

Contemporary Comment

Institutional Violence against People with Disability: Recent Legal and Political Developments

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Abstract

International and Australian domestic evidence suggest that the prevalence of violence against people with disability is substantially higher than for the rest of the community. Much of the violence experienced by people with disability in Australia occurs within the purview of a variety of institutions, including group homes, large residential institutions, Australian Disability Enterprises (that is, disability employment facilities), schools, psychiatric facilities, hospitals and correctional facilities. This comment discusses recent domestic and international legal and political attempts to grapple with the issue of institutional violence against people with disability, focusing in particular on a series of Senate Committee inquiries into abuse and violence, regulation related to the National Disability Insurance Scheme, the coming into force of the *Convention on the Rights of Persons with Disabilities*, Australia's anticipated ratification of the *Optional Protocol to the Convention Against Torture* and recent calls by Disability People's Organisations and academics for a Royal Commission into violence against people with disability.

Keywords: disability – institutional violence – restrictive practices –
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Introduction

International and Australian domestic evidence suggest that the prevalence of violence against people with disability is substantially higher than for the rest of the community (Krnjacki et

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al. 2016).¹ Much of the violence experienced by people with disability in Australia occurs within the purview of a variety of institutions, including group homes, large residential institutions, Australian Disability Enterprises (that is, disability employment facilities), schools, psychiatric facilities, hospitals and correctional facilities. Despite policies of deinstitutionalisation in the 1980s through to the 2000s, many people with disability continue to live in institutions (including being over-represented in correctional facilities) (MacKinnon & Coleborne 2003; see more broadly Chapman et al. 2014; Emerson 2004; Mansell & Ericsson 1996; Productivity Commission 2011, p. 473). Increasingly these services are provided by non-government organisations, both for-profit and not-for-profit. Moreover, where people with disability are living at home, progressively disability support services are being delivered there too (Australian Institute of Health and Welfare 2017; Henman & Foster 2015; MacDonald 2017; Muir & Salignac 2017).

Institutional violence against people with disability takes many forms, including financial abuse (or theft), emotional abuse, neglect, and physical and sexual violence. It frequently occurs behind closed doors with victims having very limited access to means of reporting violence, and with limited oversight of what occurs within these institutions. Indeed, administrative complaint processes, such as Ombudsmen or Disability Services Commissioners, often treat expressions of violence and abuse that would otherwise be considered worthy of a criminal justice response as service incidents or signs of poor quality in support provision (Frohman & Sands 2015, p. 19). This can limit the capacity of people with disability to access justice on an equal basis with others. Some forms of institutional violence are even harder to address because of their relationship with law and the way that this relationship precludes these forms of violence from both administrative and criminal justice complaints processes. The Disability Acts of most Australian jurisdictions, for instance, allow disability service providers to use restrictive practices to contain and control people with disability receiving their services (see Spivakovsky 2012). In practice this means that it is *legally permissible* for people with disability living in group homes or attending day services to be physically or mechanically restrained, forcibly sedated and/or ‘secluded’ (that is, placed in solitary confinement), despite the fact that if these harmful actions occurred outside of a disability setting or in relation to any other population they would be recognised for what they are: acts of violence, abuse, false imprisonment, and/or a breach of human rights. This has prompted scholars like Steele (2015, 2017) to rebadge restrictive practices as ‘disability-specific lawful violence’, a term adopted by the Senate Community Affairs References Committee in its recent inquiry into the abuse, neglect and violence of people with disability (SCARC 2015), and a practice which has been consistently flagged for elimination by disability advocates due to the violent nature of its harms (see, for example, Frohman & Sands 2015, pp. 45–7 and People with Disability Australia & Women with Disability Australia 2015). Essentially, then, institutional violence in the context of this comment should be understood to include the forms of violence that institutions are designed to enable, support and make lawful (that is, restrictive practices), as well as those instances of violence within institutions which, while not strictly lawful, are not typically subject to intervention due to the characteristics of the institution and its actors.

