



Rating the ACT Legislative Assembly against  
*CPA Benchmarks for Democratic Legislatures*  
– is A minus good enough?

Wayne Berry MLA,  
Speaker of the Legislative Assembly for the Australian Capital Territory

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## **Introduction and background**

In 2006, a Commonwealth Parliamentary Association (CPA) study group hosted by Bermuda produced a report entitled, *Benchmarks for Democratic Legislatures*. Drawing on a range of earlier works including the National Democratic Institute's discussion paper, *Toward the Development of International Standards for Democratic Legislatures*, the benchmarks set out a set of best practice standards aimed at providing tools to better assess levels of parliamentary democracy across CPA branches. The ultimate goal of this exercise was to increase accountability in Commonwealth member nations through analysis, discussion and review.

The study group in question considered a range of themes as part of its work and developed recommended benchmarks in relation to:

- the representative aspects of parliament;
- ensuring the independence, effectiveness and accountability of parliament;
- parliamentary procedures;
- public accountability;
- the parliamentary service; and
- parliament and the media.<sup>1</sup>

Against this background, after reviewing the 87 benchmarks set out in the paper, I decided it would be a useful exercise to gauge the Australian Capital Territory (ACT) Legislative Assembly's performance against them and provide some analysis as to the areas where the ACT's form of governance could be improved.

## **Findings**

In reviewing the ACT Legislative Assembly's performance against the benchmarks, I applied a broad interpretation of each benchmark that considered compliance with *both* the letter and spirit of the measures. In doing this I found that there were a number of areas where the Assembly did not perform as well as it could.

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<sup>1</sup> Commonwealth Parliamentary Association Study Group (2006) '[Benchmarks for Democratic Legislatures](#)' p 8.

Out of the 87 benchmarks I found that there were seven benchmarks where the Assembly did not fully meet either the spirit and/or the letter of a measure as it had been set out by the Study Group. Whilst I consider that the Assembly's performance is, in the main, of a high standard (80 out of 87 benchmarks being met) – an A minus if you will – this does not mean that we can rest on our laurels.

I set out below these areas where I believe we can do better.

Appendix A is a full list of the relevant benchmarks and the Assembly's performance against them.

### The Assembly Budget

An issue of ongoing concern to me is the inadequate arrangements for formulating the Assembly's budget, which currently involve the Executive to a degree not envisioned by the Study Group in its benchmark related to parliamentary budgeting (*benchmark 6.1.2*) – namely that, 'Only the legislature shall be empowered to determine and approve the budget of the legislature'.

Nor does the Legislative Assembly's approach accord with the relevant Latimer House Principle concerning the development and administration of parliamentary budgets which sets out that, 'An all-party committee of members of parliament should review and administer parliament's budget which should not be subject to amendment by the executive'<sup>2</sup>. Delegates may recall that at last year's conference I presented a paper on this subject.

Whilst the Assembly's Standing Committee on Administration and Procedure do involve themselves in the development of the Assembly's budget submission, it is ultimately the Executive, through Budget Cabinet, that unilaterally decides the quantum of funding for the legislature that will be inserted in the appropriation bill. While it is true that the Assembly as a whole still has an opportunity to vote on the

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<sup>2</sup> Commonwealth Parliamentary Association, Commonwealth Legal Education Association, Commonwealth Magistrates' and Judges' Association, Commonwealth Lawyers' Association (2004) 'Commonwealth (Latimer House) Principles on the Three Branches of Government' Commonwealth Secretariat p 22.

appropriation bill and can recommend amendments, where there is a majority government (as there currently is), simple arithmetic means that an appropriation bill will almost always be passed in its original form without amendment.

In my paper for last year's conference, *The application of the Latimer House Principles in developing a legislature's budget: parliamentary autonomy versus executive prerogative*, I outlined a number of options that would give better expression to the relevant Latimer House principle and which would more fully address the issues that underpin the inclusion of this particular benchmark by the Study Group.

I believe this is a critical area to progress as it fundamentally affects the proper expression of the separation of powers doctrine. The current state of play involves, in my view, an incursion into the affairs of the legislative branch by the executive branch.

#### Legislative debate

*Benchmark 2.5.2* sets out that, 'The legislature shall provide adequate opportunity for legislators to debate bills prior to a vote'.

