SUBORDINATE LEGISLATION COMMITTEE
Tuesday 23 June 2009

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SUBORDINATE LEGISLATION COMMITTEE

21st Meeting 2009, Session 3

CONVENER

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

DEPUTY CONVENER

*lan McKee (Lothians) (SNP)

COMMITTEE MEMBERS

- *Jackson Carlaw (West of Scotland) (Con)
- *Malcolm Chisholm (Edinburgh North and Leith) (Lab)
- *Bob Doris (Glasgow) (SNP)

Helen Eadie (Dunfermline East) (Lab)

*Tom McCabe (Hamilton South) (Lab)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con) Ross Finnie (West of Scotland) (LD) Christopher Harvie (Mid Scotland and Fife) (SNP) Elaine Smith (Coatbridge and Chryston) (Lab)

*attended

CLERK TO THE COMMITTEE

Shelagh McKinlay

ASSISTANT CLERK

Jake Thomas

LOC ATION

Committee Room 4

Scottish Parliament

Subordinate Legislation Committee

Tuesday 23 June 2009

[THE CONVENER opened the meeting at 14:15]

Decision on Taking Business in Private

The Convener (Jamie Stone): I welcome everyone to the 21st meeting of the Subordinate Legislation Committee in 2009. We have received apologies from Helen Eadie. I ask everyone to switch off their BlackBerrys and mobile phones.

Agenda item 1 is to decide whether to take item 6 in private. Under that item we will consider our approach to the consideration of the Interpretation and Legislative Reform (Scotland) Bill. We have been designated as the lead committee for the bill, which I think is an historic first for us. Given the nature of the discussion, it is appropriate that we take the item in private. Are members agreed?

Members indicated agreement.

Climate Change (Scotland) Bill: after Stage 2

14:16

The Convener: Item 2 is a big one: the Climate Change (Scotland) Bill. We are considering the bill as amended at stage 2. The time between stage 2 and stage 3 of the bill is very short—the barest minimum under standing orders—which is why we are considering the delegated powers in the amended bill so close to stage 3. The clerks will arrange for the committee's report on the bill as amended to be published overnight, so that it is available tomorrow morning prior to the stage 3 debate.

We will go through the bill step by step.

Are we content in principle with the delegated powers in section 2A, "Modifying the interim target", and are we content that they are subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: We may, however, wish to draw it to the attention of Parliament that no explanation has been given in the supplementary delegated powers memorandum as to the relationship between the sort of Community instrument that triggers section 2A(2), and the 42 per cent figure in the section.

Are we content with the amendments made to the delegated powers provisions in section 4, "Setting annual targets"?

Members indicated agreement.

The Convener: Are we content with the amendments made to the delegated powers provisions in section 6, "Modifying annual targets etc"?

Members indicated agreement.

The Convener: Are we content in principle with the amendments made at stage 2 to section 7, "Advice before modifying annual targets etc"?

Members indicated agreement.

The Convener: On section 7A, "Achievement of annual targets: domestic effort target", are we agreed that the delegated power contained in subsection (3) is acceptable in principle, and that it is subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 12, "The net Scottish emissions account", are we content that the amendments made at stage 2 in subsections (1A) to (1C) do not confer new delegated powers or

substantially affect the delegated powers in the section at stage 1?

Members indicated agreement.

The Convener: Are we content that the amendments made at stage 2 to section 14, "Scottish share of emissions from international aviation and international shipping", do not confer new delegated powers or substantially affect existing powers?

Members indicated agreement.

The Convener: On section 18A, "Limits on use of carbon units", are we content to report that the delegated powers contained in subsections (1) to (5) are acceptable in principle, and that they are subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 18B, "Modifying limits on use of carbon units etc", are we content that the delegated powers are acceptable in principle, and that they are subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 18C, "Advice before setting or modifying limits on use of carbon units etc", are we content with the additional provisions in relation to the delegated powers?

Members indicated agreement.

