



Office of the

**First Minister and
Deputy First Minister**

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Implementing EU Equality Obligations in Northern Ireland:

The Gender Goods and Services Directive

Consultation Paper

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Foreword

In Northern Ireland there has been a significant body of equality law developed over the last 30 years. Most of this law arose from, or was amended by, European Directives and this consultation arises out of the EU Gender Goods and Services Directive. This requires amendment to the 1976 Sex Discrimination Order and the proposed changes, which aim to provide legal clarity and extend some of its provisions, are outlined in this document.

Consultation plays a vital role in the process of implementing a European Directive and we are very keen to hear your views on whether the proposed amendments to the Sex Discrimination Order clearly meet the requirements of the Directive. We are legally required by the European Union to transpose this Directive into domestic law.



**The Rt Hon I R K Paisley MP MLA
First Minister**



**Martin McGuinness MP MLA
deputy First Minister**

Chapter 1 – Introduction

Background

- 1.1 This consultation document sets out our plans for transposing Council Directive 2004/113/EC ('the Gender Directive'), which implements the principle of equal treatment between women and men in the access to and the supply of goods and services. The deadline for transposition is 21 December 2007.

- 1.2 We intend to implement the Directive using powers under the European Communities Act 1972. The Directive requires us to amend some existing provisions in the Sex Discrimination (Northern Ireland) Order 1976 (SDO) which we intend to do by introducing the Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2007. A copy of the draft Regulations can be found on OFMDFM website. We also intend to produce accompanying guidance.

Our general approach

- 1.3 Our general approach to implementation is to make the amendments necessary to fulfil our obligations under the Gender Directive while ensuring that the proposals, wherever possible, reduce existing inconsistencies and avoid creating further complexity, in line with better regulations principles. We aim to meet the terms of the Gender Directive by amending the SDO (though retaining its familiar structure, scope and approach).

Summary of proposals for change

1.4 In order to implement the Gender Directive we propose to:

- extend the Directive-based definition of indirect discrimination as it currently applies to goods, facilities or services and premises;
- introduce an express prohibition on harassment and sexual harassment in the field of goods, facilities or services and premises;
- apply the Directive's burden of proof provisions to goods, facilities or services and premises, in line with that for employment and vocational training;
- amend some of the exceptions which currently exist in the SDO, to ensure that they are compatible with the Directive;
- extend protection against direct discrimination on grounds of a person's gender reassignment to goods, facilities or services and premises;
- extend protection against discrimination on grounds of pregnancy and provide protection on grounds of maternity in the field of goods, facilities or services and premises; and
- amend the SDO exception relating to insurance to specify the circumstances under which insurance companies may charge different premiums or offer different benefits to men and women.

1.5 Our proposals are set out in detail below. Comments are invited in response to the questions below to aid further development of the proposals.

Scope of the Gender Directive

1.6 Sex discrimination in matters relating to the access to, and the provision of, goods, facilities or services and premises has been unlawful in Northern Ireland for over 30 years under the provisions in

Part 4 of the SDO. The Gender Directive's scope is narrower than that of the SDO. While the Gender Directive applies to many of the activities which are covered by the SDO, it **does not** cover them all.

- 1.7 Matters which the Directive explicitly does not cover are: the content of media and advertisements, employment and education. The Directive also makes clear the need to take account of fundamental rights and freedoms including the protection of private and family life and transactions carried out in that context, and freedom of religion.
- 1.8 In addition, there are other matters which the scope of the Directive does not cover. These include matters which can only be decided by Member States, for example, through their national legislatures, and services and facilities provided at a place occupied or used for the purposes of an organised religion, for example, for religious observance and practice. Accordingly, references in this document to proposals for change concerning "goods, facilities or services and premises" are to goods, facilities or services and premises which fall within the scope of the Directive.
- 1.9 When considering how to implement the Directive's requirements, we have guarded against adding new levels of complexity in the law which could arise because of the differences in scope between domestic and European law on gender equality.
- 1.10 However, some inconsistencies will remain in the SDO, given the narrower scope of the Directive. We intend to consider how best to resolve these.

