Sentencing Guideline Judgments[*]

THE HONOURABLE JJ SPIGELMAN, CHIEF JUSTICE OF NSW

Introduction

The NSW Court of Criminal Appeal has established a formal system of guideline judgments (*Jurisic*; *Henry*). This represents a significant development in NSW with respect to the exercise of discretion by sentencing judges, a context which is, perhaps, the most controversial single area of judicial decision-making.

The new system of guideline judgments has been well received by the public. It has also been well received in legal commentary (*Judicial Officers' Bulletin* 1998; McWilliams 1998; Donnelly 1998; Young 1999; Spears 1999; Morgan & Murray 1999). It is not a universal rule of human behaviour that persons who have a discretion invariably welcome what may be regarded as confining their exercise of it. However, insofar as I have received commentary from trial judges that has also been supportive. It may be that this is on the Mandy Rice Davies principle — 'They would say that, wouldn't they'.

The guideline judgments system has emerged in a context in which there has been a significant public debate about the introduction of various forms of legislative prescription which would significantly confine the exercise of sentencing discretion. This includes the introduction of minimum sentences or of a detailed matrix or grid for sentencing.

The introduction of legislation of this character in Western Australia last year, led to the preparation of a condemnatory report by the Chief Justice of Western Australia (Malcolm 1998), with what was described as 'the express and unanimous support and concurrence of the judges of the Supreme Court and of the District Court', although in one particular respect, on behalf of the judges of the Supreme Court only. This report was tabled in Parliament pursuant to the provisions of s144(1) of the *Sentencing Act* 1995 (WA). The report condemned the proposals as imposing an unreasonable fetter on the sentencing discretion.

We have been here before. I am indebted to his Honour Judge Greg Woods QC, of the District Court of NSW, who has drawn my attention to the *Criminal Law Amendment Act* (NSW) of 1883. That Act of the New South Wales Parliament created a sentencing structure with five distinct steps or categories, with both minimum and maximum sentences. That scheme led to palpable injustices so that, with respect to one case, the *Sydney Morning Herald* editorialised on 27 September 1883:

> We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass a sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion.

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* Address to the National Conference of District and County Court Judges, Sydney, 24 June 1999.

After such inequities were clearly established, the scheme was abandoned by statute a year after its introduction. Today's Northern Territorians are made of sterner stuff.

Consideration has been given to an argument that there exist constitutional limitations on the ability of a State Parliament to impose minimum penalties or a sentencing grid system (Flynn 1999).

This argument is based on an application of the reasoning of the High Court in *Kable* which recognised restrictions on the ability of the state parliaments to require the state courts to operate in a way which would be incompatible with their role under the Constitution of the Commonwealth, as repositories of federal judicial power.

However, it is clear that a state parliament may impose on its courts any regime which the Commonwealth could impose on Commonwealth courts, consistently with the requirements of Chapter III of the Constitution (see *HA Bachrach Pty Ltd v Queensland*:par 14). There is clear authority in the High Court that the Commonwealth can prescribe a minimum penalty for a Commonwealth offence (*Frazer Henleines Pty Ltd v Cody*:121-122; *Palling v Corfield*:58, 64, 68). The argument has not been successful in a challenge to the minimum sentencing legislation of the Northern Territory (*Wynbyne v Marshall).*[1] Similar constitutional arguments have proven unsuccessful in other jurisdictions (*Hinds*; *Gerea*:10-11; *Moffat*:237, 251, 258; *Ali*:101-102).

Discretion

As I emphasised in my judgments in *Jurisic* and *Henry*, guideline judgments are a mechanism for structuring discretion, not for restricting discretion. The continued existence of sentencing discretion is an essential component of the fairness of our criminal justice system.

Unless judges are able to mould the sentence to the circumstances of the individual case, then, irrespective of how much legislative forethought has gone into the determination of a particular regime, there will always be the prospect of injustice. No judge of my acquaintance is prepared to tolerate becoming an instrument of injustice. Guideline judgments are preferable to the constraints of mandatory minimum terms or grid sentencing.

The ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice, do not generally point in the same direction. Specifically, the requirements of justice, in the sense of just deserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

Centuries of practical experience establish that the multiplicity of factors involved in the sentencing task require the exercise of a broad discretion, which is best conferred on trial judges. That is why the promulgation of guidelines must not be inconsistent with the existence of a sentencing discretion. We must strive for both consistency and individualised justice.

Sentencing guidelines as promulgated by the NSW Court of Criminal Appeal are not binding in a formal sense. They are not precedents that must be followed. They represent a relevant indicator for the sentencing judge. They are not intended to be applied to every case

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1 Special leave to appeal this decision was refused on 21 May 1998; see also Johnston & Hardcastle (1998:234-235).

as if they were binding rules. The sentencing judge retains his or her discretion both within the guidelines as expressed, but also the discretion to depart from them if the particular circumstances of the case justify such departure (see e.g. *Jurisic*:220-221; *Henry*; *De Havilland*: 114).

The appropriateness of an appellate court establishing guidelines has been authoritatively established in *Norbis v Norbis*, in which the High Court held that the promulgation by the Full Court of the Family Court of guidelines with respect to the exercise of statutory discretions by trial judges was justified. I have summarised this line of authority in my judgment in *Henry*:para 13-31.

Mason and Deane JJ, in a joint judgment in *Norbis*:519-520, gave compelling reasons for the appropriateness of guidelines:

> ... it does not follow that, because a discretion is expressed in general terms, Parliament intended that the court should refrain from developing rules or guidelines affecting its exercise. One very significant strand in the development of the law has been the judicial transformation of discretionary remedies into remedies which are granted or refused according to well settled principle. It has been a development which has promoted consistency in decision-making and diminished the risks of arbitrary and capricious adjudication.
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> The point of preserving the width of the discretion which parliament has created is that it maximises the possibility of doing justice in every case. But the need for consistency in judicial adjudication, which is the antithesis of arbitrary and capricious decision-making, provides an important countervailing consideration supporting the giving of guidance by appellate courts, whether in the form of principles or guidelines ... To avoid the risk of inconsistency and arbitrariness which is inherent in the system of relief involving a complex of discretionary assessments and judgments, the Full Court, as a specialist appellate court with the unique experience in family law in this country, should give guidance as to the manner in which these assessments and judgments are to be made. Yet guidance must be given in a way that preserves, so far as it is possible to do so, the capacity of the Family Court to do justice according to the needs of the individual case, whatever its complications may be.

This reasoning is equally applicable to the exercise of the sentencing discretion.

There was a suggestion in the judgment of Mason and Deane JJ in *Norbis* that there may be circumstances in which it was appropriate for an appellate court to lay down a guideline, even with respect to a statutory discretion, which was in the nature of a binding rule of law. On that basis, failure to apply the guideline could itself constitute a legal error, which would justify an appellate court interfering with the exercise of the discretion. For the reasons I gave in my judgment in *Henry*, I am of the view that the balance of authority strongly indicates that this is not so (see *Norbis*:536, 538; *Shreeve v Martin*:290; *FAI Insurances Ltd v Goldleaf Interior Decorators Pty Ltd*:661; *Latoudis v Casey*:558-559; *Leighton Contractors Pty Ltd v Kilpatrick Green Pty Ltd*:516-517; *Maysell v Transport Industries Insurance Co Ltd*:334-335; *Oshlack v Richmond River Council*; *Bini*; *McDonnell*:pars 32-34, 100, 109).

The decision in *Henry* establishes for NSW, that failure to sentence in accordance with a guideline is not itself a ground of appeal. Nevertheless, where a guideline is not to be applied by a trial judge, the appellate court expects that the reasons for that decision be articulated (*Jurisic*:220-221; *Henry*).

Consistency

Just as the sentencing task involves the weighing of incommensurable and sometimes contradictory objectives, so the appellate task involves balancing the objectives of individualisation of a sentence against the requirement of consistency. Perhaps more than any other factor, it is the need for consistency in judicial decision-making which justifies appellate courts laying down guidelines for the exercise of discretion by trial judges. The cases in the various areas of the law which approve guidelines, referred to in *Henry*, refer to this factor.

