

SUBORDINATE LEGISLATION COMMITTEE

Tuesday 30 May 2006

Session 2

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SUBORDINATE LEGISLATION COMMITTEE

18th Meeting 2006, Session 2

CONVENER

*Dr Sylvia Jackson (Stirling) (Lab)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

Mr Adam Ingram (South of Scotland) (SNP)

*Mr Kenneth Macintosh (Eastwood) (Lab)

*Mr Stewart Maxwell (West of Scotland) (SNP)

Mr Jamie Stone (Caithness, Sutherland and Easter Ross) (LD)

*Murray Tosh (West of Scotland) (Con)

COMMITTEE SUBSTITUTES

Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

Maureen Macmillan (Highlands and Islands) (Lab)

Ms Maureen Watt (North East Scotland) (SNP)

THE FOLLOWING ALSO ATTENDED :

Margaret Macdonald (Adviser)

CLERK TO THE COMMITTEE

David McLaren

ASSISTANT CLERK

Jake Thomas

LOCATION

Committee Room 6

Scottish Parliament

Subordinate Legislation Committee

Tuesday 30 May 2006

[THE CONVENER *opened the meeting at 10:31*]

Delegated Powers Scrutiny

Animal Health and Welfare (Scotland) Bill: as amended at Stage 2

The Convener (Dr Sylvia Jackson): I welcome members to the 18th meeting of the Subordinate Legislation Committee in 2006. I have apologies from Adam Ingram. I remind members to switch off their mobile phones and put their cards into their consoles.

Item 1 is delegated powers scrutiny of the Animal Health and Welfare (Scotland) Bill after stage 2. We must report to Parliament today, because the stage 3 debate is tomorrow. Members will recall that we considered the bill last week and asked the Executive a number of questions. The first question was about section 2, "Slaughter of treated animals", and section 8, "Specified diseases". We asked the Executive why, as we see it, there is no alternative provision in those sections for non-urgent situations and whether it would consider introducing an amendment to bring the procedure in those sections in line with that of sections 1 and 3.

The Executive has explained that those sections are designed to deal only with emergency situations in which the ability to act quickly is essential. It does not consider it necessary or appropriate, therefore, to provide an alternative procedure for non-urgent situations or to introduce an amendment. The Executive adds that the 28-day order-making procedure was specifically chosen for those sections to allow for an enhanced level of parliamentary scrutiny. Members will recall that we went through what that entailed. Are members content with the Executive's response?

Mr Stewart Maxwell (West of Scotland) (SNP): Yes, as long as we are persuaded that, as the Executive states, sections 1 and 3 are designed to deal with both emergency and non-emergency situations. That is why there is a different choice of procedure in those sections from that in sections 2 and 8. If that is the case, there is nothing else for us to pursue. Given that the stage 3 debate is tomorrow, there is no time for us to lodge amendments, other than manuscript amendments. I do not feel that strongly about the matter.

The Convener: It depends whether the committee feels sufficiently strongly about it to go through all that procedure.

Mr Maxwell: The legal brief says that amendments would be substantial. Given that the Executive clearly considers that the current situation is all right, I cannot imagine that it would accept our amendments at such a late stage. It would seem to be a lot of work for no good reason.

The Convener: And we have got it on the record now as well.

Mr Kenneth Macintosh (Eastwood) (Lab): We made our views known previously. At an earlier stage, we might have persuaded the Executive to use a different approach, but in this case it has assured us that it does not intend to use the two measures that we cannot express our views on—the two emergency orders—other than for emergency situations. At least we have that reassurance in print and on the record.

The Convener: We will report to the Parliament on that.

On section 5, "Animal gatherings", you might recall that we had concerns about a non-Executive amendment at stage 2. However, the Executive has lodged an amendment to remove that non-Executive amendment.

Mr Maxwell: That is good.

The Convener: Things have happened as we wanted.

On section 7, "Seizure of carcasses etc", we asked the Executive for clarification on the definition of "creatures". It explains that the meaning of the word is clear from its context in new section 36ZB of the Animal Health Act 1981 and, in its ordinary sense, is a broad term that means a created or animate being other than man. Are members happy with that explanation?

Mr Macintosh: I think that we made the point that the Executive could have used a different term to make the drafting more consistent, but the term is understandable and does not affect the vires of the bill. Therefore, we should note the explanation and take no action.