Chapter 2 – Proposals for change

Definition of indirect discrimination

2.1 The Gender Directive defines indirect discrimination as:

“where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary”.

2.2 A very similar definition of indirect discrimination is already used in the SDO in relation to employment and vocational training, as a result of amendments made by the Employment Equality (Sex Discrimination) Regulations (Northern Ireland) 2005 (SR No 426), which implemented the Equal Treatment Amendment Directive. The definition in Article 3(2)(b) of the SDO is as follows:

“a person discriminates against a woman if he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but

- (i) which puts or would put women at a particular disadvantage when compared with men,
- (ii) which puts her at that disadvantage, and
- (iii) which he cannot show to be a proportionate means of achieving a legitimate aim”.

2.3 In order to implement the Gender Directive, we intend to amend the SDO so that the above definition of indirect discrimination, which currently applies in relation to employment and vocational training, also applies to the field of goods, facilities or services and premises.

Harassment and sexual harassment

2.4 The Gender Directive requires that people must have protection from harassment and sexual harassment in goods and services. Article 2 defines “harassment” as:

“where an unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”;

and “sexual harassment” as:

“where any form of unwanted physical, verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”.

2.5 The SDO now contains specific provisions prohibiting harassment and sexual harassment in relation to employment and vocational training. Before this free-standing right to be protected against harassment was explicitly set out in law, the courts established that sexual harassment at work could be direct discrimination, where the conduct amounted to less favourable treatment on the grounds of sex and where the claimant could show that they had been subjected to a detriment. Following a recent GB court ruling ⁽¹⁾, we will amend the existing provisions of the SDO to clarify that harassment is not limited to conduct caused by the sex of the claimant.

2.6 In implementing the Gender Directive, we intend to amend the SDO to make explicit that harassment and sexual harassment are prohibited in the field of goods, facilities or services and premises. We have considered the practical implications of outlawing harassment in goods, facilities or services and premises, for example, the distinction between

⁽¹⁾ Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)

the relationship between an employer and an employee and that between a service provider and customer. The Regulations will not make service providers liable for the conduct of one customer towards another.

Burden of proof

2.7 It can be difficult for an individual to prove sex discrimination. The Gender Directive, as with all other European Directives on equal treatment matters, requires that where a complaint of discrimination in relation to goods or services is brought, if the aggrieved person can provide evidence that discrimination has occurred, then it is for the goods or services provider to prove that there has been no breach of the principle of equal treatment. This approach is aimed at improving the effectiveness of access to justice for those who consider they have been subjected to sex discrimination.

2.8 The SDO already provides for an equivalent burden of proof provision for employment complaints taken to industrial tribunals. We intend to amend the SDO so that this approach also applies to goods, facilities or services and premises cases which are brought before county courts.

Exceptions

2.9 Article 4(5) of the Gender Directive permits differences in treatment between men and women if the provision of goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

2.10 The Government at that time negotiated this provision to ensure that specific exceptions in the SDO could be retained such as the provision of accommodation by a person in a part of their home for reasons of privacy and decency, single-sex voluntary bodies to promote the

interests of men or women, membership of single-sex clubs to allow freedom of association, and the organisation of single-sex sports events.

- 2.11 We have reviewed the existing exceptions in the SDO which allow for difference of treatment, to assess whether each one is compatible with the Directive or whether any changes are necessary. There are many which we consider already meet the test set out in the Directive or do not fall within its scope. However there are some where we consider specific changes are needed to ensure any differences of treatment are justified. Annex 1 lists all the current exceptions in the SDO which apply in the context of the Directive and sets out where we consider changes are needed.

Q1. Do you agree with the proposals in Annex 1? If not, please give details of those you disagree with and your reasons for doing so.

- 2.12 The following paragraphs set out in more detail our proposals on particular issues where we consider new or significantly amended provisions in the SDO are required.