The Convener: On section 23, "Reporting on progress towards targets", are we content that the delegated powers in subsections (3A) and (4) are acceptable in principle, and that they are subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 24, "Scottish Ministers' response to reports on progress", are we content that the delegated power in subsection (2) is acceptable in principle, and that it is subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 36, "Duties of public bodies relating to climate change", are we content to report—as we reported at stage 1—that the power under subsection (1) to impose further duties on public bodies relating to climate change is potentially extremely wide in its scope, in particular as the further climate change duties that may be imposed by order are not clearly defined?

Malcolm Chisholm (Edinburgh North and Leith) (Lab): I think that the powers in the bill are fine, but it is fair enough that we draw them to the attention of Parliament. I do not have a problem with the powers, but I accept the committee's view

that they should be pointed out and that there might be a problem.

The Convener: That is very generous of you. I think that we might have anticipated that comment, given what you have said at previous committee meetings.

On section 36, we may wish to welcome the fact that subsection (A2), as inserted at stage 2, provides a definition of "public body" for the purposes of part 4 of the bill.

Malcolm Chisholm: There is a Government amendment to delete that section.

The Convener: Okay.

On section 38, "Reporting on climate change duties", are we content to report that we consider the amendments made to the delegated powers in subsection (1) to be acceptable, and that it is subject to negative resolution procedure?

Members indicated agreement.

The Convener: On section 46, "Variation of permitted times for making muirburn", are we content that the power as amended is acceptable and that it is subject to affirmative resolution procedure?

Members indicated agreement.

The Convener: On section 47, "Power to modify functions of Forestry Commissioners", do we agree to draw the Parliament's attention to the width of that power to modify the functions of the forestry commissioners as regards Scotland in relation to climate change purposes, while noting that there is no longer a power to permit the delegation of functions to other bodies?

Members indicated agreement.

The Convener: On section 50, "Non-domestic buildings: assessment of energy performance and emissions", do we agree to draw it to the Parliament's attention that there is now a requirement to make regulations under subsection (1) rather than simply a power to do so? Secondly, do we agree to draw Parliament's attention to the fact that the power must be exercised to require owners to take steps to improve energy performance and reduce emissions? That is a strong power.

Members indicated agreement.

The Convener: Are we otherwise content that all of the powers under section 50 are now to be exercisable by affirmative resolution procedure?

Members indicated agreement.

The Convener: We may note that in view of that requirement to provide regulations, a tension may arise between that obligation on ministers and the

need for such regulations to be approved by the Parliament.

On section 50A, "Living accommodation: assessment of energy performance and emissions", are we content to draw the Parliament's attention to the fact that a new regulation-making power was introduced at stage 2 that enables the Scottish ministers to make provision about the energy performance of living accommodation similar to that imposed under section 50 in relation to non-domestic buildings?

Members indicated agreement.

The Convener: Secondly, are we satisfied that the powers under section 50A are to be exercisable by affirmative procedure?

Members indicated agreement.

The Convener: On section 50B, "Council tax reductions to promote energy efficiency", are we content to draw Parliament's attention to the new regulation-making provision and the fact that no justification has been provided in the supplementary DPM as to why it is appropriate to make that provision through subordinate legislation?

Members indicated agreement.

The Convener: We may wish to note that ministers are placed under an obligation to make regulations but can be prevented from so doing if Parliament does not approve what is laid before it. Given the impact of the power if Parliament considers it acceptable, the committee may consider that the power should be exercisable subject to affirmative procedure.

On section 50D, "Review of provision made by virtue of or under sections 50C and (Amounts of reductions in non-domestic rates)", are we content to draw Parliament's attention to the new regulation-making provision, with particular reference to the financial impact of the power provided to the Scottish ministers? Given the significance of the power, if it is considered acceptable the committee may consider that it should be exercisable subject to affirmative procedure.

Members indicated agreement.

The Convener: On section 51A, "Air source heat pumps and micro wind turbines in domestic properties: permitted development rights", are we content to draw the Parliament's attention to the duty placed on Scottish ministers to exercise their powers under section 30 of the Town and Country Planning (Scotland) Act 1997 to achieve the effect set out in section 51A(2)? Secondly, are we content with the additional consultation requirement imposed by section 51A(4)?