Members indicated agreement.

The Convener: I welcome Gordon Jackson to the meeting.

Gordon Jackson (Glasgow Govan) (Lab): I am sorry for being late. The 9 o'clock train was cancelled. For once, I have a reason.

The Convener: We are on agenda item 1. On section 34, "Animal welfare codes", we asked the Executive why there is no provision for prior consultation on the revocation of a code, as there

is for the publication of a code. The Executive explains that a code is most likely to be revoked as part of a replacement and therefore would be subject to consultation. It also reassures us that the revocation of a code is subject to the affirmative procedure. Are members content with that?

Mr Maxwell: We accepted last week that it was fine that, if a new code was created at the same time as one was revoked, there would be consultation. However, that was not the question; the question was about what would happen if, at any point, the Executive revoked a code without making a new one and there was no consultation on that revocation. The Executive's only answer is that the revocation order would be subject to the affirmative procedure, but so would revocation as part of a replacement. There would still be no consultation on a revocation that did not involve replacement.

The Convener: You might want to look at paragraph 17 of the legal brief, which gives a wee bit of help:

"the fact that consultation is not a statutory requirement does not prevent a consultation exercise being carried out if, in a particular case, that were appropriate. However, in the Executive's view, the only real question to be considered here would be whether the code should be revoked or not. In any event, it appears to the Executive that interested parties would be able to make relevant representations on this issue without the need for formal consultation."

Would you like us to get that on the record and state that we would expect consultation to take place?

Mr Maxwell: That is all that we can do, and I was not going to go any further than that. The point that you made is correct. There would be no consultation on a revocation order if there was no replacement, but I accept what the Executive says. However, some revocations might be contentious, as people might object to revocation without replacement. It is entirely reasonable that, if there is no statutory consultation, a revocation is at least well publicised so that the Parliament and interested parties know, and so that the latter can comment on it through their elected representatives.

The Convener: I welcome Murray Tosh to the meeting.

I hope that we have given you enough time to sort out your papers, Murray. We are discussing the revocation of animal welfare codes, in which you were interested the last time that we discussed the bill. If you look at the legal brief—

Murray Tosh (West of Scotland) (Con): I have not received one, convener.

The Convener: Okay. Paragraph 17 of the legal brief is about the fact that there would not

necessarily be any consultation about a revocation if a new code was not introduced. The Executive suggests that, because the affirmative resolution procedure applies, there would be sufficient time to deal with the matter. Relevant parties would be alerted and could make representations. As Stewart Maxwell said, that is the least that we would expect. If a revocation happened without something else being brought in, that would be contentious.

Murray Tosh: What opportunity is there for consultation purely on the basis that the affirmative procedure is to be used? The instrument is made, and it is unchangeable—unless the Executive, in response to the consultation, decides to withdraw the instrument and remake and re-lay it, but that strikes me as unlikely. It is not really much of a consultation concession to say that the affirmative procedure is to be used.

The Convener: I think that that is Stewart Maxwell's view, too.

Murray Tosh: Sorry—I was not listening when he spoke. If that is what he said, it was an incisive comment.

The Convener: Stewart Maxwell's main point is that some revocations could be contentious. If a revocation is contentious, it should perhaps be subject to consultation. It is a question of how strongly we feel about the matter.

Gordon Jackson: Put me down as a "don't feel strongly". If colleagues feel that it is an issue, I would be happy to support them, but I do not have a strong personal view.

The Convener: Do you have a particular opinion about it, Ken?

Mr Macintosh: No.

The Convener: So you are thinking along the same lines as Gordon Jackson.

Mr Macintosh: There is no statutory requirement for consultation, but the Executive has said that it is quite happy to consult if the matter in question is at all contentious. The instrument will be subject to the affirmative procedure. It is not as if it will go through the Parliament unchallenged—the Parliament has to agree to it. There are plenty of opportunities for people to make their views known. If other members feel strongly about it, that is fine, though.

The Convener: The first sentence of paragraph 17 of the legal brief says:

"The Executive observes that the fact that consultation is not a statutory requirement does not prevent a consultation exercise being carried out if, in a particular case, that were appropriate."

We have not got time—

Murray Tosh: That is a better response than saying, "Hey, it's affirmative."

