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Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY ELECTRONIC SUBMISSION

15 June 2020

Dear Committee Secretary,

Committee inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020

I welcome the opportunity to make this submission to the Committee's inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020 ('the Bill'). I do so in my capacity as a Senior Research Associate at the Andrew & Renata Kaldor Centre for International Refugee Law. The Kaldor Centre is the world's first and only research centre dedicated to the study of international refugee law. It was established in October 2013 to undertake rigorous research to support the development of legal, sustainable and humane solutions for displaced people, and to contribute to public policy involving the most pressing displacement issues in Australia, the Asia-Pacific region and the world.

In my view, this Bill should not be passed. The Bill is a renewed attempt to significantly expand government search and seizure powers in immigration detention. It proposes to do so in a manner that would dramatically increase executive power to further restrict the already very limited liberties of people in immigration detention. This is a step that should not be taken without strong justification.

The Explanatory Memorandum to the Bill says that the amendments proposed will 'allow for a targeted, intelligence-led, risk-based approach in relation to the seizure of prohibited things from detainees',¹ It is not clear why the Bill is necessary to achieve this. The *Migration Act 1958* (Cth) already provides very broad powers to prevent unlawful or harmful activity in

¹ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020, 2.

immigration detention, including through search and seizure. The Explanatory Memorandum says that these existing powers are insufficient to prevent the misuse of various ‘things that are of concern within the context of immigration detention facilities.’² However, it does not provide any evidence of specific risks that cannot be managed under existing arrangements. Moreover, as other submissions to this inquiry have also pointed out, a number of the generalised statements about the risks in detention do not align with publicly available evidence.³

Legislation with such a significant impact on individual liberty should not be passed on the basis of rhetoric and conjecture. A clear and precise justification is required, and at present this is lacking. Contrary to the assertion in the Minister’s second reading speech that the proposed amendments are ‘reasonably necessary’ and ‘proportionate’, the Bill is not accompanied by any coherent case demonstrating its necessity or proportionality.

Moreover, there is much to suggest that the measures proposed would be harmful in a number of ways. The Explanatory Memorandum, the Second Reading Speech and the examples in the Bill itself make it clear that an immediate purpose of the Bill is to facilitate a ban on mobile phones in detention. The Explanatory Memorandum explicitly states that the Bill ‘addresses’ a Full Federal Court decision that found that a blanket policy prohibiting mobile phones and SIM cards in detention was invalid.⁴ A general ban on mobile phones, either for all detainees or (as the Second Reading Speech suggests) for detainees within particular ‘categories’ (which remain undefined in the Bill) would, amongst other things:

- reduce access to personal, psychological and legal support, and would take away the capacity for detainees to maintain their privacy while accessing these kinds of support;
- reduce the transparency and public visibility of Australia’s already very opaque immigration detention regime, thereby impairing the capacity of electors to hold the government accountable for its administration of this regime;
- exacerbate the already high risk posed by detention in the context of the COVID-19 pandemic, by requiring detainees to use shared phone and computer facilities for essential communications.

A widespread ban on mobile phones in immigration detention may contravene a number of international law obligations. It may also infringe the constitutionally protected implied freedom of political communication, and would be likely to face challenge on this basis.

² Ibid, 3.

³ See eg Human Rights Law Centre, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020; See eg Visa Cancellations Working Group, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

⁴ Explanatory Memorandum, 3; *ARJ17 v Minister for Immigration and Border Protection* [2018] FCAFC 98.

For these reasons, the Bill should not be passed. I elaborate on these points in further detail below.