Members indicated agreement.

The Convener: I apologise for doing all the talking. If anyone feels like asking a question, please do so.

On section 51B, "Microgeneration in non-domestic buildings: permitted development rights", are we content to draw the Parliament's attention to the duty placed on the Scottish ministers to exercise their powers under sections 30 and 31 of the Town and Country Planning (Scotland) Act 1997 to achieve the effects set out in section 51B(2)? Secondly, are we content with the additional consultation requirement imposed by section 51B(4)?

Members indicated agreement.

The Convener: On section 51E, "Scottish civil estate: supplementary", is the committee satisfied with the terms of the new power set out in the section and that its exercise will be subject to affirmative procedure?

Members indicated agreement.

The Convener: Are we content that the broad powers in section 52, "Waste prevention and management plans", section 53, "Information on waste", section 54, "Recyclable waste: facilities for deposit etc", section 55, "Recyclable waste: facilities for deposit at events etc", section 56, "Procurement of recyclate", and section 57, "Targets for reduction of packaging etc", are now subject to super-affirmative procedure, which requires a standstill period of at least 30 parliamentary sitting days?

Members indicated agreement.

The Convener: On section 58, "Deposit and return schemes", are we content to find the powers as amended acceptable and to note also as acceptable that those subject to affirmative procedure are now subject to super-affirmative procedure, which requires a standstill period of at least 30 parliamentary sitting days?

Members indicated agreement.

The Convener: We are almost at the end of the bill.

On section 58A, "Deposit and return schemes: designation of scheme administrator", are we content to draw the Parliament's attention to the power to the extent that it may be used to modify the functions of existing bodies? Are we otherwise satisfied that the process set out the section is subject to super-affirmative procedure?

Members indicated agreement.

The Convener: On section 58B, "Power to establish scheme administrator", are we content to draw Parliament's attention to the breadth of this power, in particular so far as it enables a body established under it to

"do anything which appears to it ... to be necessary or expedient for the purpose of, or in connection with, the exercise of its functions in relation to a deposit and return scheme"

or

"to be conducive to the exercise of those functions"?

Are we otherwise satisfied that any order made under section 58B is to be made by super-affirmative procedure?

Members indicated agreement.

The Convener: On section 59, "Charges for supply of carrier bags", are we content to note as acceptable that those powers that were subject to affirmative procedure are now subject to superaffirmative procedure, which requires a standstill period of 30 parliamentary sitting days?

Members indicated agreement.

Ian McKee (Lothians) (SNP): It is indeed an important topic.

The Convener: It is certainly a super-important topic to one of my colleagues.

Ian McKee: The phrase "carrier bags" is written on his heart.

Marine (Scotland) Bill: Stage 1

14:28

The Convener: The next item is consideration of the delegated powers in the Marine (Scotland) Bill, a piece of legislation that I have looked at with great interest and about which many questions have arisen in not only our legal team's minds but, I am sure, our own. This is our first look at the bill, which we will consider again after the summer recess. In the meantime, we need to consider a number of points.

On section 3(4), which sets out the power to designate any part of the Scottish marine area as a Scottish marine region, are we content that the proposed power is acceptable in principle and that affirmative procedure is appropriate?

Members indicated agreement.

The Convener: Section 17(3) sets out powers to amend section 17(1) so as to add or remove any activity from the list of licensable marine activities. First, are we content to ask the Scottish Government about the justification for the power being completely open, in that it does not contain any limitation on the nature, scope or extent of any modification that may be made to the list of licensable marine activities? Secondly, are we content to ask the Government with reference to what criteria, if any, it will determine that a particular activity should be added to or removed from the list of licensable marine activities and whether they could be specified in the bill?

Ian McKee: I wonder about the use of the phrase "if any". Can we not assume that there are criteria?

The Convener: That is for the Government to say. I am taking a completely unbiased approach to the matter.

Is the committee content to ask those questions?

Members indicated agreement.