¹ Violence against people with disability, however, is extremely difficult to track, partly because most Australian strategies for tracking such data — for example, large-scale representative research performed by the Australian Bureau of Statistics (‘ABS’), or police crimes data — tend to produce and reproduce ‘ableist’ social norms (Kumari Campbell 2009) and thereby marginalise disabled people. For example, the ABS’s Personal Safety Survey, generally understood as the gold standard of data collection regarding violence in Australia, excludes non-private households such as institutions and group homes, and will not provide Auslan translations, braille, or Easy English versions of the survey to ensure the participation of deaf, blind, and/or people with intellectual disability (Kavanagh, Robinson & Cadwallader 2015).

In the past five years in Australia, institutional violence against people with disability has been the subject of much advocacy, and has received increased media, political and legal attention. Notably in the space of three years there were three Senate reports related to this issue (SCARC 2013, 2015, 2016). Given many of the sites of this institutional violence are services currently transitioning to the federal National Disability Insurance Scheme ('NDIS'), the role of the NDIS in enabling or preventing institutional violence has been a particular, recent concern. At the same time, two Royal Commissions — the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into the Protection and Detention of Children in the Northern Territory — have been called to focus on institutional violence (although not specifically focused on people with disability) precisely because of its unique set of legal powers to challenge the ways that institutions can limit oversight of or obfuscate the violence that occurs within their walls.

Recently, the Australian Government rejected calls by disability advocacy organisations, various federal and state inquiries, and academics, for a Royal Commission into disability violence. The aim of this comment is to inform readers of the key contemporary attempts to grapple with institutional violence against people with disability flowing from domestic review processes, the NDIS and domestic implementation of international law. We begin with a discussion of recent domestic review processes.

Domestic inquiries and reviews

Public inquiries, including Royal Commissions and government and parliamentary reviews, serve a number of functions within Australia's policy and law context (see Hindmarsh & Parkinson 2013; Prasser 1985). While in the Australian system these processes 'lack a formal constitutional basis for their existence' (Prasser 1985, p. 1), they nevertheless have the capacity to resolve contentious political issues and enable transparency where there is a government or public desire for independent oversight (see Hindmarsh & Parkinson 2013, pp. 295–6). Royal Commissions have in particular a high value attached to them because of their legislative basis, coercive powers and prestige (Prasser 1986): these features of Royal Commissions contribute to 'them being highly valued internally, and thus to a corresponding (deeply rooted) social norm of expected independence' (Samuel & Green 2017, p. 98). We note in particular that Royal Commissions potentially have a 'landmark' status in highlighting the need for deep structural change, even where governments prove unwilling to respond to the norms they create; arguably the Royal Commission into Aboriginal Deaths in Custody, finalised in 1991, is an example of this (see Cunneen 2006, p. 333).

In this section we examine relevant national inquiries relevant to violence against people with disability. There have been numerous state-level inquiries that have drawn attention to the range of institutional forms of violence committed against people with disability (see, for example, the Victorian Parliamentary Inquiry into Abuse in Disability Services and the New South Wales ('NSW') Parliamentary Inquiry into Students with a Disability or Special Needs in NSW Schools), but for brevity we focus on national developments.

Following a long-running advocacy campaign led by Women with Disabilities Australia and People with Disability Australia (see, for example, Frohmader 2013) arguing for the criminal prohibition of sterilisation — that is, the non-consensual surgical removal of reproductive organs — in 2012 the Senate Community Affairs Reference Committee ('Senate Committee') considered the issue. In its 2013 report (SCARC 2013), the Senate Committee recommended retaining the practice of court authorised sterilisation of people without capacity — so sterilisation would not be prohibited by criminal law as advocates had argued

— but including human rights considerations in the legal test that governs court authorisation (SCARC 2013, p. x). While this was a highly problematic approach that reinforced the inequality in rights of people with disability to freedom from legally sanctioned violence, there remains continuing domestic and international pressure for positive reform. In 2013, responding to the Senate Committee finding, the United Nations ('UN') Committee on the Rights of Persons with Disabilities stated it was 'deeply concerned that the Senate inquiry report ... puts forward recommendations that would allow this practice to continue' (CRPD 2013, p. 5 [39]). It urged Australia to adopt laws prohibiting sterilisation 'in the absence of their prior, fully informed and free consent' (CRPD 2013, p. 6 [40]; see Steele 2016), recognising that the issue of informed, freely given consent should focus on the issue of how capacity may or may not be supported for particular categories of people, rather than relying on outdated presumptions of who does or does not have capacity (see Arstein-Kerslake 2017; Gooding 2018; People with Disability Australia et al. 2014).