The Convener: I am sorry; say that again.

Murray Tosh: That response is better than merely saying that the affirmative procedure is to be used.

The Convener: Yes.

Murray Tosh: The use of the affirmative procedure is almost incidental.

The Convener: I suppose that there is no opportunity, unless a relevant amendment is made, to make any points about the matter during the stage 3 debate.

Mr Maxwell: I do not feel strongly about it. The only point that I was making, which Murray Tosh repeated, was that saying that the affirmative procedure is to be used does not address the matter. However, as long as there will be notification and as long as the Executive is going on the record as saying that it will consult when there is, or is perceived to be, some debate about an issue, that is good. I hope that the Executive will stand by that. That is probably as much as we can achieve at the moment.

The Convener: That is on the record. That brings us to the end of today's consideration of the Animal Health and Welfare (Scotland) Bill. The stage 3 debate is tomorrow. With all the provisos that we have discussed, we are fairly content with the bill.

Executive Response

Management of Offenders etc (Scotland) Act 2005 (Supplementary Provisions) Order 2006 (draft)

10:43

The Convener: We had two issues with regard to the vires of the draft order. The first point was to do with incidental and supplementary provisions. The provisions of articles 2, 3 and 4 can properly be termed as supplementary provisions, and are therefore within the vires of section 22(1) of the Management of Offenders etc (Scotland) Act 2005. There was some concern about that. I refer members to paragraphs 35 and 36 of the legal brief.

In relation to the second point, which was on the vires of articles 6 and 7, the Executive agrees with us that there is an alternative means of achieving the same policy objective.

We could simply note the Executive's response and consider the new draft order that has been laid, which would take us to agenda item 3. I suggest that we should do so and consider how the Executive has dealt with the new order because there are still a number of issues to look at, as members will see from the legal brief. Are members content that we note the Executive's response under this agenda item and consider the new order under the next agenda item?

Members *indicated agreement.*

Draft Instruments Subject to Approval

Management of Offenders etc (Scotland) Act 2005 (Supplementary Provisions) Order 2006 (draft)

10:45

The Convener: I refer members to what the legal brief says about section 22(1) and section 22(2) of the Management of Offenders etc (Scotland) Act 2005. Paragraphs 35 and 36 of the legal brief outline our previous concerns. Members will remember our concerns about the Bankruptcy and Diligence etc (Scotland) Bill. Paragraph 38 of the legal brief states:

"In our view the provisions of this Order exceed what might reasonably be considered consequential on the provisions in the Act for the purposes of section 22(1) and introduce new substantive material which seems to us to go far beyond a defensible use of the powers."

Paragraph 40 says a little bit more. Paragraph 41 states:

"It is settled law that an order under a 'sweeper' power cannot alter the provisions of the enabling statute in the way proposed by this Order. And therefore it appears to us that there are doubts as to whether the Order is intra vires for this reason also."

That is pretty strong stuff.

The other issue relates to the previous article 7, which is the new article 6. Paragraph 45 of the legal brief analyses the matter, and paragraph 46 states:

"the policy purpose of article 6 at least"—

that is, the new article—

"could be achieved by an order under section 104 of the Scotland Act which would remove any doubts about competence. A similar observation is made regarding article 2."

I will give members time to read the legal brief because it is lengthy and complex.

Mr Macintosh: The Executive has used powers that are supposed to allow it to make

"any supplementary, incidental or consequential provision"

in order to make more substantive changes, which should be an on-going concern for the committee. We should do two things. We should write back to the Executive to say that we have strong concerns about the power being used in such a way and we should alert the lead committee to our concerns. Given that the Executive has accepted that it does not have to use powers that are outwith its devolved competence—I am referring to the issue of employers' liability, which it has found a different way around—and that it could address

our concerns about devolved competence with respect to the second point on article 6, we should suggest that it does so. There would then be no disagreement.

The Convener: You are referring to paragraph 46 of the legal brief, which states that an order could be laid—

Mr Macintosh:—under section 104 of the Scotland Act 1998. We should go back to the Executive, because the points that have been raised are important and we should report our concerns to the lead committee. Is there enough time to get a response?

The Convener: The 40-day period starts again.

Mr Macintosh: In that case, we can go back to the Executive.

