AUSTRALIA

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Mr Stepan Kerkyasharian
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By email: vilificationconsultation@justice.nsw.gov.au

Dear Dr Kerkyasharian,

Review of serious racial vilification offence

Kingsford Legal Centre (KLC) welcomes the review of the NSW offence of serious racial vilification (s 20D, *Anti-Discrimination Act 1977* (NSW) (**ADA**)). We are concerned that without significant amendments, the offence of serious racial vilification will continue to be difficult to prosecute, as has been the experience to date in NSW. Racial vilification is a serious problem in Australia. One in five Australians say they have experienced racist speech, including verbal abuse, racial slurs and name calling.[1] One in twenty Australians have been attacked due to their race.[2] Due to the prevalence of racism, KLC submits ensuring the effectiveness of racial vilification laws is integral to provide access to effective remedies and to send a clear message that such behavior is unacceptable in modern Australian society.

[1] Australian Human Rights Commission campaign, 'Racism. It stops with me.' <itstopswithme.humanrights.gov.au/why-racism> (at 27 January 2017).
[2] Australian Human Rights Commission campaign, 'Racism. It stops with me.' <itstopswithme.humanrights.gov.au/why-racism> (at 27 January 2017).

About Kingsford Legal Centre

Kingsford Legal Centre is a community legal centre that has been providing advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. We provide general advice on a wide range of legal issues. We also have a specialist discrimination law service (NSW wide), a specialist employment law service and an Aboriginal Access program. In addition to this work, we undertake law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Recommendations

KLC recommends that:

1. The threshold in s 20D(1) of 'severe' or 'serious' hatred, contempt or ridicule be removed and replaced with "expresses hostility against, or brings into contempt or ridicule";
2. Section 20D be extended to apply to conduct constituting serious racial vilification without requiring that the conduct be a public act. Alternatively, the definition of 'public act' in section 20B be amended to include any conduct that is within the hearing of people in a public place;
3. The requirement of having 'knowledge' in section 20B(c) be removed;
4. The means element in sections 20D(a) and 20D(b) be removed;
5. Division 3A of the ADA be amended to provide coverage for persons of presumed or imputed race;
6. Section 20D be amended to provide coverage where a person is subject to serious racial vilification based on their associates;
7. The time limit for commencing prosecution for the offence of serious racial vilification be extended to 12 months from when the offence was alleged to have been committed.
8. The reliance on intent in section 20D be removed. Alternatively, if the intent requirement is retained, the section should be amended to state that recklessness is sufficient to establish intention in section 20D;
9. The requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification be removed;
10. The President of the ADB be given the power to refer matters to the DPP without receipt of a formal complaint if they believe the matter falls within section 20D;

11. The term 'incite' in sections 20C and 20D be replaced with 'promote';
12. The offence of serious racial vilification be extended to include extreme speech that promotes racial hatred;
13. The maximum punishment for imprisonment be increased to 3 years;
14. The maximum penalty units for an individual be increased to 100;
15. The maximum penalty units for a corporation be increased to 200.
16. Protection against discrimination on the basis of religion be introduced into the ADA;
17. Protection against religion vilification and serious religious vilification be introduced into the ADA;
18. The Government make similar amendments to all serious vilification provisions contained in the ADA;
19. If these amendments are accepted, all serious vilification offences in the ADA be moved to the *Crimes Act 1900.*

KLC's experience advising on section 20D of the ADA

In 2016 KLC gave 214 advices and opened 33 cases in discrimination law. 19% of these advices and 26% of the cases were for race discrimination matters. While we have advised a large number of clients on racial discrimination and vilification, we have had little exposure to the NSW offence in section 20D of the ADA. This is not surprising given that there have been no successful prosecutions of this offence. Where we have given advice on racial vilification, prosecution under section 20D has not been possible because of the high threshold requirements of the offence, even in cases where other criminal offences have been committed.

Case study: Mae

Mae sought advice from us about her options for addressing racial abuse and threats of violence. She was followed by three people and sought refuge in a nearby medical centre. They followed her into the centre, shouted racial abuse and made threats of extreme violence. Mae feared for her safety and was very distressed by the incident. The President of the Anti-Discrimination Board did not refer the case for prosecution as he did not feel that the threshold requirements for serious vilification were met. At least one of the offenders was subsequently convicted of other criminal offences.

In our experience, there are various reasons why clients may not wish to lodge a complaint with the Anti-Discrimination Board NSW, engage in conciliation, or commence civil proceedings. Complaints and proceedings can cause further stress for clients and may not provide the remedies that they seek. Prosecution by the state for racial vilification sends an important message that serious racial vilification is not acceptable in our society and that victims are equal members of the community whose rights will be protected by the state.