Perhaps for the first time in an Australian policy context, systematic violence against people with disability was addressed in the 2015 Senate Committee report on institutional violence ('Institutional Violence Senate Report'). This Inquiry was established in 2014 in response to an Australian Broadcasting Commission *Four Corners* documentary highlighting the systematic violence perpetrated by individual disability service workers against people with disability in disability services, and the failure of disability service managers to recognise and pursue legal action against perpetrators (*In our care* 2014). This documentary reflected concerns which had been raised by disabled people's organisations over a number of years in their longstanding campaign against disability institutional violence.

Relevant to this contemporary comment, the Institutional Violence Senate Report made a headline recommendation for a Royal Commission into Violence against People with Disability (SCARC 2015, p. xv). The rationale for this important recommendation was the need to 'conduct a more thorough investigation of instances of violence, abuse and neglect of people with disability, including investigative powers and be funded and empowered to visit institutions' (SCARC 2015, p. 267). In making this recommendation, the Senate Committee acknowledged the limitations of its own inquiry in capturing the extent of violence, abuse and neglect experienced by people with disability, noting that the lack of reliable data available meant that prevalence was undoubtedly far greater than 'this inquiry has been able to determine' (SCARC 2015, p. 268). The Institutional Violence Senate Report also made recommendations relating to enhancing access to justice through training of police and lawyers and better witness support services (SCARC 2015, p. xvii) and improved reporting and oversight of disability services in relation to their responses to violence in their services (SCARC 2015, p. xviii). The Institutional Violence Senate Report acknowledged and considered lawful institutional violence against people with disability (particularly restrictive practices) (SCARC 2015, ch 4), but fell short of recommending the prohibition of these forms of institutional violence.

Arguably the response of the Australian Government to these far-reaching recommendations has been poor. In March 2017, the Australian Government released its Response to the Senate Community Affairs Reference Committee's recommendations ('the Response'). The Response announced that the Australian Government would not pursue a Royal Commission into the violence and abuse of people with disability. Instead, the Government proposed that violence would be prevented by the establishment of the NDIS Quality and Safeguarding Framework (Australian Government 2017, p. 5). We return to this proposition regarding the capacity of the NDIS and its associated mechanisms to address institutional violence in the next section.

Continuing advocacy in Australia, as well as the Institutional Violence Senate Report, has highlighted the indefinite detention of people with cognitive impairment and psychiatric disabilities who are considered ‘unfit to plead’ in criminal cases due to a lack of legal capacity (Australian Government 2017, p. xvii) (see, for example, *Jailed without conviction* 2014). Following the release of the Institutional Violence Senate Report, a separate inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia was established. The subsequent report made recommendations focused on enhancing access to justice (SCARC 2015, pp. xiii–xiv) and alternatives to detention in the forensic and criminal context (SCARC 2015, pp. xvi–xix), but did make one recommendation for a nationally consistent approach to existing state and territory disability oversight mechanisms to prevent violence in detention (SCARC 2015, p. xiv).

While not specific to people with disability, the Royal Commission into Institutional Responses to Child Sexual Abuse (‘RCIRCSA’) has also problematised violence against people with disability in institutional contexts. The RCIRCSA addressed sexual abuse in disability institutional settings such as residential special schools, respite services, day services and other support services designed for children with disability (RCIRCSA 2017a). Its various public hearings have explored some of the key strategies used to ensure children and adults with disability can access criminal justice responses to institutional violence perpetrated against them, such as introducing a criminal offence for those institutional actors who know of cases of violence but do not seek to have them addressed, and the use of witness intermediaries (RCIRCSA 2017b). RCIRCSA recently released its report on criminal justice responses and made recommendations specifically in relation to victims and survivors with disability (see, for example, RCIRCSA 2017c, pp. 509–12). RCIRCSA’s also makes explicit references to children with disability in the context of its final recommendations (RCIRCSA 2017d).