1. The Bill pursues its stated objectives in disproportionate, unnecessary ways

(a) *The measures proposed in the Bill are an extreme expansion of executive power, with insufficient oversight*

The Bill, if passed, would empower the Minister to make a legislative instrument determining any item to be a prohibited thing, if:

- (a) It is already prohibited by Australian law, or
- (b) 'possession or use of the thing in an immigration detention facility *might* be a risk to the health, safety or security of persons in the facility, or to the order of the facility'.⁵

This is an extremely broad power, exercisable once a very low and poorly defined risk threshold is met. While the examples in the Bill, the Explanatory Memorandum and the Second Reading Speech focus on the control of mobile phones and communication devices, it would conceivably allow an extremely broad range of items to be determined to be 'prohibited'. This could include things like pens, paper, clothes and bedsheets. As the Full Federal Court noted in *ARJ17 v Minister for Immigration and Border Protection*, '[h]uman ingenuity can convert most everyday objects that have innocent uses into ones capable of inflicting bodily injury or being used to escape from detention'.⁶

Once an item has been designated as a 'prohibited thing', an authorised officer may, at any time and without warrant, search a detainee's body, clothing and property for the thing. This search power may be exercised even if the officer does not suspect the person of carrying any prohibited items.⁷ The prohibited thing may then be seized by the officer.⁸

Where the officer does reasonably suspect that a detainee is in possession of a prohibited thing, the powers conferred by the Bill are even greater, authorising them to perform a strip search, without warrant.⁹

The Minister is also given the power to issue directions, by legislative instrument, requiring officers to exercise their seizure powers in particular ways. The Minister, could, for instance, use this power to order that mobile phones or other communication devices be seized from all detainees. Alternatively, it could be used to direct that seizure only apply to a subset of detainees. In the past, government policy has attempted to restrict access to such devices for Unauthorised Maritime Arrivals, while allowing access to other detainees.

⁵ Proposed s 251A(2)(b).

⁶ *ARJ17 v Minister for Immigration and Border Protection*, [17].

⁷ Proposed s 252(2).

⁸ Proposed s 252(4A). If the thing was owned or controlled by the detainee then reasonable steps must be taken to return it to them when their time in detention ends, but there appears to be no other limit on how long the item may be retained by the officer.

⁹ Proposed s 252A.

Parliamentary oversight of these proposed powers is inadequate. While a legislative instrument declaring one or more items to be 'prohibited things' is an instrument disallowable by the Senate, the efficacy of this accountability mechanism is limited by the fact that the Senate can only disallow the instrument in full. This will become difficult to administer where a single instrument groups multiple items together, some of which warrant further scrutiny and some of which do not. Even more problematically, Ministerial directions that prescribe how search and seizure powers must actually be administered in practice are not disallowable.

(b) The objects which the Bill is said to pursue are already achievable using existing laws

The Explanatory Memorandum states that the Bill will 'allow for a targeted, intelligence-led, risk-based approach in relation to the seizure of prohibited things from detainees,'¹⁰ and that '[t]he existing search and seizure powers in the Migration Act are not sufficient to prevent the misuse of drugs, mobile phones, SIM cards and internet-capable devices or other things that are of concern within the context of immigration detention facilities.'¹¹

The Explanatory Memorandum also says:

*'Evidence indicates that detainees are using mobile phones and other internet-capable devices to organise criminal activities inside and outside immigration detention facilities, to coordinate and assist escape efforts, as a commodity of exchange, to aid the movement of contraband, and to convey threats to other detainees and staff.'*¹²

and,

*'There is evidence of illicit substance use and trafficking in immigration detention facilities to a degree that presents a serious health and safety risk to detainees, whether or not detainees are actively involved, as well as to officers and contracted service provider staff who may encounter unknown substances or substance-affected detainees.'*¹³

Finally, the Explanatory Memorandum says that '[t]he existing search and seizure powers in the Migration Act are not sufficient to prevent the misuse of drugs, mobile phones, SIM cards and internet-capable devices or other things that are of concern within the context of immigration detention facilities.'¹⁴

¹⁰ Explanatory Memorandum, 2.

¹¹ Ibid, 3.

¹² Ibid, 2.

¹³ Ibid, 3.

¹⁴ Ibid.

I am concerned that the stated risks that the Bill seeks to guard against take the form of broad assertions, with no substantiating evidence supplied. The very significant expansion of executive power sought in the Bill should not be granted without a clearer justification.

