

## **Human rights consultations response, BILETA**

*Prepared on behalf of the British Irish Law, Education and Technology Association (BILETA) by y Prof Abbe Brown, Dr Edina Harbinja, Dr Marion Oswald, and Dr Felipe Romero – Moreno*

The British and Irish Law Education Technology Association (BILETA) was formed in April 1986 to promote, develop and communicate high-quality research and knowledge on technology law and policy to organisations, governments, professionals, students and the public. BILETA also promotes the use of and research into technology at all stages of education. The present inquiry raises technological, economic and legal challenges that our membership explores in their research. As such, we believe that our contribution will add to the public discourse and the inquiry on the future of UK human rights law.

**Question 1: We believe that the domestic courts should be able to draw on a wide range of law when reaching decisions on human rights issues. We would welcome your thoughts on the illustrative draft clauses found after paragraph 4 of Appendix 2, as a means of achieving this.**

Option 1 is preferred. It is closer to the present position (with the UK courts under the HRA not bound to follow or apply jurisprudence of the European Court of Human Rights, merely to take it into account). Courts in the UK jurisdictions can on any event already have regard to common law decisions in relation to human rights and to the travaux préparatoires of treaties.

**Question 2: The Bill of Rights will make clear that the UK Supreme Court is the ultimate judicial arbiter of our laws in the implementation of human rights. How can the Bill of Rights best achieve this with greater certainty and authority than the current position?**

We do not consider that there is a lack of certainty or authority at present. Given Brexit, the status of EU law and the EU Charter of Fundamental Rights has changed. Under the HRA, courts must take into account decisions of European Court of Human Rights. The position regarding unincorporated human rights treaties is clear (*Salomon v Commissioners of Customs and Excise*). We do not consider that there is any need to address the institutional competence of the courts in the UK. The courts have and should have competence to address any matter properly brought before them. To remove this on any matter because there is no social consensus is not appropriate. It is in such areas where protection of human rights can be most needed.

**Question 3: Should the qualified right to jury trial be recognised in the Bill of Rights? Please provide reasons.**

Yes. For this to be brought about in practice, however, there would to be additional support for legal aid and judicial services; these are also key to other aspects of the right to a fair trial and we consider that this should be the focus of any activity in this area.

**Question 4: How could the current position under section 12 of the Human Rights Act be amended to limit interference with the press and other publishers through injunctions**

## or other relief?

We agree with the Government's belief expressed in the Consultation paper that 'the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media' and that 'such freedom underpins our democracy, ensures greater transparency and accountability, helps to prevent corruption and preserves the space for wide and vigorous democratic debate'.

Conversely, we disagree that the case law of the Strasbourg Court 'has shown a willingness to give priority to personal privacy'. Both rights have equal standing and importance in the ECHR jurisprudence and in a democratic society, both should be treated as such and evaluated on a case by case basis.<sup>1</sup> Therefore, interference with the freedom of expression and media rights is best determined by the courts and the case-by-cases balancing act. We do not believe that the Bill should limit the courts' ability to engage in this assessment and grant relief as appropriate.

**Question 5: The government is considering how it might confine the scope for interference with Article 10 to limited and exceptional circumstances, taking into account the considerations above. To this end, how could clearer guidance be given to the courts about the utmost importance attached to Article 10? What guidance could we derive from other international models for protecting freedom of speech?**

We do not believe that clearer guidance is needed as such since interference with Article 10 has been limited to exceptional circumstances already. We think that the Article 10 ECHR interference test has been well developed and clearer guidance could create room for restrictive approaches and, consequently, limit the scope of Article 10 and other relevant human rights, such as privacy. As stated in the above answer, human rights have equal importance, and freedom of expression needs to be balanced against other rights and freedoms, as well as the public interest, national security etc, as specified in paragraph 2 of Article 10 ECHR, and confirmed by the UN in various documents.<sup>2</sup> The UK remains a party to the Convention and should not attempt to jeopardise this delicate balance between the Convention rights.