Financial and insurance products

- 2.13 The SDO allows sex discrimination in the provision of insurance, provided that it is based on actuarial or other data upon which it is reasonable to rely, and the treatment is reasonable. The Gender Directive permits proportionate differences in premiums or benefits where sex is a determining factor in risk assessment based on relevant and accurate actuarial and statistical data. It requires that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. It also requires that any

costs related to pregnancy and maternity should not result in differences in individuals' premiums and benefits.

- 2.14 The issue of insurance is being taken forward by HM Treasury on a UK wide basis. In line with that approach, we propose to amend the existing insurance exception in the SDO to make an insurer's ability to discriminate on grounds of gender subject to the conditions required by the Directive, including the provisions relating to the compilation, publication and updating of supporting data. Treasury will issue guidance outlining how the latter requirement may be met. A public consultation on the draft guidance which is running until 3 September 2007, can be found on the Treasury website at www.hm-treasury.gov.uk/media/6/0/consult_gender_insurance120607.pdf. Insurers will be able to publish summary data, either individually or through collective arrangements.
- 2.15 The new insurance exception will also contain a condition requiring that the costs of pregnancy and maternity shall not result in differences in individuals' premiums and benefits. Implementation of this specific provision can be deferred until 20 December 2009, but it would be desirable not to do so unless a good case can be made for deferral.

Q2. Do you have any comments on the likely impact of the Gender Directive's insurance provisions on providers and/or customers of insurance and related financial products?

Q3. Should the ban on differences due to maternity or pregnancy costs be implemented in December 2007 or deferred until December 2009?

Gender reassignment

Discrimination against transsexual people in the provision of goods, facilities or services and premises

- 2.16 We consider discrimination on any basis is unacceptable. European case law ⁽²⁾ has held that the right not to be discriminated against on grounds of a person's sex includes discrimination on the grounds of the gender reassignment of a person. The definition of gender reassignment of a person includes those who intend to undergo, are undergoing or have undergone gender reassignment in the Sex Discrimination legislation in relation to employment and training matters.
- 2.17 We propose to make direct discrimination and harassment on grounds of a person's gender reassignment unlawful in the fields of goods, facilities or services and premises, as it already is in the fields of employment and vocational training.
- 2.18 Legal advice is that the proper implementation of the Directive would require that the same definition of gender reassignment which applies to employment and training should also apply to the provision of goods, facilities, services and premises. Consequently, it is suggested that the same definition is used in transposing this Directive.

Q4. We would, however, welcome views on this and how it might apply in practice

⁽²⁾ P v S and Cornwall County Council case C-13/94

Single-sex services - exceptions

- 2.19 As highlighted above, the SDO contains a number of exceptions from the general prohibition on sex discrimination in goods, facilities or services and premises. The Gender Directive also allows for different treatment if the provision of goods and services exclusively or primarily to members of one sex is justified.
- 2.20 Most transsexual people wish to be treated in their acquired gender. Nevertheless, we consider it is appropriate in policy terms and necessary for reasons of clarity, for the law to allow, in certain limited circumstances, single-sex service providers (such as voluntary or charitable organisations set up for the benefit of one sex only) to treat a transsexual person differently from other men or women. Those limited circumstances are where the single-sex service provider can demonstrate that their different treatment of a transsexual person in a particular case was a proportionate means of achieving a legitimate aim, in accordance with Article 4(5) of the Directive.
- 2.21 The reason for this limited exception is that we recognise that there may be some cases where it may not always be clear to a single-sex service provider whether their services can be made available to a transsexual person. This may occur, for example, where someone is in the middle of the process of gender reassignment or has undergone the process but does not present in their acquired gender and it is unclear whether the particular single-sex service can be provided to the transsexual person in accordance with their birth sex or their acquired sex. Much will depend on the particular circumstances of each case.
- 2.22 To rely on such an exception, single-sex service providers will need to be able to point to a legitimate aim and demonstrate, in the circumstances of the particular case, why no less discriminatory alternatives of achieving that legitimate aim were available. Relevant factors which may need to be taken into account include the particular service being provided or the facilities available; the views of the

transsexual person; the stage of transition of the transsexual person when they seek access to the service; and the impact on other users of the service. We propose to provide guidance on the factors which may need to be taken into account when a decision is made to treat a transsexual person differently from other men or women in the provision of single-sex services.