Moreover, contrary to the claims in the Explanatory Memorandum, current laws provide ample powers to protect against the stated risks. It is important to remember that ordinary criminal laws apply to those in detention. These laws provide a robust mechanism for dealing with the harms listed in the Explanatory Memorandum that are criminal in nature. These include:

- organising criminal activities inside and outside of detention facilities;
- possession, use and trafficking of illicit drugs (or other illegal things);
- using a mobile phone or an internet capable device in a way that a reasonable person would regard as being menacing, harassing or offensive;¹⁵
- the *Migration Act* creates a specific offence, punishable by five years' imprisonment, that a detainee commits if he or she 'manufactures, possesses, uses or distributes a weapon'.¹⁶ For the purposes of this offence, 'weapon' includes:
 - 'a thing made or adapted for use for inflicting bodily injury', and
 - a thing that the detainee threatens to use to inflict bodily injury, and
 - a thing that the detainee intends will be used to inflict bodily injury (whether by themselves or someone else).¹⁷

In addition, the *Migration Act* grants officers the power to conduct warrantless searches of detainees and their property to determine whether the detainee has hidden a thing capable of being used to inflict bodily injury or to aid escape.¹⁸ This includes the power to conduct strip searches, where the officer reasonably suspects that the detainee may have an item of this nature.¹⁹ Items found as a result of such searches can be seized.²⁰

(c) *The Bill would be harmful in a number of ways*

i. Banning mobile phones would impair transparency and public accountability

The only 'activity of concern' articulated in the materials supplementing the Bill that existing measures do not allow the government to control comprehensively comes from a statement in the Minister's Second Reading Speech:

[Mobile phones and internet capable devices] have also been used by detainees to intimidate and threaten the safety and welfare of staff. Staff have been filmed and photographed by detainees, with this material then transmitted to associates outside of

¹⁵ See *Criminal Code Act 1995* (Cth), s 474.17.

¹⁶ *Migration Act 1958* (Cth), s 197B.

¹⁷ *Ibid*, s 197B(2).

¹⁸ *Ibid*, s 252.

¹⁹ *Ibid*, s 252A.

²⁰ *Ibid*, ss 252, 252A.

*detention facilities via social media. This is causing significant fear and stress for staff and their families.*²¹

Where a detainee uses a mobile phone to threaten or harass a staff member, they are liable to prosecution under the criminal law. Section 474.17 of the *Commonwealth Criminal Code* provides that it is an offence, punishable by up to three years imprisonment, for a person to use a carriage service in a way that reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive. A person who shares footage of a staff member on social media in a manner that constitutes genuine harassment may be liable under this offence. A database search for prosecutions under this provision revealed no cases involving harassment of an immigration detention staff member.

In a 2019 report into risk management practices in immigration detention, the Australian Human Rights Commission found that:

*information provided to the Commission by facility staff suggests that only a small proportion of people in immigration detention are using mobile phones inappropriately, and that incidents of a serious nature involving mobile phone use are exceptional rather than commonplace.*²²

In light of this, the Commission concluded that

*any blanket prohibition on mobile phones in immigration detention would not be a necessary, reasonable or proportionate response to the risks arising from their use. A more appropriate response would be to ensure proper accountability for misuse of phones among the individuals involved.*²³

In contrast to the low incidence of mobile phones being used in a harmful manner, there are numerous examples of mobile phones and internet capable devices being used to *document* the treatment and conditions of detainees in immigration detention in a way that improves public visibility and, by extension, accountability. In many instances, this has facilitated journalistic coverage of topics like:

- attempts to deport the Biloela family;²⁴
- the alleged use of excessive force in immigration detention by Serco employees²⁵

²¹ Second Reading Speech, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2020.

²² Australian Human Rights Commission, 'Risk management in immigration detention' (2019) https://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_risk_management_immigration_detention_2019.pdf, 58.

²³ Ibid.