However, we are concerned about the impact other upcoming legislation may have on freedom of expression and other human rights. We applaud the Government's aim to maintain a free and open Internet. However, we are concerned that the wide scope of duties of care in the Online Safety Bill will jeopardise free speech on the Internet. We believe that the Online Safety Bill needs to be in line with the Government's intention in the human rights law reform, or it risks creating discrepancies and inconsistencies in aims and approaches when it comes to human rights on the Internet. The Government's aim in this reform could be undermined by the Online Safety Bill, if it passes in its current form.<sup>3</sup>

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<sup>1</sup> *Couderc and Hachette Filipacchi Associés v. France* [GC], § 91; *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], § 123; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], § 77).

<sup>2</sup> See e.g. JOINT DECLARATION ON MEDIA INDEPENDENCE AND DIVERSITY IN THE DIGITAL AGE, 2 May 2018

<sup>3</sup> See e.g. Harbinja, E. & Leiser, M., '[Redacted]: This Article Categorized [harmful] by the Government' 2022, (Accepted/In press) In: SCRIPTed. 19, 1, p. 90 – 121.

**Question 6: What further steps could be taken in the Bill of Rights to provide stronger protection for journalists' sources?**

Under the ECHR jurisprudence and the national case law, the disclosure orders placed on journalists have a detrimental impact on their sources, whose identity may be revealed, but also on the newspaper, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure.<sup>4</sup> Furthermore, the public is interested in receiving information imparted through anonymous sources and who are also potential sources themselves. The Bill can reinforce this importance and limit the disclosure of information identifying a source should to exceptional circumstances where vital public or individual interests are at stake and can be convincingly established.<sup>5</sup>

**Question 7: Are there any other steps that the Bill of Rights could take to strengthen the protection for freedom of expression?**

As noted above, we believe that it is of utmost importance that legislative reforms are coherent in their aims. Therefore, it is vital that human rights, including the freedom of expression, are protected in the online safety and data protection reforms, to which we contributed with our submissions.

Generally, we are deeply concerned with the Government's belief that human rights balancing principles should not be left to the courts to develop. As noted in the Consultation paper, 'it believes there should be a presumption in favour of upholding the right to freedom of expression, subject to exceptional countervailing grounds, clearly spelt out by Parliament. We are considering whether we can draw any lessons or guidance from other strong models of protection for free speech such as those found in the United States, South Africa or other countries.' As noted above, this could introduce a dangerous precedent of giving unequal weight to human rights, contrary to the ECHR principles. We do not believe that the US or South African laws are an adequate reference, given the legal traditions and very different approaches in protecting human rights. The UK is a party to the ECHR and should not skew the delicate balance between individual human rights and freedoms.

**Question 8: Do you consider that a condition that individuals must have suffered a 'significant disadvantage' to bring a claim under the Bill of Rights, as part of a permission stage for such claims, would be an effective way of making sure that courts focus on genuine human rights matters? Please provide reasons.**

We consider that all issues which involve human rights are genuine. Some arguments may be stronger than others, and rights and their limits frequently have to be balanced against other rights and their limits. If disadvantage has been suffered then a claim should be able to be brought. The higher the threshold the greater the risk of barriers to access to justice. The court is the appropriate forum to decide if a claim should succeed.

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<sup>4</sup> *Financial Times Ltd and Others v. the United Kingdom* - 821/03, Judgment 15.12.2009

<sup>5</sup> Council of Europe, Recommendation 1950 (2011), The protection of journalists' sources

**Question 9: Should the permission stage include an ‘overriding public importance’ second limb for exceptional cases that fail to meet the ‘significant disadvantage’ threshold, but where there is a highly compelling reason for the case to be heard nonetheless? Please provide reasons**

Given our position on 8, we do not consider that this is needed.

**Question 10: How else could the government best ensure that the courts can focus on genuine human rights abuses?**

All interference with human rights is a genuine human rights abuse.