14:30

The Convener: On section 18(1)(b), which sets out the power to determine fees to accompany licence applications, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: On section 20(4)(a), which sets out the power to specify the persons or bodies to be consulted with regards to each licensing application, are we content that the proposed

power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: On section 20(7), which sets out the power to make further provision on the procedure to be followed in connection with applications for and the grant of licences, are we content to ask the Scottish Government, given that the power does not appear to be addressed in the DPM, about the justification for it in accordance with rule 9.4A of standing orders? I believe that there is a gap in the DPM.

Malcolm Chisholm: Something is addressed, but I am not really clear about what it is.

The Convener: Precisely. I suggest, in passing, that DPMs in future could be slightly better than the example before us. However, we will give the Government the chance to respond. Are members agreed?

Members indicated agreement.

The Convener: Section 21(2) sets out the power to prescribe under subsection (7B) of section 210 of

"the Local Government (Scotland) Act 1973 (c.65)"

the standard daily amount that may be recovered in respect of an inquiry in relation to marine licences. In relation to section 21(2), are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 24(1) sets out the power to specify activities that will not need a marine licence. First, are we content to ask the Scottish Government about its justification for the power completely open, in that it contains no limitation on the nature, scope or extent of activities that may be specified as not needing a licence or not needing a licence if conditions specified in the order are satisfied? Secondly, are we content to ask the Government with reference to what criteria—if any, Dr McKee—it will determine that a particular activity should be specified in an order under section 24(1) and whether any such criteria could be set out in the bill?

Members indicated agreement.

The Convener: We thank our two Government colleagues for their restrained approach in this meeting.

Section 25(1) sets out the power to allow licensable marine activities that fall below a specified threshold of environmental impact to be registered rather than licensed. My mind is starting to wander reading out all this.

Is the committee content to ask the Scottish Government whether, given that regulations made under section 25(1) will specify the "threshold of environmental impact" for the purpose of determining whether a particular licensable marine activity will not need a licence but will instead be registered, it can explain the need for the regulations to

"define or elaborate the meaning of ... 'fall below', ... 'registered',

and

"'specified threshold of environmental impact",

as set out in section 25(2), and how the power may be exercised?

Ian McKee: Absolutely.

The Convener: We look forward to the response with considerable interest.

Bob Doris (Glasgow) (SNP): We will have to wait until after the recess, convener.

The Convener: You will just have to contain yourself.

On section 27(1), which makes provision for applications under section 36 of the Electricity Act 1989 and applications for a marine licence to be considered together, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: On section 29(1), which sets out the power to make provision for any person who applies for a marine licence to appeal against a decision made under section 22, are we content to ask the Scottish Government, given the importance of providing an appeals regime that is compliant with the European convention on human rights, to explain why in this case it is considered necessary to use subordinate legislation for this purpose?

Members indicated agreement.

The Convener: Section 37(1) deals with the power to make provision about the imposition of fixed monetary penalties in relation to offences under part 3, and section 39(1) deals with the power to make provision about the imposition of variable monetary penalties in relation to offences under part 3. Are we content to ask the Scottish Government what the justification is for two civil sanction regimes—fixed penalty and variable penalty—on what basis or with regard to what criteria the Scottish ministers will determine which regime to apply in a particular case, and why the maximum variable monetary penalty is not specified in the bill? Shall we put those three pertinent questions to the Government?

Members indicated agreement.

The Convener: On section 42(1), which deals with the power to provide for any delegable marine licensing functions to be exercised by a delegate, are we content that the proposed power is acceptable in principle and that the affirmative procedure is appropriate?

Members indicated agreement.

The Convener: On section 45(2), which deals with the powers to prescribe particulars to be contained in a register, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: On section 45(3), which deals with the power to set out further provisions regarding maintenance of the register of licensing information, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 52(1) deals with the power to make provision for any person to whom a notice that is listed in subsection (2) is issued to appeal against that notice. Given the importance of providing a convention-compliant appeals regime, are we content to ask the Scottish Government to explain why it is considered necessary to use subordinate legislation for that purpose in this particular case?