The collective impact of the above national review processes is difficult to assess. On one hand, the unprecedented number of public inquiries addressing violence against people with disability is indicative of the relative success of people with disability and advocates in building public awareness and prompting response from government. However, on the other hand, inquiries themselves do not necessarily lead to positive reform. There are inherent problems with review processes, including:

inquiry terms of reference decided upon by elites in non-transparent and narrow representative procedures of formulation; the selection of reviewers which exclude citizen representatives and include obviously biased ones; and where the major form of public participation is submissions ... that invite their strategic selection for decisional influence (Hindmarsh & Parkinson 2013, p. 306).

As discussed above, some review processes, such as the recommendations of the 2012 Senate Community Affairs Reference Committee, can fail to live up to the demands of advocates; while others, such as the Institutional Violence Senate Report can fail to be meaningfully implemented by government. However, there are other reasons that public inquiries may be useful within a policy and law reform context; in particular, in highlighting structural inequalities, creating an evidence base and normative demand for change. The failure of domestic inquiries to prompt institutional change perhaps reinforces the place of more significant inquiry processes, such as Royal Commissions or international monitoring through periodic human rights reviews (see below), in increasing pressure on governments to respond effectively to violence against people with disability.

National Disability Insurance Scheme

As noted above, the Australian Government's response to the overwhelming call for a Royal Commission into the violence, abuse and neglect of people with disability has focused on improving the quality of service provision through regulation of institutional spaces (not, as we noted above, ending institutionalisation or prohibiting specific lawful interventions such as restrictive practices). Until now, the majority of disability services in Australia have been 'block-funded' by government agencies. Under the NDIS, the funding of disability services will become individualised. This means that people with disability who are eligible to receive government funding will now be able to choose the services they believe they require, receive funding for those which are reasonable and necessary, and have the power to change providers should they be unhappy with the level or quality of service they receive.

As a result of the shift in the distribution of disability funding, it is expected that a number of new service providers will seek registration with the National Disability Insurance Agency ('NDIA') in order to compete with existing disability providers for people's individualised disability funding. It is intended that this development will turn Australia's disability services sector into a 'market-based system', where people with disability — repositioned as service 'consumers' — will weigh up the risks associated with choosing the various service options marketed to them by competing providers (Productivity Commission 2011). The NDIS Quality and Safeguarding Framework ('the Framework') is designed to ensure that capability and protections are built into this new market-based system (Australian Government Department of Social Services 2016, p. 6). The objectives of the Framework are to ensure NDIS funded supports, among other things, uphold the rights of people with disability, including their rights as consumers and allow participants to live free from abuse, violence, neglect and exploitation (Australian Government Department of Social Services 2016, p. 11).

In relation to the potential violence against people with disability under the NDIS, a number of protective measures have been built into the Framework, yet their potential effectiveness is questionable. For example, under the Framework, the newly established NDIS complaints commissioner has been given responsibility for responding to the inappropriate or unauthorised use of restrictive practices. The NDIS complaints commissioner refers matters to the senior practitioner for further consideration and response. Should the senior practitioner have concerns about specific workers or providers having misused restrictive practices, they can then refer the matter to the NDIS registrar, who in turn has the power to deregister or bar offending workers and/or providers. Thus, use of restrictive practices remains under the NDIS Framework as an issue of *regulation*, and not criminal *prosecution*.² That is to say, the use of restrictive practices remains *legally permissible* under the NDIS Quality and Safeguarding Framework, despite this Framework being touted by the Australian Government as the solution to eliminating all the problematic nuances of institutional violence raised in the Institutional Violence Senate Report (including the 'disability-specific lawful violence' of restrictive practices).

² This is despite the Framework directly quoting the submission of Women with Disabilities Australia and People with Disability Australia, which stated that presenting these issues as service incidents 'dilutes the reality of violence and harmful practices', and leads to the situation being 'written off' for internal investigation, closing off options for police involvement (Australian Government Department of Social Services 2016, p. 50). The Framework does make some reference to the NDIS complaints commissioner having capacity to refer matters to police, although it is unclear under what circumstances these referral pathways are expected to be invoked, with the Framework only indicating that they will be used 'as needed' (Australian Government Department of Social Services 2016, p. 18).