Freedom of speech and freedom from racial vilification

KLC acknowledges the importance of freedom of speech as a fundamental human right. However, this right is not absolute and may be limited to protect competing rights. We believe that the suggestions made below do not unduly limit freedom of speech, and create an appropriate balance between maintaining freedom of speech and freedom from racial discrimination and vilification.

Australia is obliged under the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *International Convention on the Elimination of All Forms of Racial Discrimination* (**ICERD**) to ensure that no one is subjected to racial hatred.[3]

Article 20(2) of the ICCPR provides:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

Article 4(a) of ICERD requires that states parties:

> *Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...*[4]

[3] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26; *International Convention on the Elimination of All Forms of Racial Discrimination,* opened for signatures 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 1 & 4.

[4] ICERD, art 4(a).

As provided in Article 19 of the *International Covenant on Civil and Political Rights*, freedom of expression carries with it special duties and responsibilities[5]. Freedom of expression is not an absolute right and may be restricted where necessary to respect others' rights.[6] Article 19(3) of the ICCPR requires any restrictions on freedom of expression to be provided by law, be necessary, and to pursue a legitimate aim (for the protection of national security or public order, or public health or morals).[7] As such, restrictions on freedom of expression are permissible if 'they are necessary in order for the State to fulfil an obligation to prohibit expressions on the grounds that they cause serious injury to the human rights of others'.[8] The UN Human Rights Committee has found that laws offering protection against racial vilification meet these criteria[9]. KLC submits that strengthening section 20D protections strikes the appropriate balance between freedom of speech and freedom from racial vilification.

Whether the threshold for prosecuting the offence of serious racial vilification in the ADA should be amended

Section 20D of the ADA provides:
(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

> (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
> (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

KLC submits that the threshold for prosecuting the offence of serious racial vilification should be amended. Our arguments are detailed below.

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[5] ICCPR, art 19(3).
[6] ICCPR, art 19(3).
[7] ICCPR, art 19(3).
[8] Frank La Rue, *2010 Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc: A/HRC/14/23 (20 April 2010) [79(h)].
[9] For example, *JRT and WG Party v Canada*, UN Human Rights Committee, Communication No. 104/1981, U.N. Doc. CCPR/C/OP/2 (1984).

Section 20D sets a high threshold for prosecution

Section 20D the ADA sets a high threshold for prosecution which inhibits its efficacy. Despite the offence being introduced almost 30 years ago, it has never been successfully prosecuted. KLC understands that referrals have been made to the NSW Director of Public Prosecutions (DPP), but they have not decided to prosecute. We believe this is because the threshold for prosecuting has been set too high.

KLC submits that the threshold for prosecution under section 20D should be lowered. Section 20D requires that the acts complained of must incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race for a case to be successful. This requires the prosecutors to present evidence to prove that the conduct has incited a third party, setting a high onus of proof which is difficult to discharge.

We note this high standard is not required by similar provisions in New Zealand legislation. Under New Zealand's racial harassment laws, it is enough that a person 'expresses hostility against, or brings into contempt or ridicule', not that it need to be severe or serious.[10] KLC submits the current test for serious racial vilification should be made easier to satisfy in order to be in line with community expectations and to deter individuals from engaging in such conduct.

Recommendation

1. The threshold in s 20D(1) of 'severe' or 'serious' hatred, contempt or ridicule be removed and replaced with "expresses hostility against, or brings into contempt or ridicule".

[10] *Human Rights Act 1993* (NZ) s 63(1).

Public act requirement

Case study – Ravi and Madhu

Ravi and Madhu an older couple, recently moved to a new home. They were born in India and lived in Australia for more than 30 years. They came to KLC for help about their neighbour. The man next door would verbally abuse them over the back fence calling them 'monkeys' and telling them to 'go back to the jungle'. The racist abuse was constant was seriously affecting their mental health and their enjoyment of their new home. Unfortunately these comments weren't made in 'public' and weren't overheard by anyone else so they could not make a racial vilification complaint.

KLC recommends that section 20D be amended to apply to all serious racial vilification, without limiting the location to a public act. This would be consistent with the international human rights obligations contained in Article 4(a) of the International Covenant on the Elimination of all Forms of Racial Discrimination.[11] It is also consistent with other offences involving threatened violence, which do not require violence to be threatened in public.[12] Alternatively, the scope of 'public act' could be expanded. Section 20B currently defines public act to include, amongst other aspects, conduct observable by the public. This could be amended to include any conduct that is within hearing of people in a public place.

