of contracts to mutuals, or similar organisations. Many respondents to the consultation said that they would see some advantages to this, while a larger number were more neutral in their response.

I am not convinced that this provision would be very useful in practice, however. The Directive makes clear that participation in competitions can be restricted only to those businesses which have an objective in pursuit of a public services mission linked to the particular contract being tendered, which reinvest profits with a view to achieving that objective, which have a structure of management or ownership which is based on employee ownership, and which have not been awarded a similar contract by the same public body using this procedure in the preceding three years. Additionally, any contract awarded under this procedure must not exceed three years. Collectively, these conditions mean that such a provision may rarely be applicable.

I am prepared to consider making such a provision in the future, however. This Article of the Directive has a review clause built into it, which requires the European Commission to assess its effects and report to the European Parliament and Council by 18 April 2019. It would seem to be sensible to await the outcome of that review, and to consider any conclusions it reaches.

Finally, I will be bringing forward regulations which will not allow contracting authorities to award regulated contracts on the sole basis of lowest price or lowest cost. This is in line with the Scottish Model of Procurement, which emphasises the importance of balancing cost, quality and sustainability in order to get the greatest possible value from public spending.

All three of the measures I have outlined here are areas where the Scottish approach to transposition of the Directives stands in marked contrast with the approach taken by the UK Government, and will, I believe, give Scotland a better, more balanced set of procurement regulations.

Infrastructure and Capital Investment Committee

7th Meeting, 2016 (Session 4), Wednesday 24 February 2016

Inquiry into the circumstances surrounding the closure of the Forth Road Bridge

Introduction

1. At its meeting on 16 December 2015 the Infrastructure and Capital Investment Committee agreed to hold an inquiry into the circumstances surrounding the closure of the Forth Road Bridge. This followed the closure of the bridge to all traffic on public safety grounds on 4 December due to the discovery of steelwork defects of a support beam.¹ Specifically, the remit of the inquiry is:

“To examine the management, monitoring and maintenance of the Forth Road Bridge principally in the 10 year period prior to its closure on public safety grounds in December 2015”

2. While the Committee understands that the closure of the Bridge brought frustration to travellers and continues to bring significant impact upon many businesses, it agreed that its inquiry should focus on the structural defects identified and whether these could have been avoided or dealt with differently. The Committee acknowledged that these related and hugely important issues might however be investigated at a later stage.

Current work

Written evidence

3. The Committee issued a [call for written evidence](#) on 16 December 2015 and the closing date for submissions was Friday 29 January 2016. A follow-up response from Transport Scotland to questions raised by the Committee on 20 January 2016 is attached in **Annexe A** while a full list of submissions received is listed in the **Annexe B**.

4. The Scottish Parliament Information Centre (SPICe) has also published a briefing on the [closure of the Forth Road Bridge](#). The briefing outlines the history of the Forth Road Bridge, how it has been managed, funding for bridge operations and looks in more detail at the events leading up to its temporary closure.

Evidence sessions

5. The Committee held a series of oral evidence sessions in January and February 2016.

6. At its first evidence session on 20 January 2016, the Committee heard evidence from representatives of Transport Scotland and Amey as well as bridge engineers from Arup and Fairhurst who had provided independent advice on the structural defects. On 27 January the Committee then spoke with representatives of

¹ The bridge was subsequently reopened to all traffic except Heavy Goods Vehicles (HGVs) on 23 December 2015. The restriction for HGVs is expected to be in place until mid-February 2016.

the former Forth Estuary Transport Authority (who had previously managed and maintained the Bridge up to June 2015). At its meeting on 3 February, the Committee heard from a panel a panel of bridge experts from across the UK.

7. At its final evidence session on the inquiry on Wednesday 24 February, the Committee will hear from the Minister for Transport and Islands.

Visits

8. On 19 January the Committee visited the Forth Road Bridge to see where the steelwork failure occurred and the interim solution which had been put in place.



Report

9. The Committee will take into account all evidence received on the closure of the Forth Road Bridge prior to publishing a report on its findings prior to dissolution of the Scottish Parliament in March 2016.

Andrew Proudfoot
Senior Assistant Clerk
February 2016

Annexe A

Response from Transport Scotland to questions raised by the Committee at the meeting on 20 January 2016

Please find below additional information in relation to offers we made in our oral evidence on 20th January 2016, to provide the Committee with some further information on the following:

- **The cost of the FRB's structural monitoring system (Column 21 of the [Official Report](#)):**
 - The structural health monitoring system is designed to measure global movements of the truss end links, lateral displacements, rotations, temperature and strains in the steelwork, at the location the strain gauges are fitted. From this the stresses in the steelwork, at specific locations, can be calculated to measure the effect of the transient loads (also known as live loads – wind, temperature and traffic.) The instrumented sections of the links can then be used to determine the load effects (stress distribution, bending moments and axial force) and local rotations in the members and at the pin joints. This sophisticated system, which is state of the art, was fitted by Straininstall (who are fitting the new system to the Queensferry Crossing) will cost circa £1.0m to £1.5m to install to all 8 pin joints.
- **The cost of the next phase (Phase 2) of repairs (Column 25):**
 - Phase 1 repairs (the splint works) cost in the region of £3.0m. The implementation of the Phase 2 repairs (new bracket arrangement) has been dynamic and rapid with additional resources and short timescales on deliveries used to accommodate an accelerated programme. The Phase 2 repairs will cost circa £2.65m to install at the key 4 no. main span areas (NE, NW, SE, SW). This action will allow the bridge to be re-opened to HGV traffic.
 - The cost for Phase 2 repairs at the remaining 4 truss end link locations will not be undertaken as emergency works and will be procured next financial year as planned works via a traditional tender method. The costs to complete the remaining truss end links is estimated to be approximately £2.65m.
- **The cost to replace all linkages (Column 31):**
 - The Phase 3 works are not yet fully designed and options will be looked at to achieve best value. It is planned that Phase 3 works will be taken forward at the 4 no. main span areas first. Whilst fully developed cost estimates are not yet available, the following give an indication of cost and budget required.