Notably, in regards to the regulation of restrictive practices under the Framework, the primary responsibility for reporting the inappropriate or unauthorised use of restrictive practices to the NDIS complaints commissioner rests with (the offending) service providers. Indeed, people with disability who approach the commissioner directly with a complaint will be encouraged in the first instance to raise their concern with their service provider so that the provider can address the complaint through their own internal processes (Australian Government Department of Social Services 2016, p. 47). This prescription overlooks the complexity that people who are subject to restrictive practices are most often those who are the least likely to be able to raise complaints about these practices on their own behalf — either due to the nature of their impairment or because of the environment within which they live (or both) (see Spivakovsky 2018). Moreover, should a complaint about restrictive practices be raised with the NDIS complaints commissioner the Framework does not provide any clear requirement for ensuring criminal justice intervention.

International human rights developments

Australia's ratification of the CRPD arguably has had a pronounced effect on the Australian policy and law landscape, at least in prompting analysis of the legal status of people with disability, and simultaneously contributing to reform in delivery of social supports. For example, the 2014 Australian Law Reform Commission review of laws and legal processes with the aim of recognising that people with disability should enjoy equal recognition as persons before the law (ALRC 2014) and large-scale restructuring of social supports in Australia through the development of the NDIS. However, the primary policy framework designed to give life to Australia's CRPD obligations, the National Disability Strategy 2010–2020, has achieved few of its aims and objectives, and reports and action plans under the Strategy have consistently run late since its implementation.

Insofar as the CRPD elucidates a range of obligations relevant to violence, abuse, torture and ill-treatment, the treaty also has great potential for addressing interpersonal and institutional forms of violence routinely experienced by people with disability. Indeed, in many respects, the CRPD offers a more strongly articulated set of rights in relation to freedom from violence than other core treaties, such as the *Convention on the Elimination of All Forms of Discrimination against Women* (see Šimonović 2014, pp. 599–602). The CRPD reiterates that persons with disability should enjoy on an equal basis with others liberty and security of person (art 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (art 15), freedom from exploitation, violence and abuse (art 16) and bodily integrity (art 17). In addition, these rights to freedom from violence are underpinned by rights of access to justice (art 13) and equal recognition as persons before the law (art 12), the latter right in particular problematising legal arrangements, such as guardianship, which enable institutionalisation and restrictive practices (see CRPD 2014). The rights of people with disability to be free from violence strongly interact with other CRPD rights such as the right of people to live independently in the community, including choosing their place of residence (art 19), thus effectively prohibiting institutional models of support that restrict liberty (see Kayess & French 2008, p. 29; see also Spivakovsky 2017).

One area where there have been signs of policy progress both internationally and in Australia is in relation to protection from torture and ill-treatment (see Karsay & Lewis 2012). Ill-treatment relating to people with disability in the contexts of disability support and healthcare has increasingly been problematised within the UN system, with Special Rapporteurs on torture and other cruel, inhuman or degrading treatment or punishment

drawing attention to the use of restraints and seclusion, as well as the use of forced medical interventions such as non-consensual sterilisation and the use of therapies such as electroconvulsive therapy (Novak 2008, pp. 10–18; Méndez 2013). Indeed, Special Rapporteur Méndez, examining torture and ill-treatment in health contexts, recommended ‘an absolute ban on all forced and non-consensual medical interventions against persons with disabilities’ (Novak 2008, p. 23), including in relation to children with disability (see Novak 2008, pp. 19–20; Méndez 2015, p. 12). The policy and law implications of applying a prohibition to the use of restrictive practices are potentially significant for Australia, given the continuing use of these practices within the context of disability support (see Frawley & Naylor 2014), civil and forensic mental health contexts (see McSherry 2017) and in education (CYDA 2016; see also Paley-Wakefield 2012).