Recommendation

2. Section 20D be extended to apply to conduct constituting serious racial vilification without requiring that the conduct be a public act. Alternatively, the definition of 'public act' in section 20B be amended to include any conduct that is within the hearing of people in a public place.

[11] We note that Australia has made a reservation to this article, however in doing so, it also indicated its intention to ask Parliament to legislate provisions implementing this article. The Committee on the Elimination of Racial Discrimination has also indicated that this article is mandatory (General Recommendation VII) and repeatedly requested Australia to remove its reservation and implement article 4 in legislation.

[12] For example, offences of stalking or intimidation with intent to cause fear of physical or mental harm (s 13, *Crimes (Domestic and Personal) Violence Act 2007*); violent disorder (s 11A, *Summary Offences Act 1988*); documents containing threats (s31, *Crimes Act 1900*); affray (s 90, *Crimes Act 1900*); threatening to destroy or damage property (s 199, *Crimes Act 1900*).

Knowledge requirement

Section 20B imposes further barriers to prosecution with its requirement of knowledge. Section 20B(c) requires that for the distribution or dissemination of matters to be a public act the person must have 'knowledge' that the material will 'promote or express' hatred, serious contempt or severe ridicule. This 'knowledge' is both almost impossible to prove, but also irrelevant to determining whether the matter was distributed or disseminated to the public. KLC disagrees with the current reliance on intention in section 20D. KLC recommends that the section is amended to expressly state that proof or knowledge of intent is not required to establish the offence, as per the NSW Law Reform Commission's recommendations.[13] Alternatively, if the intent requirement is retained, we suggest clarifying that recklessness is sufficient to establish intention in section 20D. We note that this is consistent with general principles of criminal law.

Recommendation

3. The requirement of having 'knowledge' in section 20B(c) be removed.
4. The reliance on intent in section 20D be removed. Alternatively, if the intent requirement is retained, the section should be amended to state that recklessness is sufficient to establish intention in section 20D.

Means element

20D(1)(a) and (b) include a 'means' element, requiring that the offending conduct be by means of threatening physical harm towards, or towards any property of, the person or group of persons; or by inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

KLC believes the means element unnecessarily restricts successful prosecution of this offence, as in effect, it would have to be proved that the conduct fell within the means listed above. KLC notes that conduct that does not fall within these means, such as an implied threat, would be almost impossible to prosecute. We recommend that the means element be removed.

Recommendation

5. The means element in sections 20D(a) and 20D(b) be removed.

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[13] New South Wales Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Report 92 [93].

Protection for conduct based on imputed race

Case study - Sally

Sally was on a bus on her way home from work one evening. When she got on the bus, a passenger yelled at her, saying "get off the bus, or I'll make you go back to Japan, you fucking Jap". Sally is Chinese, not Japanese.

KLC submits that Division 3A of the ADA should include protection against vilification for persons of presumed or imputed race. Racial vilification is just as harmful to individuals, communities and society in cases where the offender is mistaken as to the race of the victim(s), and an offender should not escape prosecution on this basis. Currently, the ADA is only arguably applicable to where the person committing the relevant public act has accurately identified the race of the person or group of persons that the incitement is directed towards. Extending the ADA to cover presumed or imputed race would provide protection even where the person committing the public act is misguided about the actual race of the victim.

Recommendation

6. Division 3A of the ADA be amended to provide coverage for persons of presumed or imputed race.

Coverage of associates

Currently, section 20D covers situations where a person is targeted because of their race, not the race of their associates. KLC recommends that section 20D be extended to cover incitement directed at persons or a group of persons on the grounds of the race of the person or the race of their associates. This will cover persons who are targeted not on the grounds of their race, but because of their association with another person or persons whose race is the subject of serious racial vilification. Section 7 of the ADA already provides coverage for the associates of race discrimination, and amending section 20D would provide consistency with this. Section 20C should also be amended to ensure uniformity throughout the Division.

Recommendation

7. Section 20D be amended to provide cover situations where a person is subject to serious racial vilification based on their associates.

Time limit

Case Study – Brian

Brian was working as a builder. A colleague consistently referred to him as a 'faggot' and made derogatory comments about his homosexuality including suggestions that he was sex offender because he was gay. Brian was very distressed about this conduct but was reluctant to formally complain. Eventually, he sought advice on his options in relation to this serious vilification, however, a referral for consideration for criminal prosecution could not occur as the conduct occurred outside the statutory referral period of 6 months.