- The preliminary estimate to install the Phase 3 repair works to the 4 main span areas is circa £5.7m, with side span Phase 3 works being similar.
- **A comparison the works proposed in 2009 and the work that is currently being carried out (Column 34);**
 - The nature, scope and structural details of the works proposed in 2009 were not developed to a stage that would allow a comparison. For example it is not known if a bracket and hanger system would have been taken forward (as our Phase 2) or a bracket and pendulum system moving the load points above the deck. If the latter had been chosen a complete new bracket system would have been required to be retrofitted within the tower and the tower strengthened to accommodate it. Then additional works to the main deck truss to enable loads to be taken from the top and not the bottom of the truss end link post (this is not the member that failed but the one through which the lower pin passes). All these presume that these modifications and additional works would have possible whilst the bridge remained in use. It is highly unlikely that the costs would have been lower than what has been implemented at Phase 1 and Phase 2 as evidenced by FETA's original preliminary budget estimates.
 - The work inside the towers, associated with the Truss End Link Bracket weld strengthening of the existing brackets, was initiated/trialled by FETA at the NW tower leg as a trial in May 2015 and completed in summer 2015 by Amey through the handover transition. Similar strengthening works to the other 3 tower legs commenced immediately following the successful trial at the NW tower leg in summer 2015. These works were undertaken by Millar Callaghan, who has been undertaking the Phase 1 and 2 repairs, thus have an intimate knowledge of the bridge. The NW, NE and SE bracket strengthening works are complete and the SW bracket strengthening works will be completed when the Phase 2 scaffolding works are removed from this area to permit access.

Annexe B

Written submissions to the Infrastructure and Capital investment Committee

- [Audit Scotland](#)
- [Audit Scotland supplementary submission](#)
- [The Forth Estuary Transport Authority \(FETA\)](#)
- [Cllr Ian Chisholm, Board Member and Fife Council elected representative to the former Forth Estuary Transport Authority \(FETA\)](#)
- [Bob Hopewell, Civil Engineer](#)
- [Pete Wilkins](#)
- [Transform Scotland](#)

Infrastructure and Capital Investment Committee

7th Meeting, 2016 (Session 4), Wednesday 24 February 2016

Subordinate legislation

Title of Instrument

[The Public Contracts \(Scotland\) Amendment Regulations 2016 \(SSI 2016/47\)](#)

Type of Instrument

Negative

Laid Date

28 January 2016

Minister to attend the meeting

No

SSI's drawn to the Parliament's attention by Delegated Powers and Law Reform (DPLR) Committee

No

Reporting Deadline

14 March 2016

Purpose

1. The purpose of this instrument is to amend drafting errors in the Public Contracts (Scotland) Regulations 2015.
2. Specifically, these are cross referencing errors and an issue regarding the definition of "central government authority" in Regulation 2(1) of the Public Contracts (Scotland) Regulations 2015, previously highlighted to members at its meeting on [3 February 2016](#).

Procedure

3. Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.
4. If that is also agreed to, Scottish Ministers must revoke the instrument. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to

allow correspondence to be entered into or a Minister or officials invited to give evidence. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.

Consideration by the DPLR Committee

5. At its meeting on 9 February 2016, the DPLR Committee considered the instrument and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

Recommendation

6. **The Committee is invited to consider any issues that it wishes to raise in reporting to the Parliament on this instrument.**

**Jason Nairn
Assistant Clerk
February 2016**

Infrastructure and Capital Investment Committee

7th Meeting, 2016 (Session 4), Wednesday 24 February 2016

Subordinate legislation

Title of Instrument

[Water and Sewerage Services Licences \(Cross-Border Applications\) \(Scotland\) Order 2016 \(SSI 2016/52\)](#)

Type of Instrument

Negative

Laid Date

28 January 2016

Minister to attend the meeting

No

SSI's drawn to the Parliament's attention by Delegated Powers and Law Reform (DPLR) Committee

No

Reporting Deadline

14 March 2016

Purpose

1. This Order makes provision to allow for an application to the Water Services Regulation Authority in England and Wales (the Authority) for a water supply or sewerage licence to also be treated as an application to the Water Industry Commission for Scotland (the Commission) for a water services or sewerage services licence respectively in Scotland.
2. The Scottish Government states that the intention for these arrangements is to assist in developing a seamless join between the markets in Scotland and England in relation to retail services for all non-household customers, and for eligible water supply customers in Wales (i.e. water supply customers that use 50 megalitres of water a year under the restricted retail authorisation).
3. The licence for England & Wales and the licence for Scotland will remain separate and assessment processes will run separately by the respective regulators. However, as a result, an applicant will now only need to provide the necessary information once when applying for multiple applications across more than one of the geographical territories at a time which are the responsibility of the Authority and the Commission.
4. The UK Government is also making an equivalent Order.

Procedure

5. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds). Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument. If the motion is agreed to, the Parliamentary Bureau must then lodge a motion to annul the instrument for consideration by the Parliament.

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Recommendation

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Jason Nairn
Assistant Clerk
February 2016