Members indicated agreement.

The Convener: Section 54(3) deals with the power to provide for marine fish farming not to constitute development. First, does the committee agree that we should ask the Scottish Government what the justification is for the power—that is, for moving aquaculture developments out of the normal planning system and into the marine licensing regime, in which different mechanisms and criteria will apply? That question sprung out at me big time. Secondly, does the committee agree that we should ask the Scottish Government what the justification is for moving aquaculture developments out of the normal planning system and into the marine licensing regime on a case-bycase—that is, an area-by-area—basis rather than by doing that all at once by an appropriate amendment to the relevant primary legislation, without the requirement for a power? Do members agree that we need clarification on that?

Members indicated agreement.

The Convener: Section 58(1) deals with the power to designate any area of the Scottish marine protection area as a nature conservation marine protected area, a demonstration and research marine protected area or an historic

marine protected area. Given the significance of designation as a nature conservation MPA, demonstration and research MPA or historic MPA and of the consequences and obligations that follow thereon, are we content to ask the Scottish Government why it considers that it is not necessary for the power to designate a marine protected area under section 58(1) to be exercised by statutory instrument?

Members indicated agreement.

The Convener: Section 64 deals with the power to amend or revoke a designation order under section 58. Members may wish to note that it relates to the power under section 58(1). We may wish to return to that power on receiving a response to our question about section 58(1). We shall see what happens with that.

On section 68(2), which deals with the power to provide for procedures to be followed at hearings, are we happy that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 74(1) deals with the powers to make marine conservation orders. Are we content to ask the Scottish Government to explain fully why negative procedure is considered sufficient scrutiny?

Members indicated agreement.

The Convener: Section 77(1) deals with the power to make an urgent marine conservation order. Are we content to ask the Scottish Government what the intended effect of section 77(2)(a) is, given that it is not necessary to specify such detail for negative Scottish statutory instruments?

Members indicated agreement.

The Convener: Section 77(6) deals with the power to make an urgent continuation order. The power relates to powers at sections 74(1) and 77(1). We may wish to return to it after we have considered the answers to our questions on those two powers. Is it okay to come back to that?

Members indicated agreement.

The Convener: On section 79(2), which deals with the power to provide for procedures to be followed in relation to any hearing on a proposed marine conservation order, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 93 deals with the penalties in regulations that implement the habitats directive for the Scottish marine area. Are

we content that the proposed power is acceptable in principle and to note that, under section 2(2) and paragraph 2(2) of schedule 2 to the European Communities Act 1972, the Scottish Government may choose the affirmative or negative procedure?

Members indicated agreement.

The Convener: On section 102(1), which deals with the powers to introduce fees for seal licences, are we content that the proposed power is acceptable in principle and that negative procedure is appropriate?

Members indicated agreement.

The Convener: Section 144(1) is on ancillary provision. Are we content to ask the Scottish Government to explain its approach to the procedure applicable to ancillary powers in more detail, given that they are significant powers that should be tailored to the individual circumstances of the bill in question?

Members indicated agreement.

The Convener: On section 148(1), which deals with the power to appoint the day on which the provisions of the act come into force, are we content that the proposed power is acceptable in principle and that, in accordance with the normal practice with respect to commencement orders, no procedure is appropriate?

Members indicated agreement.

Instruments subject to Annulment

National Health Service (Superannuation Scheme, Pension Scheme and Injury Benefits) (Scotland) Amendment (No 2) Regulations 2009 (SSI 2009/208)

14:40

The Convener: Members will be glad that we have moved from primary legislation to instruments subject to annulment.

Are we content to report to the lead committee and to the Parliament that an error has been made in regulation 21, on the replacement of regulation 2.C.3 of the National Health Service Pension Scheme (Scotland) Regulations (SSI 2008/224), at 2.C.3(22), in respect of the reference to the 2008-09 scheme year? Are we also content to report that the Scottish Government anticipates that that error will be corrected in further amending regulations, which are due to come into force in October 2009?