**Question 11: How can the Bill of Rights address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation? Please provide reasons.**

Question 11 appears to be predicated on the view that positive obligations reflecting human rights standards necessarily have a negative effect on the delivery of public services. The consultation document gives the example of threat to life (or ‘Osman’) warnings, claiming that the requirement to issue these warnings skews policing priorities and diverts resources away from other activities. Such notices/warnings are a policy response, however, not ‘required’ by the ruling as claimed in paragraph 149 of the consultation document. In fact, the Osman ruling lays out that in order to demonstrate a violation of positive obligations to protect the right to life, ‘it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.’ (Osman v UK, para 116) The police are therefore given considerable flexibility to take action appropriate to the circumstances of each case. Under common law, the police owe the public a duty to prevent and detect crime, overlapping (and certainly not conflicting with) positive obligations under Article 2. As the Independent Human Rights Act Review 2021 (IHRAR) stated; ‘the HRA supplemented, rather than replaced, the common law’ (para 97). Such preventative functions of the police have often been laid out as the fundamental justification for many Government-supported technological developments within policing and social services in recent years, such as the use of live facial recognition, predictive policing and data analytics focused on assessment of risk and harm. We assume that the Government is not proposing that such technological and operational developments should cease or have no legal basis. We suggest that a better approach to positive obligations that already exist under common law and statute, as well as pursuant to ECHR, would be to focus on reviewing the effectiveness and long-term outcomes of existing and future policy and operational responses. In addition to, or in the alternative, we would support the IHRAR’s recommendation to amend section 2 HRA to clarify priority of rights protection by requiring ‘UK Courts to consider whether rights issues could be resolved by reference to a specific domestic statute or the common law before considering Convention rights’ (para 186).

**Question 12: We would welcome your views on the options for section 3.**

***Option 1: Repeal section 3 and do not replace it.***

***Option 2: Repeal section 3 and replace it with a provision that where there is ambiguity, legislation should be construed compatibly with the rights in the Bill of Rights, but only where***

*such interpretation can be done in a manner that is consistent with the wording and overriding purpose of the legislation.*

***We would welcome comments on the above options, and the illustrative clauses in Appendix 2.***

We would agree with the IHRAR that there is no evidence that section 3 HRA has been abused by courts in the UK. Therefore, repeal is unnecessary. Bearing in mind the potential for significant human rights interference brought about by new technologies, section 3 represents an important check and balance provided that Parliamentary sovereignty is preserved. We support the IHRAR's proposal for a statutory amendment to clarify the priority of interpretation: first, normal rules of statutory interpretation, followed by the application of section 3.

**Question 13: How could Parliament's role in engaging with, and scrutinising, section 3 judgments be enhanced?**

We have no objections to the IHRAR's recommendation of an enhanced role for the JCHR in formally scrutinising section 3 judgments and the Government's response. We would suggest however that such scrutiny role should not necessarily be limited to the JCHR bearing in mind that other committees may also have specialist knowledge of the subject matter relating to the particular section 3 judgment and in respect of any proposed legislative response.

**Question 14: Should a new database be created to record all judgments that rely on section 3 in interpreting legislation?**

BILETA is a strong supporter of transparency and of the use of appropriate technology to support this aim. We agree with the view of the IHRAR that concerns around section 3 are 'best addressed, acted upon, or dispelled, on the basis of facts and evidence as to its use' (para 193). However, creating and maintenance of such a database must be properly resourced and maintained, and should not be a standalone exercise. Instead, it will be important for this database to be coordinated with, and linked to, other existing databases of court decisions (such as those produced by the National Archives) and relevant administrative data sources, and to enable investigation of other factors and research questions, in line with the HMCTS Data Strategy.