Sport

- 2.23 We intend to clarify in the SDO that in single-sex sporting competitions, it will only be lawful to discriminate on grounds of a person's gender reassignment where this is necessary to secure fair competition or the safety of competitors, but not otherwise.

Insurance and actuarial factors

- 2.24 We propose that the Regulations should make clear that discrimination on grounds of a person's gender reassignment in access to, or the provision of, insurance or financial services is generally unlawful. For the sake of clarity for insurance companies and transsexual people seeking insurance policies, we propose to provide an exception so that calculations of premiums and benefits for a person who intends to undergo or is undergoing gender reassignment should be based on data relating to their birth sex. However, calculations for premiums and benefits for a person who has undergone gender reassignment should be based on data relating to their acquired gender.
- 2.25 There will be no requirement that a transsexual person must have a Gender Recognition Certificate to prove that they have undergone gender reassignment. We do not envisage that general policy terms relating to any pre-existing medical condition or history will be affected, enabling their continued use for risk assessment.

Discrimination on the grounds of pregnancy and maternity

- 2.26 The Gender Directive stipulates that less favourable treatment on grounds of pregnancy or maternity in goods and services is direct sex discrimination.
- 2.27 The SDO explicitly provides that less favourable treatment on grounds of pregnancy or maternity leave is unlawful in relation to employment, but there is nothing on the face of the SDO making similar provision in respect of goods, facilities or services and premises.
- 2.28 To ensure clarity and consistency of the law, we intend to make explicit that less favourable treatment on grounds of pregnancy and maternity in the provision of goods, facilities or services and premises is direct sex discrimination.
- 2.29 There are no precedents for a definition of ‘maternity’ in discrimination law concerning provision of goods, facilities or services and premises. When considering how maternity should be defined, we noted that the:
- definition used in the SDO in the context of employment relates to ‘maternity leave’ ⁽³⁾ and
 - SDO contains a provision for special treatment of women in connection with ‘pregnancy and childbirth’ (Article 4 of the SDO). This applies to both employment and other fields, including goods, facilities or services and premises. This means that it is not discriminatory to afford women special treatment in connection with pregnancy and childbirth.
- 2.30 Options for defining maternity for the purpose of the SDO provisions covering goods, facilities or services and premises therefore include:
- defining maternity as ‘childbirth’;

⁽³⁾ Following the recent court ruling in the Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] EWHAC (Admin) we will amend this definition to remove the need for a comparator.

- defining maternity according to the age of the child – for example, protecting mothers of babies aged up to one year;
- providing protection for ‘mothers of young children’;
- not defining maternity.

2.31 The draft Regulations which we have prepared for consultation define maternity for the purposes of the goods, facilities or services and premises provisions as one year (52 weeks) after the birth of the child. We consider that this would add clarity and certainty about rights and responsibilities.

Q5. Do you think maternity should be defined for the purposes of the SDO provisions covering goods, facilities or services and premises, and if so how?

Chapter 3 - Statutory Equality Duties

3.1 In line with section 75 of the Northern Ireland Act 1998, we have considered the impact of the policy proposals on the nine section 75 categories by conducting a “screening” exercise to determine whether a full Equality Impact Assessment is necessary.

3.2 In doing so, we have noted the following:

- that implementation of the Gender Directive is by means of Regulations made under section 2(2) of the European Communities Act 1972, and doing so restricts the scope and level of protection afforded, and
- that there is already legislation in place to protect people from discrimination on grounds of their gender. This policy being screened is therefore the amending and extending of this legislation to primarily clarify the law.

