Feasibility Study of Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status

Study Brief

Introduction

The Equal Opportunities Commission (EOC) has decided to commission a research project entitled “Feasibility Study of Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status”. The study will provide an overview on discrimination encountered by people with different sexual orientation, gender identity (SOGI) and intersex status, including the lesbian, gay, bisexual, transgender and intersex (LGBTI) people, from all walks-of-life in Hong Kong. Furthermore, it will solicit views from stakeholders on the feasibility of legislation to outlaw discrimination on the grounds of SOGI and intersex status.

Background

2. The EOC is continuously looking for ways to improve its work and services to the public. It is found that the public generally expects the EOC to play a more proactive role in advocating human rights issues beyond its jurisdiction and to take the lead in the discussions on controversial issues in the society. Legal protection for sexual minorities from discrimination on the grounds of SOGI and intersex status is one of the priority areas in the EOC’s 3-year strategic plan.

Definitions of LGBTI and SOGI

3. The acronym LGBTI stands for lesbian, gay, bisexual, transgender (viz. individuals whose gender identity and/or expression of their gender differs from social norms related to their gender of birth) and intersex (viz. a variation in sex characteristics including chromosomes, gonads, and/or genitals that do not allow an individual to be distinctly identified as male or female). In use since the 1990s, the acronym has become mainstreaming as a self-designation and has been adopted by the majority of sexuality and gender identity-based community worldwide. Despite the fact that LGBTI does not nominally encompass all individuals with different gender identity, the term is generally accepted to include those not identified in the five-letter acronym.
4. Next, SOGI is an acronym which stands for sexual orientation and gender identity. Sexual orientation refers to an enduring pattern of emotional, romantic and/or sexual attractions to people of the opposite sex (heterosexual), same sex (homosexual) or both sexes (bisexual). The terms lesbian describes women who are sexually attracted to other women, gay describes men who are sexually attracted to other men, and bisexual describes women or men who are sexually attracted to both sexes. Sexual orientation also refers to a person’s sense of identity based on those attractions, related behaviors and membership in a community of others who share those attractions. Research over several decades has demonstrated that sexual orientation ranges along a continuum, from exclusive attraction to the other sex to exclusive attraction to the same sex.

5. Based on the Yogyakarta Principles\(^1\), gender identity refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

6. Sexual orientation and gender identity are separate concepts and should not be confused. This implies that transgender people as anyone else in society may be heterosexual, homosexual or bisexual. For example, a transgender woman (a person who was assigned at birth being a man but whose affirmed gender is a woman) may be attracted to men and described as heterosexual. If she was attracted to other women, she may be described as homosexual. The following paragraphs provide a detailed elaboration of how the issue of sexual orientation has been tackled by key stakeholders. Yet we should beware that concurrently gender identity is a non-dispensable topic for consideration.

**Historical review**

7. Forms of sexual orientation other than heterosexuality have existed in Chinese society for a long time, but have always remained a taboo. A public consultation exercise was held in 1988 on the laws regulating homosexual acts. In 1990, the Legislative Council (LegCo) passed a motion in favour of removing criminal penalties relating to homosexual acts committed in private by consenting men at the

\(^1\) Available from: http://www.yogyakartaprinicples.org/principles_en.htm
age of 21 or above\(^2\). This decriminalization proposal was implemented by the enactment of the Crimes (Amendment) Ordinance in July 1991.

8. Since then, the public debate on homosexuality subsided until the then lawmaker Anna Wu introduced the Equal Opportunities Bill (EOB) in the 1994-95 legislative session in the form of a Private Member’s Bill in the LegCo. The Bill contained provisions outlawing discrimination on the ground of “sexuality”, but was voted down in the LegCo.\(^3\)

9. The Government did not support the Bill. It considered that sexuality was still a very controversial and highly sensitive issue, and preferred to take a gradual and progressive approach lest that legislation which failed to reflect social values would be counter-productive. Instead, the Government undertook to carry out a study in respect of sexual orientation discrimination, which would be followed by a public consultation exercise. A Consultation Paper on “Equal Opportunities -- A Study on Discrimination on the Ground of Sexual Orientation” was published in 1996\(^4\). The Government concluded that an overwhelming majority had strongly opposed to legislation in respect of sexual orientation. The Government therefore decided to pursue non-legislative means to enhance public understanding and acceptance of different forms of sexual orientation.