Allegations of inconsistency are not always well informed (see e.g. Green 1996). Nevertheless inconsistency in sentencing can and does occur. By inconsistency I do not mean only that individual judges have different penal philosophies. This is not a bad thing in a field in which, as Sir Frederick Jordan once put it: 'The only golden rule is that there is no golden rule' (*Geddes*:555). In this regard, judges reflect the wide range of differing views on this very matter that exists in the general community. However, there are limits to the permissible range of variation.

There is one significant impediment to the ability of our traditional system of appeals to achieve the objective of consistency. Our system of appeals operates in a distinctly different way with respect to appeals against severity, from the way it operates with respect to Crown appeals against leniency.

Wherever a trial judge sentences in a manner that can be described as inconsistent with that of other trial judges by being too harsh, the appellate court will correct the error without any restraint on its doing so. In the case of Crown appeals however, there are significant restraints which do not operate in the case of severity appeals (see e.g. *Griffiths*:310; *Tait & Barkley*:388; *Allpass*:562-563).

Crown appeals are said to be comparatively infrequent, though perhaps less so now than hitherto. There remain significant, and entirely appropriate, inhibitions on Crown law officers initiating appeals at all. If they are lodged, appellate courts approach such appeals with the application of the principle of double jeopardy. There are hurdles which the Crown has to overcome, before the court will interfere with an exercise of discretion that is said to be too lenient, which do not need to be overcome in the case of interference with the exercise of discretion said to be too harsh. In this context, it becomes even more important than usual that we do what we can to minimise the need for appeals. Guideline judgments may assist in this regard.

No-one doubts the significance of consistency in decision-making in this very difficult and sensitive area. That significance was well expressed by Sir Anthony Mason, when his Honour said:

> Just as consistency in punishment – a reflection of the notion of equal justice – is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice (*Lowe*:610-611).

Consistency in sentencing does not simply impinge on the criminal justice system. By reason of the public prominence of the issues that arise, consistency in sentencing serves a high constitutional purpose: the maintenance of the rule of law.

Leniency

Issues of inconsistency in sentencing must be distinguished from allegations of systematic excessive leniency. Plainly where such is established, it may call for a sentencing guideline of the character I have identified. The Court of Criminal Appeal did detect a pattern of leniency in both *Jurisic*:229-230 — with respect to the offence of dangerous driving causing grievous bodily harm or death — and in *Henry* — with respect to the offence of armed robbery.

In *Jurisic*, the Court referred to a long list of invariably successful Crown appeals for the relevant offence. It appeared to the Court that the parliamentary intention reflected in significantly increased maximum penalties, which the Court of Criminal Appeal had said a number of times should lead to a 'sharp upward' movement in sentences, had simply not been implemented.

In *Henry*, the statistics indicated that non-custodial sentences for armed robbery were common. This contrasted with a long line of appellate authority which stated that such sentences should be rare. Nevertheless, on other aspects of sentencing for armed robbery trial judges would have found it difficult to reconcile decisions of the Court of Criminal Appeal. One of the functions of a guideline judgment, as shown in *Henry*, is to prevent inconsistency at an appellate level also.

Justice Wood, Chief Judge at Common Law, said in an address to the Annual Conference of the District Court of NSW in April (Wood 1999) that one reason for promulgating a guideline judgment is:

> it is becoming apparent that sentencing judges are merely paying lip-service to pronouncements by the Court of Criminal Appeal as to sentencing policy in a particular area of criminality, and are possibly relying on: the reluctance of the Crown to appeal against sentence; or upon the discretion traditionally exercised by the Court of Criminal Appeal in declining to interfere in such matters; or upon the double jeopardy principle, in those cases where it does intervene, to produce a less severe sentence than that properly called for.

Where it becomes apparent to a Court of Criminal Appeal that a particular judge is behaving in this way, it is open to the appellate court to approach that judge's sentences without the usual inhibitions on intervening with the exercise of discretion, and to suspend the double jeopardy principle in such a case. A guideline judgment system appears to me to be preferable to such a course.