In late 2017, the Australian Government ratified the Optional Protocol to CAT (‘OPCAT’), after an Australian Human Rights Commission consultation process (see AHRC 2017). OPCAT ratification will lead to international monitoring of sites of detention by the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture (‘SPT’) and also lead to the creation of a domestic National Preventative Mechanism (‘NPM’). OPCAT has significant potential (alongside domestic criminal legal and other mechanisms being considered in domestic law reform) as a vehicle for monitoring of the treatment of people in a variety of institutional contexts, and also for pursuing improvements in support systems, with the aim of eliminating systematic violence against people with disability, and has been used in this way in a number of other countries (Sveaass & Madrigal-Borloz 2017). However, significant political and conceptual challenges remain for implementation of an Australian NPM in such a way to offer enhanced protection for persons with disability; such a mechanism would require the development of a disability inclusive approach to monitoring, including recognising non-traditional sites of detention – such as large and small disability institutions — and monitoring interventions such as restraint and seclusion practiced in contexts of ‘support’ and ‘therapy’ (see Lea et al. 2018; PWDA 2017; see also Karsay & Lewis 2012).

Conclusion: Where to from here?

Institutional violence is a widespread systemic issue with significant criminal law and criminal justice dimensions, which include conventional questions of attrition and enforcement as well as deeper issues around what constitutes violence and who can be a subject of it. In light of recent human rights developments designed to realise the rights of people with disability, and the movement made by recent domestic inquiries to engage with these multiple issues, it is troubling that the Australian Government has so far avoided a far reaching response to violence against people with disability, such as might be provided by a Royal Commission.

Since the release of the Australian Government Response to the Institutional Violence Senate Report into institutional violence against people with disability, a number of disability advocacy groups, as well as academics, have renewed the call for a Royal Commission into violence against people with disability. Disabled People’s Organisations Australia (DPO Australia), a coalition of peak disability advocacy groups in Australia, has been particularly instrumental in reinstating this call (see, for example, DPO Australia 2017a, 2017b). In May 2017, over 160 Australian academics joined this call for a Royal Commission, writing an open letter to Australia’s Prime Minister (DisabilityRoyalCommissionNow 2017).

At the time of writing, the Australian Government, led by Prime Minister Turnbull, has not changed its position on the establishment of a Royal Commission. The Government continues to present the forthcoming NDIS Quality and Safeguarding Framework as the only mechanism needed for protecting people with disability from violence, abuse and neglect in institutional settings, despite advocates continuing to emphasise its numerous limitations, especially in light of the overt alignment between the NDIS Act Charter and the CRPD. Notably, however, the Australian Labor Party has announced a commitment to establish a Royal Commission into disability violence and abuse should the Labor win the 2019 election. Disability advocates continue to encourage Prime Minister Turnbull to show the same leadership (DPO Australia 2017b).

Most of the problems and injustices addressed by Royal Commissions in Australia remain after they have completed their work, and few recommendations arising from Royal Commissions have been implemented. However, as highlighted earlier, the significance of Royal Commissions lies not solely in the implementation of recommendations, but also in the impact they have on the perception of the injustice discussed therein. A Royal Commission offers unparalleled discovery powers and thus could conduct comprehensive and independent investigation into the extent of violence against people with disability in Australia. Importantly, such a review has the potential to highlight the connection between institutional environments and systemic violence against people with disability, and elucidate the barriers that prevent a criminal justice response, enabling reforms to support systems, inclusion outcomes. This kind of robust interrogation has the potential to also examine how and why criminal justice remedies remain inaccessible to people with disability, despite the Australian Government's explicit commitment to realising their human rights, including their equality before the law. It can also enable research designed to adapt the measures developed internationally to address institutional violence against people with disability, and ensure evidence-based reform of and beyond the justice system, in line with the CRPD. Perhaps most significantly, however, it has the potential to make explicit and help to shift the normative discourses about people with disability that continue to inhibit the current approach to institutional violence within Australia.

Conventions and Protocols

Convention against Torture and Other Cruel, Inhumane or Degrading treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)

Convention of the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

Convention of the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 4 February 2003, UN Doc A/RES/57/199 (entered into force 22 June 2006).

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