Members indicated agreement.

Looked After Children (Scotland) Regulations 2009 (SSI 2009/210)

The Convener: Are we content to accept the explanation that has been provided for the failure to cite section 17(1) of the Children (Scotland) Act 1995 and the erroneous reference to subsections (2) and (3) in the preamble to the regulations, and to note the indication that matters are to be addressed by way of a correction slip?

Members indicated agreement.

Contaminants in Food (Scotland) Regulations 2009 (SSI 2009/215)

The Convener: Are we content to report the regulations to the lead committee and to the Parliament on the basis that they contain a drafting error in that they fail to identify correctly transitional provisions for the purpose of excluding them from the scope of the offence provision in regulation 3? The committee may also wish to recommend that the Government take steps to correct that error so that the extent of the criminal offences imposed is clear in the regulations. Are members content to do so?

Members indicated agreement.

Knife Dealers (Licence Conditions) Order 2009 (SSI 2009/217)

The Convener: Are we content to report that an explanation as to the powers used to make the order was sought from the Government and that the committee is satisfied with the response and the order?

Members indicated agreement.

Knife Dealers (Exceptions) Order 2009 (SSI 2009/218)

The Convener: Are we content to report the order to the lead committee and the Parliament on the ground that its meaning could be clearer in relation to the extent to which persons are to be treated as "qualified to teach" fencing? Clarity is particularly important, as only "qualified" persons who hire, lend or give a fencing sword will be exempt from the requirement to hold a licence, and hiring, lending or giving a sword without a licence is to be a criminal offence from 1 September 2009.

Ian McKee: That is important.

The Convener: Indeed.

Environmental Impact Assessment (Scotland) Amendment Regulations 2009 (SSI 2009/221)

The Convener: Are we content to report the regulations on the basis that an explanation has been sought and provided by the Scottish Government in relation to regulation 9A, with which the committee is satisfied?

Members indicated agreement.

Marketing of Horticultural Produce (Scotland) Regulations 2009 (SSI 2009/225)

The Convener: Are we content to report the regulations as set out in the summary of recommendations?

Members indicated agreement.

Seed Potatoes (Scotland) Amendment Regulations 2009 (SSI 2009/226)

The Convener: Are we content to report the regulations on the grounds that, in relation to the new regulation 8(5)(b) of the Seed Potatoes (Scotland) Regulations 2000 (SSI 2000/201) inserted by regulation 4, as read with the definition of the "region of origin" in regulation 3, we consider that the meaning and effect of that subparagraph (b) could be made clearer; and in relation to the new regulation 8(6) inserted by regulation 4, we consider that, having regard to the intended meaning and effect as explained in

the Government's response to the committee, the meaning and effect of that paragraph (6) could be made clearer?

Members indicated agreement.

Horse Identification (Scotland) Regulations 2009 (SSI 2009/231)

The Convener: Are we content to report to the lead committee and to the Parliament that responses have been provided by the Scottish Government to the committee in relation to regulations 4(2), 5(2), 11, 14(4) and 17(2), with which the committee is satisfied?

Members indicated agreement.

Brucellosis (Scotland) Order 2009 (SSI 2009/232)

The Convener: Are we content to report the order as set out in the summary of recommendations?

Members indicated agreement.

Instruments not laid before the Parliament

Fire and Rescue Authorities (Appointment of Chief Inspector) (Scotland) Order 2009 (SSI 2009/235)

Criminal Proceedings etc (Reform) (Scotland) Act 2007 (Commencement No 7) Revocation Order 2009 (SSI 2009/238)

Health Boards (Membership and Elections) (Scotland) Act 2009 (Commencement No 1) Order 2009 (SSI 2009/242)

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (Contempt of Court) 2009 (SSI 2009/243)

Act of Adjournal (Criminal Procedure Rules Amendment No 3) (Confiscation Proceedings) 2009 (SSI 2009/244)

14:46

The committee agreed that no points arose on the instruments.

The Convener: As agreed earlier, we now move into private session.

14:46

Meeting continued in private until 14:50.

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