The Convener: I tend to think that that is how to proceed.

Gordon Jackson: There are obviously real concerns. I do not have the expertise to know what to make of it all, but I certainly want to ask the Executive questions.

My only reservation is that what the Executive is doing seems to be sensible, but that is irrelevant in a sense. It seems good common sense to say that the positions in question should come into the politically restricted category. What would be achieved would be entirely sensible and appropriate. I like the intended result. Obviously, a community justice authority could say, "You can't be a member of this," but we should ask whether things are being done legally.

Mr Maxwell: In a sense, that is not the point.

Gordon Jackson: I know. It is not our business whether the result is good or bad.

Mr Maxwell: In every previous case on which we have corresponded on the matter with the Executive, it said that the powers would be interpreted in a limited way, that they have limited scope and that they could not be used in the way that concerned us. The Executive said that recently in relation to the Bankruptcy and Diligence etc (Scotland) Bill. However, the order breaches that very point, which has been made certainly for the three years for which I have been on the committee. I am sure that Gordon Jackson agrees that we should be concerned about the order because, even if the Executive's purposes are reasonable, what is to prevent it from doing the same thing again? A precedent will be set for a much wider use of the power.

Gordon Jackson: For the avoidance of doubt, I totally agree. I did say that the result is irrelevant. The Executive's purposes could be rotten, but we would still say that the order was okay as long as it was done properly. The purposes are not our

business. It is just ironic that, in this case, the purposes are good.

Murray Tosh: As in the old saying, the ends do not justify the means, especially as there are competent ways in which the Executive could achieve the same ends. It is important that, in our letter to the Executive, we make it clear that we are not quibbling about the policy intention. We are simply saying—"simply" is perhaps the wrong word, although it is simple in a sense—that there is a better way to achieve what the Executive wishes. The matter is not simple, at least in relation to paragraph 46 of the legal brief and the use of section 104 of the Scotland Act 1998.

On the other aspect, I agree with colleagues. In the three years for which I have been on the Subordinate Legislation Committee we have regularly seen sweepier clauses and we have had Executive officials here to assure us—at least in informal sessions—that such clauses are limited in scope. In effect, the Executive is now using a sweepier clause as a massive Henry VIII provision to entitle it to make significant changes to primary legislation. That is a qualitative step forward in the use of the provision and I have little doubt that, if it is accepted as it stands, it will be used as a precedent for further similar actions. Indeed, it might be used to extend the scope of ministerial power even further.

I do not think that this is a political issue. It is a parliamentary issue. Our job is to scrutinise, but this will take scrutiny out of our hands and put it into the hands of the Executive. All parties and all parliamentarians should be concerned about what is being done. The Executive should consider the matter again as an issue of some gravity and one that is out of all proportion to the policy issues that are raised.

The Convener: Absolutely.

Gordon Jackson: Agreed.

The Convener: I think that we should write quite a strong letter because the order would create a precedent.

Gordon Jackson: I say this tentatively. In the past—although not so much in your time, convener—we have asked officials to come to the committee when we thought that an instrument was going down a really bad path.

The Convener: I wonder whether we should do that in this case.

Gordon Jackson: Normally, we ask for a response, we get the response, and we are all snookered. I am open to other members' views, but in this case we should perhaps say to the Executive, "If you think we're wrong on this and you don't agree, you'd better come to the committee, explain why you're right and let us question you about it." Is that fair?

Murray Tosh: We do that so seldom, but it is a legitimate exercise and it will signal to the Executive how concerned we are about the issue.

The Convener: We will send a letter outlining our concerns and asking the officials to come and explain. Is that agreed?

Members indicated agreement.

The Convener: We will try to do that for next week.

Mr Macintosh: I agree with the gist of what Murray Tosh said but, for clarification, I do not think that the provision in the order is a Henry VIII power. The Executive is using the provision in lieu of primary legislation; it is not amending primary legislation. It is providing something that should be done by primary legislation.

Murray Tosh: It is not exactly a Henry VIII power.

The Convener: No.

Murray Tosh: It is more like a Henry VII-and-a-half power with more or less equal status. The legal advisers are on my side—I am sure that they take on Ken Macintosh on these issues with some trepidation.