10. Meanwhile, despite the Government’s decision to withhold the legislation option, legislator Lau Chin-shek proposed the Equal Opportunities (Family Responsibility, Sexuality and Age) Bill in 1995\(^5\) after Anna Wu stepped down from the Legislative Council. Even though the bill was negatied by a narrow margin of two votes before the handover of Hong Kong, the effort of Members of the LegCo on eliminating discrimination did not stop there.

11. The LegCo Panel on Home Affairs set up a Subcommittee to follow up the related issues in various areas including blood donation, film censorship, medical services, education, legislating against discrimination, etc. The Subcommittee pointed out in its final report that many homosexual groups were willing to come forward to

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\(^2\) The age of the consenting men was lowered to 16 or above in 2006. *Leung v. Secretary for Justice* Available from: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=54227&QS=%2B&TP=JU

\(^3\) On 28 July 1995, 24 Members of the Legislative Council voted in favour of the Bill and 31 voted against it during the Second Reading.


\(^5\) The three Bills originated from the Equal Opportunities Bill introduced by Anna WU in July 1994.
express their views which reflected that society was becoming more open towards different sexual orientations. The Subcommittee considered that it was opportune for the Government to conduct another comprehensive consultation on the issue.

12. The Government commissioned a second telephone survey on public attitudes towards homosexuals\(^6\). The survey was conducted in 2005 with a sample size of 2,068 respondents. While the public consultation on sexual orientation in 1996 had found that over 80% of the respondents objected to the introduction of legislation to prohibit discrimination on the ground of sexual orientation, the 2006 Survey found that only 35% of the people did not accept the introduction of such legislation. However, Home Affairs Bureau (HAB) reiterated the view that proposals on legislating against discrimination on the ground of sexual orientation would be controversial, and therefore, they need to conduct further consultation before deciding on the way forward. Based on its assessment, HAB considered that it was not yet the right time to do so.

13. Although the Government maintained its position on not recognizing same sex marriages or civil unions, it extended protection from domestic violence towards same sex cohabitants in 2007\(^7\). However, the Government emphasized that the extension was only introduced in response to “the distinct and unique context of domestic violence” and it remained that it was the Government’s clear policy not to recognize same sex relationships and “any change to this policy stance should not be introduced unless a consensus or a majority view is reached within the society”.

14. On 7 November 2012, the LegCo debated on whether the Government should conduct a public consultation on legislating against discrimination on the ground of sexual orientation. The Equal Opportunities Commission (EOC) issued a statement of support\(^8\) for the motion moved by legislator Cyd Ho to urge “the Government to expeditiously launch public consultation on enacting legislation to safeguard equal opportunities for and the basic rights of people of different sexual orientations”. Finally, the original motion and all other related amendments made to the motion by other Members were defeated in LegCo.

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\(^7\) Report of the Bills Committee on Domestic Violence (Amendment) Bill 2007. LC Paper No. CB(2)2289/07-08.

On 10 June 2013, a new Advisory Group on Eliminating Discrimination Against Sexual Minorities\(^9\) was formed to replace the Sexual Minorities Forum in a bid to advise the Secretary for Constitutional and Mainland Affairs. It includes Professor Fanny Cheung as Chairperson and 13 members, who are appointed for two-year terms from the academic and business sectors, the sexual minority community, and the Legislative Council. The group will look into problems faced by sexual minorities, and will map out strategies to curb discrimination.

**Current protections from discrimination on grounds of sexual orientation and gender identity**

The HKSAR Government has international legal obligation to eliminate discrimination on the basis of SOGI, including those provided for under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as local legislation including the Basic Law and the Bill of Rights Ordinance (BORO). The BORO prohibits discrimination on the basis of SOGI and it is binding on the Government, public authorities and persons acting on behalf of the Government or a public authority, but not on private bodies or individuals.