Whilst the Assembly largely conforms to this measure, as in many other parliaments, there may be occasions where a majority government in our case (holding nine or more of the 17 seats) can apply a closure or 'gag' motion to a particular item under discussion, including a bill, to end debate and resolve a question immediately. Some would argue that the application of an urgency motion, limiting debating time allotments for each also affects the 'adequacy' of debate on legislation.

Thankfully, in my experience these procedures are not commonly used in the Assembly with respect to debating bills but, nonetheless, the procedures do allow it. To underscore this, since 1996 only three bills have been declared urgent and since 2000 no bills have been the subject of a closure motion.

### Committee review

*Benchmark 3.2.1* sets out that, ‘There shall be a presumption that the legislature will refer legislation to a committee, and any exceptions must be transparent, narrowly-defined, and extraordinary in nature’.

The Assembly does not comply with this measure if it is taken to mean that all bills are referred for substantive review on the policy aspects of the legislation by standing, select or committee-as-whole type apparatus.

The Assembly does, however, refer all legislation to its Standing Committee on Scrutiny of Bills and Subordinate Legislation which amongst other roles, evaluates and reports on whether legislation unduly trespasses on personal rights and liberties, whether legislation inappropriately delegates legislative powers and insufficiently subjects the exercise of legislative power to parliamentary scrutiny. It is not the remit of the committee to form a view as to the merits or otherwise of the public policy dimensions expressed in the legislation.

To refer each piece of legislation for substantive review along these lines could result in legislative gridlock and has not been seen as desirable by any members of the Assembly of whom I am aware.

### Independent employment arrangements

*Benchmark 5.1.2* sets out that, ‘The legislature, rather than the executive branch, shall control the parliamentary service and determine the terms of employment’.

The arrangements in place in the ACT do not conform to this benchmark in a number of key respects. Firstly, the staff employed by the ACT Legislative Assembly Secretariat to support the legislature are employed under the *Public Sector Management Act 1994* and are ACT Government (Executive) employees. These staff are bound by the ACT Public Service Code of Conduct (although there is also a Secretariat-specific code of conduct) and their rates of pay and conditions flow from template agreements negotiated at the whole-of-government level by the Executive.

However, there are a number of provisions in both the Public Sector Management Act and the Financial Management Act which identify the independence of the Clerk (the administrative head of the Secretariat) and his or her staff. It remains an open question as to whether it is appropriate to devise a stand-alone legislative framework which covers Secretariat staff. Whilst there would be advantages in terms of entrenching the separation of the functions performed by Secretariat staff from those of the wider civil service, there would also be considerable administrative overheads involved in developing stand alone industrial and governance related policies of the types already in place at the whole-of-government level.

#### Code of conduct for staff

*Benchmark 5.4.3* provides that, ‘All staff shall be subject to a code of conduct’.

Legislative Assembly Secretariat staff are subject to a separate code of conduct. MLAs are also subject to a code of conduct.

Although it was recommended by the Assembly’s Standing Committee on Administration and Procedure a number of years ago, the Assembly has not implemented a code of conduct for members’ staff. I am supportive of a code of conduct for members’ staff which sets out general principles and standards of behaviour to be observed. Although there are always political sanctions that can be levied against MLAs and their staff who do not observe general community standards of behaviour, I believe that a specific code for staff, endorsed by members and given continuing effect by the Assembly, would provide an explicit covenant that more legitimately binds members’ offices to proper standards.

#### Committee oversight

*Benchmark 7.2.2* provides that, ‘Oversight committees shall provide meaningful opportunities for minority or opposition parties to engage in effective oversight of government expenditures. Typically, the public accounts committee will be chaired by a member of the opposition party’.

This convention has been consistently observed until the most recent Assembly where the Opposition Chair was deposed by a vote of the committee (made up of three

members – one Opposition member, one Government member and one member of the crossbench). This was the legitimate prerogative of the Committee. However, the Assembly's commitment to this convention is second to none when compared to parliaments in other state and territory jurisdictions.