**Question 15: Should the courts be able to make a declaration of incompatibility for all secondary legislation, as they can currently do for Acts of Parliament?**

We consider that the courts should be able to make a declaration of incompatibility for all secondary legislation. Indeed, this is what the courts currently do for Acts of Parliament. That said, however, for instance, the Human Rights Joint Committee has also stressed that they do not possess the resources to scrutinise all statutory instruments that are brought before Parliament. Thus, they must rely upon the UK government to draw to their attention any statutory instruments that raise important human rights issues. Importantly, the Human Rights Joint Committee explains that a statutory instrument that is created to fix an incompatibility with an ECHR right, which have been flagged up by a Court is certainly such an instrument. In fact, if these fixes are made through a remedial order pursuant to the HRA 1998, they are the Committee responsible for monitoring those instruments. In this regard, it is worth noting that the Human Rights Joint Committee is alarmed by the fact that some secondary legislation, which is created to remedy declarations of incompatibility is not currently being drawn to their attention by the UK government when it is introduced. Thus, it is concerning that the Committee does not currently have the chance of monitoring it and reporting to Parliament, thereby providing their view on whether incompatibilities with ECHR rights, which

have been identified by a Court are remedied.<sup>6</sup> We consider that the UK government should address this issue.

**Question 16: Should the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with the Convention rights? Please provide reasons.**

We consider that the proposals for suspended and prospective quashing orders put forward in the Judicial Review and Courts Bill should not be extended to all proceedings under the Bill of Rights where secondary legislation is found to be incompatible with ECHR rights. This is because, historically, courts have constantly refused to grant suspended or prospective quashing orders, not as they do not currently have such a power, but since in most cases they have found it unfair to do so. In *National Westminster Bank plc v. Spectrum Plus Limited & Ors* [2005] UKHL 41 (30 June 2005),<sup>6</sup> the House of Lords acknowledged the jurisdiction to grant prospective remedies. Importantly, however, the HL stressed that they should be applied ‘altogether exceptionally’, or in a ‘wholly exceptional case’ to avoid ‘gravely unfair and disruptive consequences’.

As has been convincingly argued, the proposals for suspended and prospective quashing orders suggested by the UK government are mechanisms the courts already have, and have always been reluctant to use, raising issues that they risk deferring or refusing justice to those impacted by the illegal activities of a public body, that their deployment could lead to uncertainty and that they are likely to be used unfairly. Therefore, legislating in this specific domain could be, at best, a misuse of legislative resources, merely corroborating a discretion that is already recognised in the common law. At worst, it might constitute an arbitrary reduction of remedial discretion, prejudicing claimants and undermining the rule of law.<sup>7</sup> Accordingly, we consider that the UK government proposals are not necessary.

**Question 17: Should the Bill of Rights contain a remedial order power? In particular, should it be:**

- a. similar to that contained in section 10 of the Human Rights Act;**
- b. similar to that in the Human Rights Act, but not able to be used to amend the Bill of Rights itself;**
- c. limited only to remedial orders made under the ‘urgent’ procedure; or**
- d. abolished altogether?**

**Please provide reasons.**

We consider that the UK government’s suggested remedial order power included within the Bill of Rights should be abolished. This is because Section 10 of the Human Rights Act 1998 and Schedule 2 are a blueprint of a so-called ‘Henry VIII’ clause. Put it differently, Henry VIII clauses permit

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<sup>6</sup> <https://publications.parliament.uk/pa/jt201415/jtselect/jtrights/130/13006.htm>

<sup>7</sup> <https://ukconstitutionallaw.org/2021/06/07/lewis-graham-suspended-and-prospective-quashing-orders-the-current-picture/>

Ministers, using secondary legislation, to amend primary legislation. Indeed, in *R v Secretary of State for Social Security, Ex p Britnell* [1991] 1 WLR 198, [204], Lord Donaldson warned that these clauses should be interpreted strictly and narrowly:

*a delegation to the Executive of power to modify primary legislation must be an exceptional course and that, if there is any doubt about the scope of the power conferred upon the Executive or upon whether it has been exercised, it should be resolved by a restrictive approach.*

As has been convincingly argued, while ‘orthodox Henry VIII’ clauses that just allow amendment of Acts passed *before* the enabling Act seem to be problematic. On the other hand, ‘future-amending Henry VIII clauses’ granting powers, which can be used on Acts passed *after* the enabling Act are even a more worrisome problem. This is because the latter grant no power to the Executive to amend future Acts of Parliament by remedial order, thus potentially being *ultra vires*.<sup>8</sup>

### **Statement of Compatibility – Section 19 of the Human Rights Act**

#### **Question 18: We would welcome your views on how you consider section 19 is operating in practice, and whether there is a case for change.**

We consider that, practically speaking, as of February 2022, Section 19 of the Human Rights Act 1998 is working properly. Thus, currently, there does not appear to be a case for change.