Currently, a person has 12 months to lodge a complaint to the Anti-Discrimination Board (ADB) under s89B of the ADA. However, proceedings for the serious racial vilification offence must be commenced no later than 6 months from when the offence was alleged to have been committed under section 179 of the *Criminal Procedure Act 1986* (NSW). KLC recommends extending the time limit for commencing prosecutions for the offence of serious racial vilification to 12 months to be consistent with the time limit for lodging complaints under the ADA. This is particularly important as the time taken by the ADB to assess, investigate and refer complaints combined with the time take for the Attorney-General to consider and consent to prosecution effectively shortens the time available for the commencement of proceedings.

Recommendation

8. The time limit for commencing prosecution for the offence of serious racial vilification be extended to 12 months from when the offence was alleged to have been committed.

Attorney-General's consent requirement

We believe that the requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification should be removed. The consent requirement unnecessarily politicises serious vilification matters and removing it will send the message that serious vilification is considered to be in the same category as other criminal offences. We note that since 1990, the Attorney-General has delegated this power to the DPP. We recommend that the ADA be amended to make clear that the DPP holds the discretion to prosecute offences of serious racial vilification without requiring the consent of the Attorney-General.

Recommendation

9. The requirement of the Attorney-General's consent for prosecuting the offence of serious racial vilification be removed.

ADB President's power to refer matters

KLC notes that victims of serious racial vilification are likely to be traumatized by the experience, and may be unable or unwilling to initiate a complaint. We submit that the powers of the President of the ADB should be extended for serious racial vilification offences. KLC recommends that the President of the ADB be given the power to refer a matter to the DPP without needing to receive a formal complaint if they believe the matter falls within section 20D. This would act to relieve pressure on individuals to initiate action where serious racial vilification occurs.

Recommendation

10. The President of the ADB be given the power to refer matters to the DPP without receipt of a formal complaint if they believe the matter falls within section 20D.

Whether the element of the offence of serious racial vilification of 'inciting others to threaten' in the ADA should be amended

KLC submits that the requirement to 'incite' hatred or contempt in others is too high and should be removed. We suggest replacing it with a term such as 'promoting'. This would bring the offence in line with international human rights law which prohibits acts that have significant potential to promote racism.[14] We submit this amendment should be extended to the use of 'incite' and 'inciting' in sections 20C and 20D of the ADA.

We also recommend that the offence be extended to include extreme speech that promotes racial hatred in the absence of explicit threats of physical harm. Harassment or intimidation based on race can be a form of serious and substantial abuse. It can make people fear for their safety and limit the extent to which they participate in society. It also creates a broader culture within which race based discrimination and physical harm becomes more acceptable.

[14] See for example, *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 4; *Vejdeland and ors v Sweden*, ECHR Application no. 1813/07, 57.

Recommendations

11. The term 'incite' in sections 20C and 20D be amended to 'promote'.
12. The offence of serious racial vilification be extended to include extreme speech that promotes racial hatred.

The appropriate penalty for the offence of serious racial vilification

KLC submits that the current maximum punishment of 6 months imprisonment is relatively lenient and does not reflect the impact such conduct has on the community.[15] Comparable offences in the *Crimes Act 1900* (NSW) have higher penalties and are more likely to be pursued by prosecutors. For example, common assault, as a threat that has the possibility of being immediately carried out, holds a maximum penalty of 2 years.[16] A threat to property of a person holds a maximum penalty of 5 years in NSW.[17] Due to the similarities with these offences, and the impact of serious racial vilification, we suggest that the maximum punishment be amended to 3 years imprisonment. We also recommend amending the maximum penalty units for the offence. Currently, the maximum penalty units are 50 for an individual and 100 for a corporation.[18] We recommend increasing the maximum penalty units to 100 for an individual and 200 for a corporation to reflect community values that engaging in serious racial vilification is unacceptable in modern Australian society.

Recommendations

13. The maximum punishment for imprisonment be increased to 3 years;
14. The maximum penalty units for an individual be increased to 100;
15. The maximum penalty units for a corporation be increased to 200.

Whether the ADA should be extended to cover serious vilification specifically on the grounds of 'religious belief or affiliation'

Case study: Zeinab

[15] *Anti-Discrimination Act 1977* (NSW) s 20D(1).
[16] *Crimes Act 1900* (NSW) s 61.
[17] *Crimes Act 1900* (NSW) s 199(1).
[18] *Anti-Discrimination Act 1977* (NSW) s 20D(1).