There is currently no distinct discrimination ordinance protecting people from discrimination on the basis of their sexual orientation or gender identity. In relation to gender identity however, the EOC currently deals with complaints of discrimination relating to gender identity under the Disability Discrimination Ordinance. This is because the definition of a disability includes mental conditions. People who are transgender usually experience the mental condition of gender dysphoria (incongruence between one’s personal gender identity and the one assigned to the person at birth). However, it is believed that a preferable approach will be adopted so as to have distinct discrimination legislation relating specifically to gender identity as found in a number of countries.

The United Nations Human Rights Committee has made specific recommendations to the HKSAR to adopt anti-discrimination legislation relating to SOGI on a number of occasions, most recently in its concluding observations on the third periodic report on Hong Kong’s compliance with the ICCPR, issued in March 2013.

\(^9\) Available from: http://www.info.gov.hk/gia/general/201306/10/P201306100466.htm
**Surveys on public attitudes**

19. The public opinion may still be diverse on legislating against discrimination on the ground of sexual orientation. Yet, the acceptance level of homosexuality at present is higher than that in the 1990s, and support for legislating against discrimination is gaining momentum.

20. In the consultation following the 1995 Survey, a total of 10,014 submissions were received. According to the Government, an overwhelming majority of over 80% strongly opposed to legislation in respect of sexual orientation.\(^\text{10}\) The educational and religious sectors considered legislation to protect the rights of homosexuals a form of “reverse discrimination” against the rights of the majority who chose not to accept non-heterosexuality. There were also concerns about the possible impact on young people and on the traditional institutions of family and marriage if non-heterosexual behaviour was recognized formally through anti-discrimination legislation. Many felt that non-legislative measures, such as public education, would be more appropriate to address discrimination on the ground of sexual orientation.

21. Ten years after the 1995 Survey, a second opinion survey commissioned by the Government on Public Attitudes towards Homosexuals was conducted in 2005\(^\text{11}\). It revealed that fewer people opposed to the introduction of legislation to prohibit discrimination on the ground of sexual orientation. While there were still 35% of the respondents believed that the Government should not legislate to outlaw discrimination on the ground of sexual orientation, 29% thought otherwise and 34% stood neutral.

22. In the Equal Opportunities Awareness Survey conducted by the EOC in 2012\(^\text{12}\), 1,504 respondents from the general public were interviewed and 43% of them believed that sexual orientation discrimination in Hong Kong was very serious/quite serious. When asked what should be the forthcoming areas of work of the EOC, 60% of the respondents considered that the introduction of legislation against discrimination on the ground of sexual orientation was very important/quite important.

\(^{10}\) Home Affairs Bureau (2005). LC Paper No. CB(2)595/04-05(04).

\(^{11}\) A sample of 2,068 respondents aged between 18 and 64 were successfully contacted for telephone interview.

Surveys on discrimination faced by sexual minorities

23. In the Survey commissioned by the Government in 2005, 30% of the respondents perceived that discrimination against homosexuals because of their sexual orientation was “very serious/serious” in Hong Kong, 42% considered the situation “average”, while 25% found the situation “posed little problem/no problem at all”. However, those who have frequent contacts with homosexuals have a different perception of the problem: 41% of the respondents with frequent contact with homosexuals considered the problem of discrimination in Hong Kong “very serious/serious”.

24. Even though less than one-third of respondents in the Government Survey thought that discrimination was a serious problem for homosexuals in various aspects of life, academics opinioned that the perception of the respondents is “likely to be poor barometer for the seriousness of sexual orientation discrimination in Hong Kong”, the reason being that 77% of the respondents reported having had no contacts with homosexuals. Since the Government Survey did not ask about sexual orientation of individual respondents, responses of sexual orientation minorities were not disaggregated from the majorities. In this connection, academics argued that “the government’s findings potentially obscure the actual situation in Hong Kong.”