The sine qua non of the ability of the Court of Criminal Appeal in NSW to assess sentencing practice for the purpose of determining the need for a guideline judgment is the systematic collection of sentencing statistics by the Judicial Commission of NSW of a comprehensiveness that is not readily available in all Australian states. In 1989, the Australian Bureau of Statistics ceased publishing detailed sentencing statistics for higher courts in Australia. Since that time, sources of information have not been adequate in some states. I am aware that the judiciary in those states has been urging the collection of such statistics. I confirm that the absence of such comprehensive information makes it extremely difficult to ensure consistency in sentencing practice. A system of guideline judgments would be virtually impossible.

I do not need to tell this audience that allegations of systematic leniency in sentencing decisions, which so frequently appear in the media, are often not well informed criticisms. That is not to say that there are not occasions when public criticism of specific sentences for leniency is justified. There are such examples and, for the reasons I have mentioned, they are not always able to be cured by appellate courts.

Part of the role of sentencing guidelines is to reinforce public confidence in the administration of justice. Indeed the experience in NSW is that the very announcement of a system of sentencing guidelines by the Court of Criminal Appeal has, of itself, had an announcement effect on public perception on questions of both leniency and inconsistency, in such a way as to enhance public confidence in the criminal justice system.

One of the tasks that courts, and others responsible for the administration of the criminal justice system, must undertake is public education of what sentencing practices actually are. There is no doubt that the occasional inadequate sentence receives much more significant public exposure through the media than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and, therefore, pass without comment.

Research throughout the western world has indicated that there is a widely held belief that sentences actually imposed are not commensurate with the seriousness of the crimes for which they are imposed (Roberts & Stalans 1997). However, there are now numerous studies which show that the public opinion expressed in polls, through the media and talk back radio and various other expressions of public opinion, are often ill informed. The belief that there exists a significant disparity of a systematic character between actual sentencing practice and what the public see as appropriate sentences, is wrong. More detailed and sophisticated methods of gauging popular opinion suggest that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed or, at least, to express the opinion that they are lenient to a significantly lesser extent than answers to general, undirected questions would suggest.

This is true of research in the United States (Roberts & Stalans 1997:210; Thomson & Ragona 1987:338-339), in the United Kingdom (Ashworth & Hough 1996) and in Canada (Walker & Hough 1988:Chapter 6). These studies have been replicated in Australia with generally similar results (Walker & Hough 1988:Chapter 8; Indermaur 1987, 1990).

A good example of such research was conducted by the Royal Commission on Criminal Justice in the United Kingdom, which asked 2,300 jurors what they thought about the sentence passed in the case in which they served. About a third said they had no expectation. Almost a third said that the sentence was as they had expected. The remaining one third was divided between those who thought it was more severe than they expected (14%) and those who regarded it as less severe (23%) (Zander & Henderson 1993: par 8.8.3.).

This discrepancy between public perception and the reality of sentencing practice exists. The public interest would be served by minimising that discrepancy. The public response to the system of guideline judgments in NSW, suggests that such judgments may help to bring public perception into line with actual practice.

Deterrence

Another function performed by the promulgation of guidelines is that of deterrence. The public at large, and potential offenders in particular, should know in advance that offences of a particular kind are likely to lead to a particular level of sentence. This is often said to be an advantage of a minimum sentence regime or of grid sentencing. It is apparent that the publication of maximum sentences does not perform a substantial deterrent function, as the relationship between maximum sentences and actual sentences is not sufficiently clear.

There is a considerable debate about the deterrent effect of sentences and, particularly, of marginal increases in sentences. That penalties operate as a deterrent is a structural

phenomenon of our criminal justice system. For reasons I analysed in *Henry*, the courts must continue to act on the basis that punishment deters and that, within limits of tolerance, increased punishment has a corresponding effect by way of deterrence. This is a structural feature of the common law, in its application to criminal justice. Legislation would be required to change the traditional approach to this matter.

However, deterrence only works to the extent to which knowledge is transmitted to potential offenders about actual sentencing practice. Guideline judgments are a mechanism of increasing the efficiency of the transmission of such knowledge.