3.3 Our conclusion is that the Regulations implementing the Gender Directive will lead to increased legal clarity. All section 75 categories sectors affected in Northern Ireland should therefore benefit from more coherent equality legislation. We do not consider there to be any negative equality impacts and as a result, the policy has been screened out and will not be subject to a full Equality Impact Assessment. The more detailed assessment is available on the Department’s website at www.ofmdfmi.gov.uk/sex-discrimination-and-equal-pay.

Q6. Do you have any comments about the Statutory Equality Duty?

Chapter 4 - Financial Implications

- 4.1 A partial Regulatory Impact Assessment, which considers the economic impact of these proposals and draft amending Regulations on Northern Ireland business, has been conducted.
- 4.2 This assessment identifies that additional costs associated with the implementation of the Gender Directive will relate, in the main, to time associated with familiarisation of the changes to the Sex Discrimination Order. We have estimated the overall cost to be in the region of £600,000 to NI economy and a breakdown of these costs is outlined in the RIA.
- 4.3 A more detailed Regulatory Impact Assessment is available on the Department's website at www.ofmdfni.gov.uk/sex-discrimination-and-equal-pay.
- 4.4 There are, however, also costs associated with 'Insurance' discussed earlier in this document and which is being taken forward by HM Treasury on a UK-wide basis. A partial Regulatory Impact Assessment on insurance costs can be found at Annex A of the Treasury's consultation on draft guidance, which can be found on the Treasury's website at www.hm-treasury.gov.uk/media/6/0/consult_gender_insurance120607.pdf

Q7. Do you have any comments on the financial implications of the draft Regulations?

Annex 1

Exceptions in the Sex Discrimination (NI) Order 1976

SDO Reference	Effect of existing provision	Proposed changes
Art 27	Educational institutions can restrict admissions to pupils of one sex.	No change. The scope of the Directive does not apply to schools.
Art 31(3)	Owner-occupiers can discriminate against a buyer on grounds of sex if they sell their property without advertising the sale or using an estate agent.	No change. The scope of the Directive does not extend to the functions which are covered by this exception (as it concerns private and family life issues).
Art 32(2)	Owner-occupiers in small dwellings who choose to share their accommodation on a subletting basis can discriminate.	No change. The scope of the Directive does not extend to the functions which are covered by this exception (as it concerns private and family life issues).
Art 33	Owner-occupiers of small, (ie residential) properties, or their relatives, can refuse to provide accommodation, if it involves sharing facilities, to a person because of their sex. This applies irrespective of whether the accommodation is provided as a service for the public or on a private basis.	No change. The scope of the Directive does not apply to private life.
Art 34	Political parties can make specific provisions for one sex, for example women's committees.	No change. We do not consider Article 34 SDO (political parties) and Article 43A SDO (selection of candidates) to be services for the purposes of the Directive and therefore, do not consider them to be in scope.

SDO Reference	Effect of existing provision	Proposed changes
Art 35	Voluntary bodies can restrict membership or benefits to people of one sex.	The Directive makes clear that differences in treatment for women and men by voluntary bodies may be justified if in pursuance of a legitimate aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will be lawful only where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances.
Art 36 (1)(a)	Services and facilities can be restricted to one sex only in hospitals, or other establishments for people requiring special care, supervision or attention.	We propose that the Regulations make clear that it is lawful to restrict such services to one sex only as long as that restriction is justified by a legitimate aim and the restriction is made in a way that is proportionate to achieving that aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances.
Art 36(1)(b)	Services and facilities can be restricted to one sex in a place occupied or used by an organised religion and the restriction is made in order to comply with the doctrines of the religion or to avoid offending the religious susceptibilities of a significant number of its followers.	No change. We do not consider such facilities and services fall within the scope of the Directive.