²⁴ See eg Viki Gerova, 'Waleed Aly: This Is What Deportation Looks Like', *10Daily* (30 August 2019), <https://10daily.com.au/news/australia/a190830hivcg/waleed-aly-this-is-what-deportation-looks-like-20190830>

²⁵ See eg Helen Davidson, 'Secret recordings allege excessive force by guards in Australia's detention centres', *The Guardian* (25 March 2019) <https://www.theguardian.com/australia-news/2019/mar/25/secret-recordings-allege-excessive-force-by-guards-in-australias-detention-centres>

- the management of COVID-19 risks in immigration detention.²⁶

Mobile phones have also given detainees an important voice in public debate. For instance, an asylum seeker in detention, Farhad Bandesh, appeared by videolink on the Q&A episode 'COVID19: Where to Next?' to ask a question of panellists. Indeed, the perspectives of asylum seekers in detention about this very Bill were brought into the public conversation by virtue of a WhatsApp chat with journalist Hannah Ryan.²⁷ The capacity of detainees to communicate in this manner facilitates transparency and promotes accountability, and it should not be eroded. Indeed, as discussed further below, there are strong arguments that restricting the capacity for such communications would be unconstitutional.

ii. Banning mobile phones would reduce access to personal, psychological and legal support

Recent figures from the Department of Home Affairs indicate that there are over 1300 people housed in Australia's immigration detention facilities.²⁸ 40% of detainees have been in detention for over a year, and 23% for over two years.²⁹ This far exceeds time periods in common comparator countries.³⁰

As a recent study into the mental health and self-harm amongst asylum seekers in onshore detention has found, being in detention has a 'far ranging detrimental impact' on mental health.³¹ The Australian Human Rights Commission's 2019 report also found that the reintroduction of mobile phones into immigration detention facilities following the Full Federal Court's decision in *ARJ17 v Minister for Immigration and Border Protection* had facilitated increased contact with family members, friends and other supports outside detention, and that this had been recognised by both staff and detainees as having a positive impact on the mental health of detainees.³² Currently, the risks of COVID-19 (discussed further below) have meant that detainees are cut off from all in-person visits, making the need for phone contact with these support networks even more critical.

Mobile phones also allow detainees to access psychological and trauma support, including urgent support when detainees are contemplating self-harm, in a manner that affords some

²⁶ Hannah Ryan, 'A Leaked Video Shows Scared Refugees Questioning Immigration Officials About The Coronavirus', *Buzzfeed News* (19 March 2020) <https://www.buzzfeed.com/hannahryan/refugees-coronavirus-detention-brisbane-guard-diagnosed>

²⁷ Hannah Ryan, 'I WhatsApped refugees to ask why they're so freaked out about the Government taking their phones away', *Buzzfeed News* (20 May 2020) <https://www.buzzfeed.com/hannahryan/refugees-phones-australia-whatsapp-interview>

²⁸ See Refugee Council of Australia, 'Statistics on people in detention in Australia' (7 May 2020), Part 2: Number of people in detention, <https://www.refugeecouncil.org.au/detention-australia-statistics/2/>

²⁹ See Australian Government, Department of Home Affairs, *Immigration Detention and Community Status Statistics* (February 2020).

³⁰ Human Rights Law Centre, Submission to the Senate Select Committee on COVID-19, 6-7.

³¹ Kyli Hendrick, Gregory Armstrong, Guy Coffey and Rohan Borschmann, 'Self-harm among asylum seekers in Australian onshore immigration detention: how incidence rates vary by held detention type' (2020) *BMC Public Health* 20, 592, <https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-020-08717-2>

³² Australian Human Rights Commission, above n 22, 57.

privacy. They are also a critical tool used by detainees to maintain contact with legal representatives. The Visa Cancellations Working Group, of which the Kaldor Centre is a member, has covered this point in depth in its submission to this inquiry. The Working Group's submission comprehensively outlines:

- why mobile phones are critical to facilitating contact with clients in detention that allows for adequate preparation of cases,³³ and
- why replacing this with access to shared facilities, as the Explanatory Memorandum suggests, is inadequate.³⁴

I endorse the submissions made by the Working Group on this matter.

iii. The Bill would exacerbate the already high risk that COVID-19 poses in the context of immigration detention