25. In a research report entitled “Employment Discrimination Based on Sexual Orientation: A Hong Kong Study” released in May 2010, academics conducted an online survey recruiting 792 self-reported sexual minorities using the “snowball sampling method”. It was found that 29% of the responding employees reported experiencing sexual-orientation based employment discrimination in the last five years. This discrimination took several forms, including being rejected for a job, being fired or asked to leave work, being denied a promotion and being mistreated in the assignment of tasks.

26. Community Business Limited had also commissioned an online survey between November 2011 and January 2012, which found that 13% of the LGBT employees indicated they had personally experienced negative treatment because of

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their sexual orientation and/or gender identity and 18% said they had seen people openly bullied, harassed or discriminated LGBT employees.

27. Regarding the experience at school, the Boys’ and Girls’ Clubs Association of Hong Kong conducted an online survey in 2009\textsuperscript{15}. It was found that among the 80% of the respondents who said that some fellow students knew their sexual orientation, more than half of them experienced various degrees of bullying such as humiliation, distancing from the respondents, etc. Among those who have come out, 33% felt being discriminated, and 22% even claimed they thought about committing suicide. Nevertheless, 64% of the respondents said that they received positive response after disclosing their sexual orientation.

28. Between 2007 and 2012, the EOC received 2,687 enquires relating to sexual orientation discrimination, despite the fact that the EOC has no jurisdiction to deal with those complaints. The EOC has also received a number of complaints of gender identity discrimination by transgender people under the Disability Discrimination Ordinance. This further highlights that sexual orientation discrimination is an area of significant concern.

\textit{Practices in other jurisdictions}

29. Many developed countries including those with common law systems similar to Hong Kong have adopted discrimination laws which include protection on the basis of sexual orientation. In the United Kingdom, the Equality Act 2010 provides comprehensive protection from discrimination and harassment on the basis of sexual orientation or gender identity\textsuperscript{16}. The protected areas include: employment, education, the provision of goods and services, housing, clubs and other member-based associations, the government and other public authorities in the exercise of their functions.

30. In Australia, on top of undertakings at the state level, the Federal government has recently enacted comprehensive discrimination laws relating to sexual orientation, gender identity and intersex status\textsuperscript{17}. It provides protection from discrimination, harassment and other unlawful conducts in key areas of public life at the federal level.


\textsuperscript{16} Available from: http://www.legislation.gov.uk/ukpga/2010/15/contents

\textsuperscript{17} Sex Discrimination amendment (Sexual orientation, gender identity and intersex status) Act 2013. The Act came into force at the beginning of August 2013.
Other common law jurisdictions have anti-discrimination law which expressively covers sexual orientation, including the Canadian Human Rights Act, the South African Employment Equity 2000, and the New Zealand Human Rights Act 1993.

31. In developed Asian jurisdictions, countries employ diverse approaches to outlaw sexual orientation discrimination. Taiwan has adopted the Act of Gender Equality in Employment which prohibits employers to discriminate against applicants or employees because of their gender or sexual orientation. Furthermore, the Gender Equity Education Act prohibits schools from discriminating or bullying against prospective/current students on the basis of his or her gender identity or sexual orientation.

32. While Taiwan takes the lead in legislating to prohibit discrimination on the ground of sexual orientation in specific areas, other Asian countries apparently lag behind. Obviously, no constitutional protection against discrimination on the basis of sexual orientation/gender identity is found in China, Japan, Korea and Singapore.

**Existing Arguments and Concerns**

33. The public, especially those who are against the introduction of legislating relating to sexual orientation discrimination, have raised a number of questions over the legislation option. This also often involves misunderstandings of what the effect of the legislation would be. For example, can an employer fire a foreign domestic helper who has been found a lesbian? Can a school refuse to employ a teacher who is a homosexual? Can people express their disapproval of homosexuality on the basis of religious and/or moral beliefs? Some of the concerns may simply be a reflection of bias towards sexual orientation. But some concerns reflect that the legislation option may lead to possible conflicts between people with different values on the rights of the LGBTI. For example, there may be conflicts between the rights of persons not to be discriminated against on the basis of their sexual orientation or gender identity, and the perceived rights of persons to freedom of expression and freedom of religion. It may also involve misunderstandings as to the nature and limits of the rights to freedom of expression and religion. Some people (e.g. parent groups, religious groups) regard these conflicts as some forms of “reverse discrimination” because their rights to freedom of expression and religion are challenged.