SDO Reference	Effect of existing provision	Proposed changes
Art 36(1)(c)	Services and facilities which are likely to be used by two or more people at the same time can be restricted to one sex for reasons of privacy and decency.	No change. The Directive makes clear that reasons of privacy and decency are a legitimate aim. Service providers will need to ensure any difference in treatment is a proportionate means of achieving that aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim. We propose to develop guidance on the factors that need to be taken into account in such circumstances
Art 43A	Political parties' procedures for selecting election candidates can be designed to reduce inequality in the numbers of men and women elected.	No change. We do not consider Article 34 SDO (political parties) and Article 43A SDO (selection of candidates) to be services for the purposes of the Directive and therefore, do not consider them to be in scope.
Art 44	Charitable bodies can restrict benefits to people of one sex if their charitable instrument makes clear that this is their purpose.	Given the wide range of reasons why charities are set up, we propose to make explicit that, if it is challenged, a charity will need to justify restricting services to one sex as long as that restriction is justified by a legitimate aim and the restriction is made in a way that is proportionate to achieving that aim. For the avoidance of doubt, we propose also to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim.

SDO Reference	Effect of existing provision	Proposed changes
Art 45	Sporting competitions involving physical strength, stamina or physique can be restricted to one sex only if it would put “the average woman” at a disadvantage to “the average man”.	The Gender Directive makes clear that organising sporting competitions can be a legitimate aim. For the avoidance of doubt, we propose to make clear that different treatment for transsexual people will be lawful only where this is necessary to secure the safety of competitors or fair competition.
Art 46	Insurance can be offered at different premium and benefit rates for men and women as long as that difference is based on relevant and accurate actuarial data showing different risk levels as between men and women, and the treatment is reasonable.	<p>Insurance can be offered at different premium and benefit rates for men and women as long as there is supporting data; the differences are proportionate; and the differences do not result from costs related to pregnancy or maternity.</p> <p>The data relied upon must comply with Treasury guidance relating to its compilation, publication and updating.</p> <p>For the sake of clarity we propose that calculations of premiums and benefits for a person who intends to undergo or is undergoing gender reassignment should be based on data related to that person’s birth gender. If a person has undergone gender reassignment then calculations for premiums or benefits should be based on data related to that person’s acquired gender.</p>
Art 47	Where residential accommodation is being provided on a communal basis, such as in hostels, the respective demands of women and men for that accommodation should be provided as fairly and equitably as circumstances allow.	For the avoidance of doubt, we propose also to make clear that different treatment for transsexual people will also be lawful where this would be a proportionate means of achieving a legitimate aim.

Annex 2

Responding to the Consultation

How can you respond?

A copy of the consultation response form is enclosed. Electronic versions of this document can be accessed on the website of Office of the First Minister and deputy First Minister at www.ofmdfmni.gov.uk/sex-discrimination-and-equal-pay.

A response can be submitted by e-mail, letter or fax or via the internet to:

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To assist you in considering your response you may wish to refer to:

- the draft Sex Discrimination Order 1976 (Amendment) Regulations (Northern Ireland) 2007
- the Regulatory Impact Assessment
- the Screening Assessment
- European Union Council Directive 2004/113/EC
- the Sex Discrimination (Northern Ireland) Order 1976

These documents can be found on our website at www.ofmdfmni.gov.uk/sex-discrimination-and-equal-pay.

What about Freedom of Information?

The Department will publish responses following the completion of the consultation process. If you would prefer your response to be treated as confidential, please let us know, stating your reasons clearly. Any automatic confidentiality disclaimer generated by your IT system will be taken to apply only to information in your response for which confidentiality has been specifically requested.

If we are asked to disclose responses under freedom of information legislation, we will take any requests for confidentiality into account. However, confidentiality cannot be guaranteed.

We will handle appropriately any personal data you provide in accordance with the Data Protection Act 1998.

For further information about confidentiality of responses, please contact the Information Commissioner's Office or see website at:

www.informationcommissioner.gov.uk

When does this consultation close?

This consultation closes on 21 September 2007

How can you order additional copies or alternative formats?

Further copies of this and other documents in this consultation can be obtained by using the contact details in the previous page. Alternative formats are available on request.

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