As a result of the COVID-19 pandemic, immigration detention has become a potential health risk, to detainees, staff and the public. Indeed, the Commonwealth Department of Health itself recognises that 'people in correctional and detention facilities' are amongst those most at risk of contracting COVID-19.³⁵

The Australasian Society for Infectious Diseases and the Australian College of Infection Prevention and Control have cautioned that the conditions in detention centres 'would preclude adequate social distancing or self-isolation', potentially posing a risk to the health of detainees, staff and the broader Australian community.³⁶ This is exacerbated by shortages of hygiene supplies, such as soap, toilet paper and hand sanitiser,³⁷ and by the fact that a number of detainees have compromised immune systems or chronic medical conditions, and therefore fall into high-risk groups in the event of a COVID-19 outbreak.³⁸ In March 2020, a staff member at a Brisbane detention centre has tested positive for COVID-19.³⁹

³³ Visa Cancellations Working Group, above n 3, 19-20

³⁴ Ibid, 13-15.

³⁵ Australian Government, Department of Health, 'What you need to know about coronavirus (COVID-19)', <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/what-you-need-to-know-about-coronavirus-covid-19#who-is-most-at-risk>

³⁶ Australasian Society for Infectious Diseases and Australian College of Infection Prevention and Control, Joint Statement on COVID-19 and detainees, <https://www.asid.net.au/documents/item/1868>

³⁷ See eg Rebekah Holt and Saba Vasefi, 'We are sitting ducks for Covid 19': asylum seekers write to PM after detainee tested in immigration detention', *The Guardian* (24 March 2020), <https://www.theguardian.com/australia-news/2020/mar/24/we-are-sitting-ducks-for-covid-19-asylum-seekers-write-to-pm-after-detainee-tested-in-immigration-detention>

³⁸ See eg Refugee Council of Australia, 'Leaving no-one behind: Ensuring people seeking asylum and refugees are included in COVID-19 strategies' (28 April 2020), <https://www.refugeecouncil.org.au/priorities-covid-19/>

³⁹ See eg Ben Smee, Ben Doherty and Rebekah Holt, 'Fears for refugees after guard at Brisbane immigration detention centre tests positive for coronavirus', *The Guardian* (19 March 2020), <https://www.theguardian.com/australia-news/2020/mar/19/fears-for-refugees-as-guard-at-brisbane-immigration-detention-centre-tests-positive-for-coronavirus>

In these circumstances, over 11,000 health care professionals have signed a joint letter to the Australian Government, calling for the release of detainees, on public health grounds.⁴⁰ Similar calls have been made by the Australian Human Rights Commissioner,⁴¹ and a number of UN organisations.⁴² Several foreign countries, including Canada, the United Kingdom, Spain and Belgium have elected to reduce the number of people in immigration detention to mitigate the risks of COVID-19.

The measures proposed in the Bill would, by contrast, serve to *exacerbate* the already high risk of COVID-19 in Australia's immigration detention facilities, by forcing large numbers of detainees to use a small number of shared phone and computer facilities. As the Visa Cancellations Working Group has noted in its submission to this inquiry, broadening search powers during this time is also likely to lead to an increase in physical contact between staff and detainees that does not adhere to necessary social distancing protocols.⁴³

Collectively, these reasons suggest that the Bill is disproportionate and maladapted to its stated objectives. This lack of proportionality indicates that it may infringe a number of international human rights law obligations. International human rights law requires that people in detention:

- be treated fairly and in a manner that upholds their dignity,⁴⁴
- have their rights to freedom of expression (including seeking, receiving and imparting information and ideas),⁴⁵ free association with others,⁴⁶ and participation in cultural life⁴⁷ preserved, and
- are free from arbitrary interference with privacy, family or correspondence.⁴⁸

2. The Bill, if passed, would be likely to face constitutional challenge

If the Bill is passed, there will be a significant burden on communication about political matters, both by its direct operation and its chilling effect. Indeed, the Explanatory Memorandum to the first iteration of this Bill, which was put before Parliament 2017, justified the need for legislation