Whilst the rationale behind this benchmark is sound, that is that the government's expenditure and revenue decisions are subject to rigorous scrutiny through a public accounts committee headed by an Opposition member, the fact that the Assembly's public accounts committee replaced the Opposition Chair with a crossbench chair (a member of the Greens) rather than a government chair shows that the Assembly lives up to at least its spirit. Since self-government in the ACT, there have been twelve chairs of the public accounts committee. The first ever chair of the committee was a member of the government, while the current chair is a member of the cross bench. In between, however, ten of these have been members of the Opposition (nine have been either Leaders of the Opposition or Shadow Treasurers).

This is a record, as far as I am aware, unrivalled by any other Australian jurisdiction.

It is also worth noting that the current majority government has observed the convention that the Deputy Speaker be a member of the Opposition despite having the numbers to award both the speakership and deputy speakership to government members. Eschewing a 'winner takes all' approach can also be viewed as inherently democratic and I would suggest that conventions such as these, themselves, form important benchmarks with which to assess the democratic character of a legislature.

#### Public votes

Benchmark 2.6.1 states that, 'Plenary votes in the legislature shall be public'.

This benchmark is generally observed at the Assembly. However, there are a number of exceptions. The election of the Speaker, Deputy Speaker and Chief Minister at the commencement of a new Assembly, which whilst taking place as a public proceeding, is conducted by secret ballot and means that the voting records of individual members cannot be publicly known.

There are arguments for and against secret ballots. One argument goes that a secret ballot alleviates any external pressure being exerted on a member to vote for a particular candidate (although this claim could be equally true for all plenary votes and indeed an inherent part of a pluralist, democratic, process involves the application of pressure on elected representatives to cast their votes in particular ways by constituents and interest groups).

The counter-argument is that the public has a right to know how MLAs vote in all aspects of their public duty and that by making ballots secret, means that members do not have to account to their constituents for their decisions. It is also the case that an MLA could use the secret ballot to vote contrary to their public pronouncements on the issue. For example, a member could indicate public support for a politically popular candidate for Speaker but, for whatever reason, hide behind the secret ballot to vote for an undisclosed political ally.

This lack of transparency has the potential to thwart accountability.

## **Conclusion**

Whilst the ACT Legislative Assembly does perform to a high standard against the benchmarks set out by the Study Group, there is still room for improvement. The main area which I believe requires immediate attention is with respect to benchmark 6.1.2 concerning the legislature's budget development and decision making. In this regard, it is my view that should the ACT be able to implement changes that provide greater control for the legislature in determining its budget, the Assembly would substantially improve its democratic credentials and give more fulsome expression to the separation of powers doctrine. I believe that addressing this area of concern would bolster the ACT's performance to an 'A' grade vis-à-vis the benchmarks notwithstanding some of the other areas of non- or semi-compliance that I have touched upon.



While these other areas of incomplete or non-compliance need to be given further consideration and will involve further discussion, I do not believe that they fundamentally undermine the democratic character of the ACT.

*I would like to acknowledge the work of David Skinner, Manager of Strategy and Parliamentary Education, ACT Legislative Assembly Secretariat, in the preparation and drafting of this paper.*