For instance, according to JUSTICE the will of Parliament includes an intention that laws should not be incompatible with ECHR rights.<sup>9</sup> Indeed, the UK government’s Independent Review of the HRA also agrees with this view. It echoes that new Bills brought before Parliament should not be inconsistent with human rights as Section 19 of the HRA 1998 compels the Minister in charge of any Bill to publish a statement either making it clear that the provisions of the Bill are consistent with ECHR rights or confirming that although they are unable to say the Bill is consistent, the government however wishes Parliament to proceed with it. In this regard, it is worth stressing that the UK government has only made a Section 19(1)(b) HRA statement that they cannot say a Bill is consistent with ECHR rights on extremely rare cases.<sup>10</sup> For this reason, we consider that there does not appear to be a case for change.

#### **Question 19: How can the Bill of Rights best reflect the different interests, histories and legal traditions of all parts of the UK, while retaining the key principles that underlie a Bill of Rights for the whole UK?**

Regard to the ECHR and when there is legislative ambiguity to other unincorporated treaties is part of the legal tradition of all parts of the UK. Note also findings that human rights are a fundamental part of the common law (*R v Secretary of State ex p McQuillan, Kennedy*) and that the common law can evolve to ensure adequate regard to human rights (*Airedale v Bland*)

#### **Question 20: Should the existing definition of public authorities be maintained, or can more certainty be provided as to which bodies or functions are covered? Please provide reasons.**

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<sup>8</sup> <https://ukconstitutionallaw.org/2017/12/21/robert-craig-why-remedial-orders-altering-post-hra-acts-of-parliament-are-ultra-vires/>

<sup>9</sup> <https://committees.parliament.uk/writtenevidence/24852/html/>

<sup>10</sup> <https://publications.parliament.uk/pa/jt5802/jtselect/jtrights/89/8907.htm>

We remain generally supportive of the drafting of section 6(3)(b) ('any person certain of whose functions are functions of a public nature') bearing in mind the types of bodies engaged in providing public services. However, we would be concerned about any deliberate or inadvertent narrowing of the scope of the definition. Instead, we would prefer to see a clear statement of principle that all public/State/publicly-funded functions (whether delivered by a public, private or third sector body) are subject to the HRA (or any future Bill of Rights) with the commissioning public body remaining primarily responsible. The human rights compliance implications of new functions, such as those envisaged by the Online Harms Bill, will need to be carefully considered. Any changes to mode of delivery of public services (whether by outsourcing, contract, change of public body, statute, regulation or otherwise) should be made subject to a clear statement of responsibility for human rights compliance.

**Question 21: The government would like to give public authorities greater confidence to perform their functions within the bounds of human rights law. Which of the following replacement options for section 6(2) would you prefer? Please explain your reasons.**

**Option 1: Provide that wherever public authorities are clearly giving effect to primary legislation, then they are not acting unlawfully; or**

**Option 2: Retain the current exception, but in a way which mirrors the changes to how legislation can be interpreted discussed above for section 3.**

We would be in favour of option 2, provided that the changes to section 3 are those as recommended by IHRAR mentioned above i.e. statutory amendment to clarify the priority of interpretation: first, normal rules of statutory interpretation, followed by the application of section 3.