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34. In the court case of *W v Registrar of Marriages* case, the Court of Final Appeal held that the Marriage Ordinance in not permitting male-to-female transsexuals (having undergone gender reassignment treatment and been certified as the changed gender) to marry was unconstitutional and in breach of the Basic Law and BORO. The Court also recommended to the Government that it should introduce legislation to set out the elements for recognizing the transsexuals/ transgender and their associated rights including entitlement to marriage. In the midst of arguments over transgender marriage by the LegCo, the public showed concerns that the introduction of legislation against discrimination on the ground of SOGI will give green light to same-sex/ gay marriage. In fact, the introduction of SOGI discrimination legislation would not affect whether same sex couples would be entitled to marry or form some other similar unions, as marriage is not normally within the fields covered by the discrimination law.

35. The public also argue vigorously over how far the LGBTI can exercise their rights in daily life. For instance, for transgender people as well as the public, the confusion or discomfort about where gender lines are drawn make toilets/bathrooms in public facilities a perennial hot-button, because those are the only places most people are self-segregating based on their gender in an average day. Some people may suggest that labeling the single-stall toilets/bathrooms as “unisex” is a possible solution. However, will it be one easy fix for all?

36. In other countries, some of the concerns are handled through exemptions. In the United Kingdom, where the employment is for the purpose of an organized religion, it is not unlawful for an employer to apply a requirement related to the potential employee’s specific sexual orientation or not being a transsexual person, so as to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion’s followers.\

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19 Equality Act 2012 of the United Kingdom, Schedule 9, Paragraph 2.
Invitation to Submit Proposals

37. The EOC encourage proposals provided by research teams having in-depth comprehension and expertise experience in the study of issues about discrimination on the grounds of SOGI and intersex status, as well as possessing an established networking with relevant stakeholders.

Specific Objectives

38. The study is expected to be a fact-finding exercise with specific objectives as follows:

(a) To conduct a literature review of local and overseas policies and practices relating to discrimination on the grounds of SOGI and intersex status in the following areas: employment, education and training, social interaction, public access, services and facilities, management of premises, etc.

(b) To identify discrimination, harassment and vilification encountered by LGBTI groups in areas listed in (a).

(c) To solicit public views20 on: their awareness (including their contact and understanding) of LGBTI groups; their acceptance of LGBTI groups in various aspects of life; their perception of the discrimination encountered by LGBTI groups; and their views towards possible legislation against discrimination on the grounds of SOGI and intersex status.

(d) To evaluate and make recommendations on feasibility of legislating against discrimination on the grounds of SOGI and intersex status, scope of protection, possible practicable exemptions and justifications, and strategies of rolling out the legislation.

39. Research teams are welcome to cover other specific issues which would facilitate the fact-finding exercise. Such suggestions and related research design should be included in the research proposal and will be counted towards the team’s score in the tender assessment exercise.

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20 Views shall also be collected from: (1) representative parent groups/ religious groups who have perceived some forms of “reverse discrimination” because their rights to freedom of expression and religion are challenged; and (2) specific group of people who need treatment to change their sexual orientation from being gay/lesbian to heterosexual.
**Research Proposal**

40. Research teams who are interested in taking up the survey project are required to submit a proposal to the EOC in accordance with paragraph 41 below. The proposal should include, but not limited to, the following:

- information to be collected to achieve the survey objectives,
- detailed sample design,
- pilot survey to verify testing instruments and procedures,
- process of data collection, including recruitment of respondents, and designing questionnaires and discussion guidelines, etc.,
- quality control measures in both field work and office editing,
- data processing and data analysis,
- precision of results,
- working schedule of the entire project,
- number of interviewers and their qualifications,
- qualification and experience of the research team and of the principal investigator, and
- quotation and method of payment.