Guideline Judgments

Guideline cases are judgments that go beyond the point raised in the particular case to suggest a sentencing scale, or appropriate starting point, in one or more commonly encountered factual situations.

As I emphasised in my judgment in *Jurisic*, the statement of guidelines in a quantitative form is a development of what appellate courts have long done by way of statement of sentencing principles. I set out in *Jurisic* the range of cases in which the NSW Court of Criminal Appeal had previously indicated circumstances in which a custodial sentence would usually be appropriate and cases in which the court had stressed that the length of imprisonment should be substantial (*Jurisic*:217-219). However, the laying down of guidelines and sentencing principles in the traditional manner, does run the risk that the guidelines will be overlooked.

As the Honourable Justice Wood, Chief Judge at Common Law said in *Jurisic*:

> The court has ... over the years endeavoured to lay down sentencing principles for particular classes of cases where sentences reflecting a significant element of general deterrence are required, or where non-custodial options are inappropriate. It appears that sometimes these principles are lost or that their significance is overlooked, in the volume of appellate decisions handed down and in the pressures imposed on trial courts to dispose of the increasingly busy criminal lists (233).

Formally labelling particular judgments as 'guideline judgments' will reduce the possibility of oversight.

Two kinds of systems of guideline judgments have emerged in different jurisdictions. The first is a system in which the appellate court establishes a guideline of a prescriptive character. The second, is a system in which the appellate court purports to derive a range or 'tariff' from the actual sentences of trial judges. The former, I have called 'top-down' sentencing guidelines, and the latter, 'bottom-up' sentencing guidelines.

The most well developed system of guideline judgments is in England, where the system was initiated in the 1970s by the English Court of Appeal (Criminal Division) under Lord Justice Lawton and further developed by Lord Chief Justice Lane. The usual English guideline judgment does two things: first, it sets a tariff or sentencing range for a particular offence; and, secondly, it differentiates between, and analyses, aggravating and mitigating factors in relation to a particular type of offence. Guidelines have been for particular offences (e.g. rape (*Billam*)) or for type of penalty (e.g. imprisonment (*Bibi*)) or for the type of offender (e.g. non-violent petty offenders (*Upton*)). Sometimes, a quantitative measure is not appropriate because of wide variations in the circumstances of an offence (e.g. burglary or manslaughter (*Brewster*:225-227)). In such cases, the guidance is in the form of consideration of aggravating and mitigating factors.

In Canada, the courts have developed, in certain specific cases, a prescriptive approach to guidelines. The Supreme Court of Canada has affirmed the appropriateness for a criminal appellate court to lay down guidelines in the nature of a starting point for sentencing of a particular offence (*McDonell*; Bloos & Renk 1997; Ruby 1994:481-482).[2] In *McDonnell* the majority judgment was delivered by McLachlin J. Her Ladyship said:

> The traditional notion that sentencing is primarily a matter of impression for the sentencing judge and only secondarily a matter of principle, began to be questioned by the Courts in the mid 60's. Behind the challenge lay increasing recognition that some measure of uniformity was essential in a sentencing process that was not only just, but was seen to be just (par 65).

In New Zealand, sentencing guidelines are of the bottom-up variety; that is, a synthesis of pre-existing first instance sentences, rather than a guideline as to what is appropriate (*Puru*; *Te Pou*; Hall 1991:223-224).

In Australia, the Supreme Court of South Australia has promulgated sentencing standards, in particular cases, which are recognisably prescriptive (i.e. of a top-down character) (*Police v Cadd*:479-480, 487, 490-491, 511, 520).[3]

In Western Australia, the Court of Criminal Appeal has provided sentencing guidelines in a 'bottom-up' fashion derived from sentences actually imposed by trial judges.[4]

Henry summarised the guidelines that had been developed in all these jurisdictions, and some other jurisdictions, for the offence of armed robbery. Although differences in remissions sometimes make comparisons difficult, it proved a most instructive review for the formulation of a guideline for NSW with respect to that offence.