**Question 22: Given the above, we would welcome your views on the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict. Qualified and limited rights**

We consider that the most appropriate approach for addressing the issue of extraterritorial jurisdiction, including the tension between the law of armed conflict and the Convention in relation to extraterritorial armed conflict, is to be found in the ECtHR's case-law. In *Hassan v United Kingdom* - 29750/09 - Grand Chamber Judgment [2014] ECHR 936 (16 September 2014), the ECtHR was not convinced by the UK government's argument that jurisdiction should not be applicable to the active hostilities stage of an international armed conflict, in which Contracting State's agents were acting in territory where they were not the occupying power, and in which the State's conduct should rather be subject to the principles of international humanitarian legislation. Nor did the ECtHR accept the UK government's argument for excluding jurisdiction insofar as the period after the applicant's brother had entered Camp Bucca was concerned as it entailed a custody transfer from the UK to the US.

Importantly, *Hassan v United Kingdom* was the first decision where a contracting State had asked the ECtHR to disapply its duties under Article 5 of the ECHR (i.e., the right to liberty and security) or interpret them considering the detention powers available to the UK under international humanitarian legislation. The ECtHR found that, taken together, international humanitarian legislation and the ECHR both offered safeguards from unlawful detention if armed conflict took place. It also held that the grounds of allowed deprivation of liberty included within Article 5 ECHR



should be afforded, as much possible, with the detention of civilians posing a threat to security, as well as the catching of war prisoners, pursuant to the Third and Fourth Geneva Conventions.<sup>11</sup>

**Question 23: To what extent has the application of the principle of ‘proportionality’ given rise to problems, in practice, under the Human Rights Act?**

We wish to provide more guidance to the courts on how to balance qualified and limited rights. Which of the below options do you believe is the best way to achieve this? Please provide reasons.

**Option 1:** Clarify that when the courts are deciding whether an interference with a qualified right is ‘necessary’ in a ‘democratic society’, legislation enacted by Parliament should be given great weight, in determining what is deemed to be ‘necessary’.

**Option 2:** Require the courts to give great weight to the expressed view of Parliament, when assessing the public interest, for the purposes of determining the compatibility of legislation, or actions by public authorities in discharging their statutory or other duties, with any right.

We would welcome your views on the above options, and the draft clauses after paragraph 10 of Appendix 2.

We do not consider that it is appropriate for Parliament to provide more guidance to the courts on how to balance qualified and limited rights. However, given the two options provided, we consider that Option 1 is more appropriate regardless. The principle of proportionality is at the core of the ECtHR’s assessment on the reasonableness of the interference. It is true that the ECtHR provides a margin of appreciation to the Member State and its institutions. However, the ECtHR’s key task is to make sure that the rights set out in the ECHR are not restricted upon unnecessarily.

When human rights are at stake the approach adopted in *Handyside v United Kingdom* - 5493/72 [1976] ECHR 5 (7 December 1976) is appropriate here. It involves a four questions test: (i) does there exist a pressing social need for some interference with the ECHR?; (ii) if so, does the specific interference relate to this need?; (iii) if so, is it a proportionate answer to such need?; and (iv) in any case, are the reasons provided by State authorities, relevant and sufficient?

Where the relationship between the margin of appreciation and the principle of proportionality is to be assessed, there are some factors that need to be considered. Firstly, the importance of the right at issue as the ECtHR has noted that some ECHR rights are deemed to be fundamental (e.g., the right to freedom of expression, the right private life, or the right to a fair trial). Secondly, the objectivity of the interference at issue. For instance, in *Sunday Times v United Kingdom* - 6538/74 [1979] ECHR 1 (26 April 1979), the ECtHR differentiated between the objective character of safeguarding the authority of the judiciary (leading to a narrower margin of appreciation for Member States) and the subjective character of the protection of morals. Here, the ECtHR should accommodate to domestic approaches. Thirdly, when there was an agreement in practice among Member States and legislation. In *Marckx v Belgium* - 6833/74 [1979] ECHR 2 (13 June 1979), the ECtHR recognised an emerging agreement in the lawful treatment of illegitimate kids and invalidated inheritance legislation that discriminated against those kids.<sup>12</sup>

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<sup>11</sup> [https://www.echr.coe.int/documents/fs\\_armed\\_conflicts\\_eng.pdf](https://www.echr.coe.int/documents/fs_armed_conflicts_eng.pdf)

<sup>12</sup> [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)

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