**Specification of Services**

41. The researchers are required to specify survey focus, sampling design, design of discussion guidelines, fieldwork and quality control, data processing and data analysis, and final report according to the following conditions:

- **Survey Focus:** Considering the survey objectives, the research team should identify and define the variables, and decide on the types of data to be collected.

- **Sampling Design:** The study may involve the methods below. Alternative sampling methods are welcome when they are deemed appropriate.
(a) *Public Education and Recruitment Exercise:* At least 2 seminar sessions shall be organized for the public and sexual minorities. They serve a key purpose of recruiting participants for focus group discussion survey. The subsidiary purpose is to arouse public awareness on the issue of discrimination on the grounds of SOGI and intersex status as well as the struggles and concerns of sexual minorities in the family, workplace and community.

(b) *Focus Groups for LGBTI:* LGBTI groups who have experienced discrimination are recruited for focus group discussion survey. Apart from obtaining details about their experiences of having been discriminated, participants’ views will be solicited on the feasibility of legislation against discrimination on the grounds of SOGI and intersex status, possible practicable exemptions and justifications, and strategies of rolling out the legislation.

(c) *Questionnaire Survey for the Public:* a general territory-wide survey of representative sample of people aged 15 or above. Various sampling methods can be considered, including but not limited to: face-to-face household survey, telephone survey, online survey, etc. Each method has its own merits and demerits and the essence is whether the method can achieve the objectives and is cost-effective to the study.

(d) *Focus Groups for the Public:* Participants are recruited from the general public to reflect representative views on the feasibility of legislation against discrimination on the grounds of SOGI and intersex status. Furthermore, they will be invited to give views on scope of protection, possible practicable exemptions and justifications, and strategies of rolling out the legislation. Grouping might be based on: (a) professions (e.g., workers, homemakers); (b) educational attainment level; (c) affiliation (e.g., parent groups, religious groups). Other relevant categorization options are welcome for consideration.

The research team has to discuss regularly with EOC staff in developing an appropriate sampling method and designing robust questionnaires / focus group discussion guidelines, which should be approved by the EOC.

- **Fieldwork and Quality Control:**

  (a) All interviewers/ facilitators should have a basic knowledge of equal opportunity issues and be thoroughly trained before they commence.
(b) All interviews/ focus group discussion sessions should be conducted in a sensitive manner about equal opportunity issues. The EOC will provide additional briefing for the successful bidder.

(c) A detailed quality control process needs to be identified.

- **Data Processing and Data Analysis:**

  (a) All survey data must be processed on computer. Data can be aggregated as composite scores whenever necessary.

  (b) Information on data processing, measurement of variables and the use of statistical analysis should be provided.

  (c) Detailed plans of tabulations and statistical analyses of the survey should be prepared for EOC’s consideration.

- **Presentation of Survey Results:**

  (a) A bilingual [Chinese and English] full report of the survey, including a glossary of definition of terms and technical jargons, should be produced. The format of the report should be agreed by the EOC. The full report should include the following as its contents: research objectives, methodology, findings, discussions, and recommendations and implications.

  (b) A validated and clean data file in a mutually agreed format on computer diskettes should be submitted to the EOC.

  (c) An oral presentation of the research results to the EOC should be made plus the attendance at a media briefing, if so requested by the EOC.

- **Timing:** It is expected that the project will be completed within a timeframe of 12 months.

- **Copyright:** Copyright of the survey report, data collected and information derived from the survey shall remain the property of the EOC.

- **Budget:** All expenditure items should be grouped under appropriate categories and justifications must be given to support purchase of equipment items.
• *Evaluation*: Survey progress is subject to monitoring by the EOC. It is imperative to submit progress reports and/or present results orally as means of process evaluation.

**Submission of Proposal**

42. It is noteworthy that the study is of a moderate scale, with well-defined scope and sufficient references for information. Cost and quality of the project will be considered concurrently.

43. One original and one duplicate copy of the proposal in bilingual (English and Chinese) setting should be submitted by hand or courier to the EOC Office on or before 24 February 2014. The envelope should be marked with the project title and “Placed in Tender Box”. The research team, that has submitted a proposal, may be required to give an oral presentation to members of the EOC.

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