A Legislative Scheme

By way of reaction to *Jurisic*, the NSW Parliament inserted a new Part 8 into the *Criminal Procedure Act* 1986. This part provides for the Attorney General to apply to the court to give a guideline judgment. Subsection 26(2) specifies that:

> An application may be made with respect to sentencing of persons found guilty of a particular specified indictable offence or category of indictable offences and may include submissions with respect to the framing of the guideline.

Such applications would not extend to requesting guidelines for types of offender or types of penalty, as the English Court of Appeal has done on occasion.

The legislation expressly envisages the continuation by the Court of the formulation of guideline judgments without any form of application by the Attorney General (s s26(4), 28(a)). The Court is not obliged to issue any guideline, even after application, unless it believes it appropriate to do so (s 28(b)).

During the course of the campaign for the recent NSW state election, the Government, as part of its platform, undertook to apply to the Court of Criminal Appeal for guideline

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2 See also the Canadian armed robbery cases collected in *Henry*:140-144.

3 See also my discussion of the South Australian guidelines on armed robbery in *Henry*:250-158.

4 See, e.g., *Miles* and other armed robbery cases discussed in *Henry*:145-149. The Western Australian Court of Criminal Appeal has express statutory authority to issue guidelines under s 143 of the *Sentencing Act* 1995. It has not yet done so (see *Jurisic*:217).

judgments in the following cases: 'Break enter and steal, home invasion, drug importation, child sexual assault, sexual assault and high range drink driving offences'.

With respect to all but one of these matters, cases involving either severity or Crown appeals against sentence are regularly before the Court of Criminal Appeal. It is my intention, if feasible, to list any application made under s 26 of the *Criminal Procedure Act*, together with actual cases involving real factual situations.

One of the matters with respect to which the government has indicated it will apply to the Court of Criminal Appeal is 'high range drink driving' offences. These are not appeals that come to the Court of Criminal Appeal. They are heard in the District Court. Special arrangements for informing the Court will need to be made with respect to this application, if it is received.

In the normal course, the Commonwealth Director of Public Prosecutions would apply for a guideline with respect to Commonwealth offences. One of the matters which the NSW Government indicated it would refer to the Court of Criminal Appeal under s 26 of the *Criminal Procedure Act*, is the offence of drug importation. That is a Commonwealth matter. It may be that this application, if and when received, will raise a constitutional question.

In any event special consideration will arise in deciding on the feasibility of a guideline judgments system for Commonwealth offences. Section 16A of the *Crimes Act* 1914 (Cth) formulates a principle of general application and a list of factors required to be taken into account on the sentencing task. The application of the reasoning in *Norbis* may arise directly.

In the future it may very well prove to be the case that applications for guideline judgments come from the defence side of the record. In NSW this is feasible because of the existence of a Public Defender, although it is a function that can be performed also by the Legal Aid Commission. The capacity of the Public Defender is acknowledged in s 26 of the *Criminal Procedure Act*.

English guideline judgments have encompassed the identification of situations in which custodial sentences should not be regarded as appropriate. Guideline judgments do not operate in one direction only. The pressures of an ever increasing prison population may well justify a systematic consideration of the need for custodial sentences for a range of offences, as has happened in England.

The experience of the Court in *Henry*, involving the consideration of seven separate cases for the offence of armed robbery, being six Crown appeals and one severity appeal, was particularly gratifying. The interaction between the Court and the range of counsel, for the Crown and those representing offenders in a significant number of different factual situations, proved to be particularly successful in the conduct of the policy inquiry required for formulation of guidelines. The system of guideline judgments enabled all relevant parties to approach preparation with a degree of comprehensiveness that would usually be difficult to justify. The quality of the materials presented to the Court, and of the oral argument, was very high.

It is reasonably clear that in the near future, the Court of Criminal Appeal of NSW will devote considerable effort and energy to determining whether or not guideline judgments are appropriate in a number of different spheres of sentencing. As I said in *Jurisic*:220C, such guidelines should be recognised as having a useful role to play in maintaining an appropriate balance between the broad discretion that must be retained to ensure that justice

is done in each individual case, on the one hand, and the need for consistency in sentencing and the promotion of public confidence in the administration of justice, on the other hand.

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