Gordon Jackson: Do the officials have to come next week? I ask because I will have to send my apologies—I have to go to something else next Tuesday morning. As I suggested that we call the officials, I quite fancy being here.

The Convener: We will look at the timetable. It depends how it impacts on the lead committee. If we can fit it in so that it is on the agenda in two weeks' time when we can have you here, we will do so.

Gordon Jackson: It does not matter, but I am quite interested in the issue.

The Convener: Okay. Is that agreed?

Members indicated agreement.

The Convener: We will not write to the lead committee until we have met the officials.

Civil Partnership Act 2004 (Consequential Amendments) (Scotland) Order 2006 (draft)

Family Law (Scotland) Act 2006 (Consequential Modifications) Order 2006 (draft)

The Convener: There are no substantial points on the orders, but there is a minor point on each that we could raise informally with the Executive. Is that agreed?

Members indicated agreement.

Human Organ and Tissue Live Transplants (Scotland) Regulations 2006 (draft)

The Convener: The legal advisers have liaised with the Executive on drafting errors that were identified in the regulations. Those have now been rectified, so we thank the legal advisers for that. There are no other points, unless members have any. Is that agreed?

Members *indicated agreement.*

International Criminal Court (Immunities and Privileges) (No 1) Order 2006 (draft)

International Criminal Court (Immunities and Privileges) (No 2) Order 2006 (draft)

The Convener: No points arise on the orders. Are there any other points?

Members: No.

Scotland Act 1998 (River Tweed) Order 2006 (draft)

The Convener: Members may know that there has been a long period of discussion between Westminster and the Scottish Parliament on the order. The legal advisers have been involved in the matter. We have now more or less got there. I gather that a couple of typos will have to be rectified, but the order is at the draft stage. The affirmative procedure will be used. There is nothing else to tell the committee, if members are happy with that.

Gordon Jackson: Forgive me for being stupid, but what does the order do?

The Convener: If you give me two seconds, I have the information.

Murray Tosh: The brief promises that the legal adviser will speak to the item at the meeting. We are all sitting comfortably.

The Convener: The legal adviser gave me all the background, so that I could speak about the order. The explanatory note states that the order consolidates, with some amendments, the existing salmon and freshwater fisheries legislation. There was discussion with Westminster because the legislation covers both areas.

Murray Tosh: Is it, in terms of our report, a pure consolidation, or does it include policy changes?

Margaret Macdonald (Adviser): There are certain changes. The Tweed commissioners are reconstituted in a slightly different form and there are various modernisations throughout. This could have been incorporated in the consolidation of the salmon acts a few years ago, in which I think Gordon Jackson was involved, but it was decided to do it separately.

Gordon Jackson: I vaguely remember that there was a lot of fuss about the consolidation because a lot of people got very excited about it.

Murray Tosh: I asked the question about policy only out of interest. In respect of our remit, do any matters need to be drawn to our attention?

Margaret Macdonald: I sincerely hope not, because the order has been argued over for years.

Murray Tosh: You take personal responsibility for this.

The Convener: Margaret Macdonald takes a lot of responsibility.

Gordon Jackson: I will make a slightly facetious comment. Remember that the order is on fishing. Article 10(1) states:

"The Commission shall have a seal."

Murray Tosh: Not in the River Tweed, I hope.

Gordon Jackson: Does nobody think about things when they write them down?

The Convener: Wonderful. That is almost on a par with the regulation about the width and length of a pig. Well spotted, Gordon. You always provide a high note. Are members happy with the order?

Members *indicated agreement.*

Draft Code of Practice Subject to Annulment

Pesticides, Code of Practice for using plant protection products in Scotland (SE 2006/83)

10:59

The Convener: No points arise on the draft code, although there are many typos that we can raise with the Executive.

Mr Maxwell: For clarification, I assume that the fact that it says "Control of Pesticide", in the singular, does not affect the meaning in any way. That suggests that there is only one pesticide.

The Convener: It should say, "Pesticides".

Mr Maxwell: According to the legal brief, there is an

"s' missing in title of Act—Control of Pesticides (Amendment) Regulations 1997."

The Convener: There are several typographical errors in the draft code of practice, Stewart.

Instruments Subject to Annulment

Seed Potatoes (Fees) (Scotland) Amendment Regulations 2006 (SSI 2006/264)

Planning (National Security Directions and Appointed Representatives) (Scotland) Rules 2006 (SSI 2006/265)

11:00

The Convener: No points arise on the instruments. Do members want to comment?