## Appendix A – Benchmarks for democratic legislatures – ACT Legislative Assembly compliance.

Benchmark	Legislative Assembly for the Australian Capital Territory - comments
1.1.1 Members of the popularly elected or only house shall be elected by direct universal and equal suffrage in a free and secret ballot.	√
1.1.2 Legislative elections shall meet international standards for genuine and transparent elections.	√
1.1.3 Term lengths for members of the popular house shall reflect the need for accountability through regular and periodic legislative elections.	√ Fixed term elections (held every four years)
1.2.1 Restrictions on candidate eligibility shall not be based on religion, gender, ethnicity, race or disability.	√
1.2.2 Special measures to encourage the political participation of marginalized groups shall be narrowly drawn to accomplish precisely defined, and time-limited, objectives.	√ There are no special measures in place of this nature
1.3.1 No elected member shall be required to take a religious oath against his or her conscience in order to take his or her seat in the legislature.	√ Members can take an oath or a secular affirmation
1.3.2 In a bicameral legislature, a legislator may not be a member of both houses.	N/A - the Assembly is unicameral
1.3.3 A legislator may not simultaneously serve in the judicial branch or as a civil servant of the executive branch.	√
1.4.1 Legislators shall have immunity for anything said in the course of the proceedings of legislature.	√ Parliamentary privilege applies to MLAs
1.4.2 Parliamentary immunity shall not extend beyond the term of office; but a former legislator shall continue to enjoy protection for his or her term of office.	√
1.4.3 The executive branch shall have no right or power to lift the immunity of a legislator.	√
1.4.4 Legislators must be able to carry out their legislative and constitutional functions in accordance with the constitution, free from interference.	√
1.5.1 The legislature shall provide proper remuneration and reimbursement of parliamentary expenses to legislators for their service, and all forms of compensation shall be allocated on a nonpartisan basis.	√
1.6.1 Legislators shall have the right to resign their seats.	√
1.7.1 The legislature shall have adequate physical infrastructure to enable members and staff to fulfil their responsibilities.	√ This is a difficult area to operationalise and relates to the Latimer House principles. However, in the broad, the Assembly has adequate physical infrastructure (i.e. there is a building and associated facilities which are in good repair and provide a suitable venue for the Assembly and its committees to undertake its work effectively).
2.1.1 Only the legislature may adopt and amend its rules of procedure.	√
2.2.1 The legislature shall select or elect presiding officers pursuant to criteria and procedures clearly defined in the rules of procedure.	√
2.3.1 The legislature shall meet regularly, at intervals sufficient to fulfil its responsibilities.	√
2.3.2 The legislature shall have procedures for calling itself into regular session.	√

2.3.3 The legislature shall have procedures for calling itself into extraordinary or special session.	√
2.3.4 Provisions for the executive branch to convene a special session of the legislature shall be clearly specified.	√ There is a requirement for 9 members of the Assembly to agree to a special sitting of the Assembly proceeding (i.e. an absolute majority)
2.4.1 Legislators shall have the right to vote to amend the proposed agenda for debate.	√
2.4.2 Legislators in the lower or only house shall have the right to initiate legislation and to offer amendments to proposed legislation.	√
2.4.3 The legislature shall give legislators adequate advance notice of session meetings and the agenda for the meeting.	√
2.5.1 The legislature shall establish and follow clear procedures for structuring debate and determining the order of precedence of motions tabled by members.	√
<b>2.5.2 The legislature shall provide adequate opportunity for legislators to debate bills prior to a vote.</b>	<b>X</b>  <b>As is the case in many democratic legislatures, adequate opportunity for debate on bills can be curtailed by the application of a closure motion or ‘gag’ by the majority party.</b>
<b>2.6.1 Plenary votes in the legislature shall be public.</b>	<b>X</b>  <b>The only exception to this is the election of the Speaker, Deputy Speaker and Chief Minister at the commencement of a new Assembly. The election of these officers, which whilst still a public proceeding, is conducted by secret ballot.</b>
2.6.2 Members in a minority on a vote shall be able to demand a recorded vote.	√
2.6.3 Only legislators may vote on issues before the legislature.	√
2.7.1 The legislature shall maintain and publish readily accessible records of its proceedings.	√
3.1.1 The legislature shall have the right to form permanent and temporary committees.	√
3.1.2 The legislature’s assignment of committee members on each committee shall include both majority and minority party members and reflect the political composition of the legislature.	√
3.1.3 The legislature shall establish and follow a transparent method for selecting or electing the chairs of committees.	√
3.1.4 Committee hearings shall be in public. Any exceptions shall be clearly defined and provided for in the rules of procedure.	√
3.1.5 Votes of committee shall be in public. Any exceptions shall be clearly defined and provided for in the rules of procedure.	√
<b>3.2.1 There shall be a presumption that the legislature will refer legislation to a committee, and any exceptions must be transparent, narrowly-defined, and extraordinary in nature.</b>	<b>X</b>  <b>This is not the case in the assembly.</b>
3.2.2 Committees shall scrutinize legislation referred to them and have the power to recommend amendments or amend the legislation.	√
3.2.3 Committees shall have the right to consult and/or employ experts.	√
3.2.4 Committees shall have the power to summon persons, papers and records, and this power shall extend to witnesses and evidence from the executive	√