Zeinab is Muslim and wears the hijab. One day, while waiting in line at a café, a fellow customer starting yelling at her. The customer said "go back to your country terrorist". When Zeinab went back to the café the following week, the same customer was there and yelled at her again, saying "If you love Islam...I'll fucking show you", calling Zeinab a "fucking murderer", saying "maybe you have a knife to kill me because Muslims kill people", and telling Zeinab to "fuck off". Zeinab was very intimidated and shaken by this incident and reported it to the police. We advised Zeinab that she was unable to take action under discrimination law, as it doesn't protect Muslims against religious vilification.

KLC notes that the ADA does not provide protection against religious discrimination and religious vilification. Religious discrimination and religious vilification occur frequently, and vulnerable clients cannot access remedies for such conduct under discrimination law in NSW.

KLC recommends that the serious racial vilification offence be extended to cover serious vilification on the grounds of 'religious belief or affiliation'. This would ensure that inciting religious hatred would be covered by the offence. In particular, Muslims in Australia have suffered significant vilification and harassment in recent times, with little legal remedy available. It would also bring the vilification offence in line with international human rights obligations in Article 20(2) of the International Covenant on Civil and Political Rights, which requires that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[19]

Case study: Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled and he was not allowed to continue his studies. This caused significant distress to Ali and his family. We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion.

[19] We note that Australia has made a reservation to this article. However, the United Nations Human Rights Committee has recommended that Australia withdraw this reservation: *Concluding Observations on Australia*, CCPR/C/AUS/CO/5, 2 April 2009.

Case study: Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law in NSW.

In the last five years, we have advised 12 clients about religious discrimination, vilification and harassment. We have had to tell these clients that it can be difficult to seek remedy under NSW anti-discrimination law because there is no protection against religious discrimination, vilification or harassment, and it can be difficult to establish ethno-religious discrimination, vilification or harassment. KLC recommends that protection against discrimination on the basis of religion be introduced into the ADA.

Recommendations

16. Protection against discrimination on the basis of religion be introduced into the ADA.
17. Protection against religious vilification and serious religious vilification be introduced into the ADA.

Whether any changes to the elements or process for the investigation and prosecution of the offence of serious racial vilification should be mirrored in the ADA offences of serious transgender vilification, serious homosexual vilification or serious HIV/AIDS vilification

KLC recommends that the Government make similar amendments to the other vilification laws contained in the ADA: that is, homosexuality, transgender status and HIV/AIDS in sections 49ZTA, 38T, and 49ZXC. The problems that exist for section 20D exist for the other serious vilification offences in the ADA, and amending these offences would ensure increased protections against serious vilification as well as consistency in NSW discrimination law.

Recommendation

18. The Government make similar amendments to all serious vilification provisions contained in the ADA.

Whether all serious vilification offences should be moved from the ADA to the *Crimes Act 1900*

KLC submits that all serious vilification offences should be relocated to the *Crimes Act 1900* to address the perception that investigating racial vilification is a matter for the Anti-Discrimination Board, and not the police. We believe relocating the offence to the *Crimes Act 1900* will cause the offence to be successfully prosecuted more frequently. We recommend providing training to the NSW Police and DPP about serious vilification offences, a belief shared by the former DPP, Nicholas Cowdery AM QC.[20] A sound understanding of the nature of racial vilification and the serious impact that it can have on individuals, communities and society is essential to ensuring appropriate investigation and subsequent prosecution of this conduct.

Moving the serious vilification offences to the *Crimes Act 1900* would also utilize the investigative powers of the NSW Police and DPP. The ADB does not have investigative powers, nor the resources to prepare a prosecution brief for the DPP. No other agency or body is responsible for preparing an evidence brief for these matters. Cowdery identified the issue of evidence as a major problem in pursuing prosecution for these matters, stating:

> "The most common reason why prosecutions have not been commenced has been the inability of the prosecution to adduce evidence to prove to the necessary standard either incitement or incitement by the specific means described in the offence provisions."[21]

Moving the offence to the *Crimes Act 1900* would require the NSW Police to assume investigative responsibility for these matters and alleviate this barrier to prosecution.

[20] Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects, Roundtable on Hate Crime and Vilification Law: Developments and Directions*, Law School, University of Sydney, August 2009, 7.

[21] Nicholas Cowdery, *Review of Law of Vilification: Criminal Aspects, Roundtable on Hate Crime and Vilification Law: Developments and Directions*, Law School, University of Sydney, August 2009, 4.

Recommendation

19. All serious vilification offences in the ADA be moved to the *Crimes Act 1900*.

Please don't hesitate to contact us on (02)9385 9566 or at legal@unsw.edu.au should you wish to discuss our submission.

Yours sincerely,
KINGSFORD LEGAL CENTRE

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