Members: No.

Town and Country Planning (Listed Buildings and Buildings in Conservation Areas) (Amendment) (Scotland) Regulations 2006 (SSI 2006/266)

Planning and Compulsory Purchase Act 2004 (Transitional Provisions) (Scotland) Order 2006 (SSI 2006/269)

Town and Country Planning (Application of Subordinate Legislation to the Crown) (Scotland) Order 2006 (SSI 2006/270)

The Convener: We consider a package of instruments on planning.

Three points arise on SSI 2006/266. Are members content to ask the Executive to explain, first, the vires for subparagraph (ii) of the inserted provision; secondly, the numbering of the inserted paragraph; and thirdly, other references that are set out in the legal brief? We can also raise a large number of minor points with the Executive.

Mr Macintosh: A larger number of queries than we would expect arise on the regulations. Some points are relatively minor, but others are quite serious and affect the vires of the regulations. We should flag up all the points in a letter to the Executive.

The Convener: Yes. The legal adviser notes that the instruments have been "carelessly drafted".

Murray Tosh: I am sure that the legal adviser considered this, but the Planning and Compulsory Purchase Act 2004 removed from Scots law Crown immunity from planning controls for development. The Parliament agreed to a Sewel motion on the matter. The regulations make reference to the enabling power.

I am advised by the legal adviser that consideration was given to the 2004 act.

The Convener: We will write to the Executive as Ken Macintosh suggested.

Regulation of Care (Applications and Provision of Advice) (Scotland) Amendment Order 2006 (SSI 2006/272)

The Convener: The legal adviser suggests that we consider asking the Executive to explain the purpose of the citation, as an enabling power, of section 14(3) of the Regulation of Care (Scotland) Act 2001, given that that section does not appear to be relevant to the making of the order. We might also press the Executive further on consolidation.

Mr Maxwell: The order is the fourth substantive amendment of the principal order.

Gordon Jackson: It is always worth asking about consolidation after there have been four such amendments.

Mr Maxwell: I thought that the general rule was to consolidate after five amending instruments have been made.

The Convener: That is the general rule.

Gordon Jackson: We could point out that this is the fourth amending instrument.

The Convener: That would do no harm. There is also a minor point on the order. Do members have any other comments?

Members: No.

Regulation of Care (Fees) (Scotland) Amendment Order 2006 (SSI 2006/273)

The Convener: No substantive points arise on the order, although a minor point has been identified.

Regulation of Care (Requirements as to Care Services) (Scotland) Amendment Regulations 2006 (SSI 2006/274)

Robert Gordon University (Establishment) (Scotland) Order 2006 (SSI 2006/276)

The Convener: No points arise on the instruments. Are members content?

Members *indicated agreement.*

Designation of Institutions of Higher Education (Scotland) Order 2006 (SSI 2006/279)

The Convener: My brief suggests that we ask why article 3 omits words that are not in the 1992 order—it is not clear to me what that means.

Mr Maxwell: I do not get that, either.

Margaret Macdonald: The brief could have been clearer. Article 3 removes from the Designation of Institutions of Higher Education (Scotland) Order 1992 (SI 1992/1025) words that do not actually appear in the order.

Mr Maxwell: I understand now.

The Convener: Okay. Minor points also arise on the order.

Scotland Act 1998 (Agency Arrangements) (Specification) Order 2006 (SI 2006/1251)

The Convener: No points arise on the order. Murray Tosh looks as if he has a problem. Do you want to comment?

Murray Tosh: No. We are just having a sub-committee meeting on a point of detail.

Instruments Not Laid Before the Parliament

The Convener: The next meeting of the committee will take place on Tuesday 6 June.

Meeting closed at 11:05.

Planning and Compulsory Purchase Act 2004 (Commencement No 3) (Scotland) Order 2006 (SSI 2006/268)

11:04

The Convener: No points arise on the order.

Regulation of Care (Scotland) Act 2001 (Commencement No 7 and Transitional Provisions) Order 2006 (SSI 2006/275)

The Convener: No substantive points arise on the order, but a minor point has been identified. Are members content?

Members *indicated agreement.*

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