⁴⁰ See eg Bianca Hall, 'Doctors warn of deadly coronavirus risks for refugees, guests at Melbourne hotel', *The Sydney Morning Herald* (April 1 2020), https://www.smh.com.au/national/doctors-warn-of-deadly-coronavirus-risks-for-refugees-guests-at-melbourne-hotel-20200401-p54g1t.html?mc_cid=9bf2d4e720&mc_eid=33b95b7d1e

⁴¹ Stefan Armbruster, 'Human Rights Commissioner calls for immigration detainees' release over coronavirus infection fears', *SBS News* (13 April 2020), <https://www.sbs.com.au/news/human-rights-commissioner-calls-for-immigration-detainees-release-over-coronavirus-infection-fears>

⁴² See eg 'The rights and health of refugees, migrants and stateless must be protected in COVID-19 response', Joint Statement from OHCHR, IOM, UNHCR and WHO (31 March 2020), <https://www.unhcr.org/news/press/2020/3/5e836f164/rights-health-refugees-migrants-stateless-must-protected-covid-19-response.html>

⁴³ Visa Cancellations Working Group, above n 3, 27.

⁴⁴ *International Covenant on Civil and Political Rights*, arts 9(1), 10(1).

⁴⁵ *Ibid*, art 19(b).

⁴⁶ *Ibid*, art 22.

⁴⁷ *International Covenant on Economic, Social and Cultural Rights*, art 15(1)(a).

⁴⁸ *International Covenant on Civil and Political Rights*, art 17(1).

of this nature by reference to 'reports that mobile phones have contributed to ... efforts to coordinate internal demonstrations to coincide with external protests'.⁴⁹

While this justification no longer features in the Explanatory Memorandum to the current Bill, the Bill would nonetheless have the effect of curtailing the ability of immigration detainees to participate in protest activities. It would also prevent detainees from engaging in public discourse in a variety of other ways, as discussed in Part 1(c)(i) of this submission. This would impose a direct burden on detainees' ability to engage in political communication.

Additionally, the imposition of a blanket ban on mobile phones, SIM cards, computers or other electronic devices may have a chilling effect on detainees' communications. While the Explanatory Memorandum notes that detainees will have access to their networks via 'alternate communication avenues', this may both limit detainees' ability and willingness to communicate. Detainees may be reluctant to use these facilities to discuss sensitive matters such as conditions of detention or other matters that may be relevant to political discourse on asylum seeker issues because of fears their communications may be monitored. The Statement of Compatibility with Human Rights attached to the Explanatory Memorandum outlines that some forms of communication are monitored, while others are not.⁵⁰ However, the mere perception that monitoring is possible, regardless of whether such monitoring is occurring is sufficient to have a chilling effect on communication.

In my view, the proposed legislation would be open to constitutional challenge on the grounds that it infringes the implied freedom of political communication, and that such a challenge would have reasonable prospects of success.

Current High Court case law⁵¹ suggests that a law that imposes a burden on freedom of communication about government and political matters, will not infringe the freedom of political communication, provided:

- the purpose of the law is compatible with the maintenance of the constitutionally prescribed system of representative government, and
- the law pursues this purpose in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative government.

This is assessed via a proportionality analysis that examines three considerations:

- suitability (whether the law has a rational connection to its purpose),
- necessity (whether there is an obvious and compelling alternative that has a less restrictive effect on the freedom), and
- adequacy in its balance (whether the importance of the purpose served by the impugned provision outweighs the restriction imposed on the freedom)

The proportionality concerns outlined in Part 1 of this submission raise the significant possibility that the Bill would not pass this test.

For all the reasons outlined above, I recommend that the Bill should not be passed.

⁴⁹ Explanatory Memorandum, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2017, 4-5.

⁵⁰ Explanatory Memorandum, Attachment A (Statement of Compatibility with Human Rights), 39-40.

⁵¹ See eg *McCloy v NSW* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards*; *Preston v Avery* [2019] HCA 11.

Thank you for the opportunity to make this submission. If I can be of further assistance to the Committee, please do not hesitate to contact me

Yours sincerely,

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