branch, including officials.	
3.2.5 Only legislators appointed to the committee, or authorised substitutes, shall have the right to vote in committee.	√
3.2.6 Legislation shall protect informants and witnesses presenting relevant information to commissions of inquiry about corruption or unlawful activity.	√
4.1.1 The right of freedom of association shall exist for legislators, as for all people.	√
4.1.2 Any restrictions on the legality of political parties shall be narrowly drawn in law and shall be consistent with the International Covenant on Civil and Political Rights.	√
4.2.1 Criteria for the formation of parliamentary party groups, and their rights and responsibilities in the legislature, shall be clearly stated in the Rules.	√
4.2.2 The legislature shall provide adequate resources and facilities for party groups pursuant to a clear and transparent formula that does not unduly advantage the majority party.	√
4.3.1 Legislators shall have the right to form interest caucuses around issues of common concern.	√ Although not prescribed, no prohibition exists
5.1.1 The legislature shall have an adequate non-partisan professional staff to support its operations including the operations of its committees.	√
<b>5.1.2 The legislature, rather than the executive branch, shall control the parliamentary service and determine the terms of employment.</b>	<b>X</b>  <b>This is not the case in many respects.</b>  <b>Although recognised as being independent of executive government, Secretariat staff are essentially ACT Government public servants with the same terms of employment which derive from agreements made with the Government of the day.</b>
5.1.3 The legislature shall draw and maintain a clear distinction between partisan and non-partisan staff.	√
5.1.4 Members and staff of the legislature shall have access to sufficient research, library, and ICT facilities.	√  Again, it is difficult to define 'sufficient'. In whose mind? There could well be individual members who view the standard of facilities as being insufficient. However, in the broad, MLAs and staff have access to these facilities to a reasonable standard and concerns about the sufficiency of facilities of the type described can be addressed through the Assembly's Standing Committee on Administration and Procedure which advises the Speaker on Members' entitlements and facilities.
5.2.1 The legislature shall have adequate resources to recruit staff sufficient to fulfil its responsibilities. The rates of pay shall be broadly comparable to those in the public service.	√
5.2.2 The legislature shall not discriminate in its recruitment of staff on the basis of race, ethnicity, religion, gender, disability, or, in the case of non-	√

partisan staff, party affiliation.	
5.3.1 Recruitment and promotion of non-partisan staff shall be on the basis of merit and equal opportunity.	√
5.4.1 The head of the parliamentary service shall have a form of protected status to prevent undue political pressure.	√
5.4.2 Legislatures should, either by legislation or resolution, establish corporate bodies responsible for providing services and funding entitlements for parliamentary purposes and providing for governance of the parliamentary service.	√  The ACT Legislative Assembly Secretariat is recognised in the Public Sector Management Act and the Financial Management Act as having an independent status in supporting the work of the legislature.
<b>5.4.3 All staff shall be subject to a code of conduct.</b>	<b>X</b>  <b>The Assembly partly complies.</b>  <b>All Secretariat staff are subject to both the ACT Public Service Code of Conduct and a Secretariat specific code of conduct.</b>  <b>However, staff employed by members are not subject to an Assembly specific code of conduct.</b>
6.1.1 The approval of the legislature is required for the passage of all legislation, including budgets.	√
<b>6.1.2 Only the legislature shall be empowered to determine and approve the budget of the legislature.</b>	<b>X</b>  <b>The Assembly does not comply with the spirit of this measure. In practice, it is the Government of the day that determines the quantum of funding made available through the appropriation bill.</b>
6.1.3 The legislature shall have the power to enact resolutions or other non-binding expressions of its will.	√
6.1.4 In bicameral systems, only a popularly elected house shall have the power to bring down government.	n/a
6.1.5 A chamber where a majority of members are not directly or indirectly elected may not indefinitely deny or reject a money bill.	n/a
6.2.1 In a bicameral legislature there shall be clearly defined roles for each chamber in the passage of legislation.	n/a
6.2.2 The legislature shall have the right to override an executive veto.	n/a
6.3.1. Opportunities shall be given for public input into the legislative process.	√
6.3.2 Information shall be provided to the public in a timely manner regarding matters under consideration by the legislature.	√
7.1.1 The legislature shall have mechanisms to obtain information from the executive branch sufficient to exercise its oversight function in a meaningful way.	√
7.1.2 The oversight authority of the legislature shall include meaningful oversight of the military security and intelligence services.	n/a
7.1.3 The oversight authority of the legislature shall include meaningful oversight of state owned enterprises.	√

	However, claims of commercial-in-confidence status have been viewed as an impediment to oversight throughout the years.
7.2.1 The legislature shall have a reasonable period of time in which to review the proposed national budget.6	√
<b>7.2.2 Oversight committees shall provide meaningful opportunities for minority or opposition parties to engage in effective oversight of government expenditures. Typically, the public accounts committee will be chaired by a member of the opposition party.</b>	<b>X</b>  <b>The ACT Legislative Assembly has a proud record with respect to this benchmark. Whilst in many other jurisdictions government have used their numbers to install a government chair to this position, the Assembly has consistently had an Opposition chair in the role. However, recently the Opposition Chair of the Public Accounts committee was deposed by a vote of its membership and a member of the Crossbench assumed the Chair as a result. I would argue that the fact that the Chair remains a non-government member means that the spirit of this benchmark is being met by the Assembly.</b>
7.2.3 Oversight committees shall have access to records of executive branch accounts and related documentation sufficient to be able to meaningfully review the accuracy of executive branch reporting on its revenues and expenditures.	√
7.2.4 There shall be an independent, non-partisan Supreme or National Audit Office whose reports are tabled in the legislature in a timely manner.	√
7.2.5 The supreme or national audit office shall be provided with adequate resources and legal authority to conduct audits in a timely manner.	√
7.3.1 The legislature shall have mechanisms to impeach or censure officials of the executive branch, or express no-confidence in the government.	√
7.3.2 If the legislature expresses no confidence in the government the government is obliged to offer its resignation. If the head of state agrees that no other alternative government can be formed, a general election should be held.	√
8.1.1 The legislature shall provide all legislators with adequate and appropriate resources to enable the legislators to fulfil their constituency responsibilities.	√
8.2.1 The legislature shall have the right to receive development assistance to strengthen the institution of parliament.	n/a
8.2.2 Members and staff of parliament shall have the right to receive technical and advisory assistance, as well as to network and exchange experience with individuals from other legislatures.	√
9.1.1 The legislature shall be accessible and open to citizens and the media, subject only to demonstrable public safety and work requirements.	√
9.1.2 The legislature should ensure that the media are given appropriate access to the proceedings of the legislature without compromising the proper functioning of the legislature and its rules of procedure.	√
9.1.3 The legislature shall have a non-partisan media relations facility.	√  The Clerk is responsible for providing general non-partisan

	information about the Assembly where media requests are made whilst the Speaker of the Assembly makes media comment about the specific operations of the legislature, again, in a non-partisan way.
9.1.4 The legislature shall promote the public's understanding of the work of the legislature.	√
9.2.1 Where the constitution or parliamentary rules provide for the use of multiple working languages, the legislature shall make every reasonable effort to provide for simultaneous interpretation of debates and translation of records.	n/a
10.1.1 Legislators should maintain high standards of accountability, transparency and responsibility in the conduct of all public and parliamentary matters.	√  This is a matter of community perception and debate and is not easily operationalised. However, it is worthy of mention that the Assembly has recently established of an ethics adviser position which will provide a source of advice and information on areas of ethical ambiguity and will add extra assurance that MLAs uphold high standards of accountability, transparency and responsibility.
10.1.2 The legislature shall approve and enforce a code of conduct, including rules on conflicts of interest and the acceptance of gifts.	√  There is a code of conduct for MLAs. There are also rules and procedures for MLAs to declare gifts.
10.1.3 Legislatures shall require legislators to fully and publicly disclose their financial assets and business interests.	√  Members are required to declare any gifts or other financial or business interests through a Statement of Registrable Interests form. Completed forms are kept by the Clerk of the Assembly and accessible to members of the public and the press on request. The purpose of the Statement of Registrable Interests form is to place on the public record Members' and Ministers' interests which may conflict, or may be seen to conflict, with their public duty.
10.1.4 There shall be mechanisms to prevent, detect, and bring to justice legislators and staff engaged in corrupt practices.	√  Although the ACT has no independent commission to investigate corruption, the Australian Federal Police has a remit to review suspected breaches of the criminal law perpetrated MLAs. The ACT Auditor-General and the ACT Ombudsman also play a role in

	receiving and investigating reports concerning ACT MLAs suspected of wrongdoing.
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