CIPD
Championing better
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Consultation on Sexual Harassment in the Workplace

Government Equalities Office

Chartered Institute of Personnel and Development (CIPD)

May 2019

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CIPD response

Background

The CIPD is the professional body for HR and people development. The not-for-profit organisation champions better work and working lives and has been setting the benchmark for excellence in people and organisation development for more than 100 years. It has almost 155,000 members across the world, provides thought leadership through independent research on the world of work, and offers professional training and accreditation for those working in HR and learning and development.

Our membership base is wide, with 60% of our members working in private sector services and manufacturing, 33% working in the public sector and 7% in the not-for-profit sector. In addition, 76% of the FTSE 100 companies have CIPD members at director level.

Public policy at the CIPD draws on our extensive research and thought leadership, practical advice and guidance, along with the experience and expertise of our diverse membership, to inform and shape debate, government policy and legislation for the benefit of employees and employers, to improve best practice in the workplace, to promote high standards of work and to represent the interests of our members at the highest level

CIPD has a number of resources available for members relating to harassment and discrimination at work, ranging from factsheets to guides and toolkits, including:

- 24/7 access to unlimited free calls to the Employment Law Helpline for advice on UK and Irish employment law,
- Access to the CIPD sexual harassment guide, harassment and bullying factsheet,
- CIPD Community discussion forums,
- Discounted access to HR Inform, a practical online tool designed to embed good HR practice and to help organisations stay legally compliant.

Q1. If a preventative duty were introduced, do you agree with our proposed approach?
Yes/No/Don't know
Please explain your answer, drawing on any evidence you have.

There is already a legal duty on employers to protect employees from harassment, including sexual harassment. Although we've had legislation in this area for 40 years, progress isn't fast enough. Clearly the current law is not working effectively enough across all workplaces and we welcome the attention this consultation brings to improving the protection individuals receive from harassment at work. However, we are not convinced based on the current evidence available that a new mandatory duty on employers to prevent harassment would have the desired impact and there's a risk of using legislation as a blunt tool. It's likely that new legislation could face the same barriers as current law, for example employers not being clear enough on their obligations and how to implement the right steps to prevent sexual and other types of harassment. This doesn't mean that the existing legislation can't be improved: much more can be done to improve awareness and compliance by employers and create inclusive and respectful work environments to bridge the gap regarding the law and its effective implementation in the workplace.

Q2. **Would a new duty to prevent harassment prompt employers to prioritise prevention?**
Yes/No/Don't know
Please explain your answer, drawing on any evidence you have.

We fully support the principle that employers should take their preventative responsibilities more seriously in relation to protecting employees from harassment at work. However, we don't believe that a new statutory duty on employers to prevent harassment at the present time would necessarily prompt employers to prioritise prevention. Employers are already responsible for protecting employees from harassment at work including from actions by other employees, and as the consultation paper points out, the new duty would not require employers to take any practical steps they are not already expected to take. Before introducing a new law, we therefore believe there is scope within the current legal framework to improve employer compliance with their existing duties, including through some of the other proposals set out in this consultation such as better enforcement and stronger guidance and education for employers.

Given the evidence considered by the Women and Equalities Committee during its Inquiry into sexual harassment and its continued prevalence, it's clear that [many] employers lack the required awareness and understanding of their obligations under current law including unintentional harassment. As the Government's response points out, [many] employers do

not know what 'all reasonable steps' to prevent harassment are. We therefore very much welcome the proposed new statutory Code of Practice, including the EHRC's plans to provide further clarity on what constitutes 'reasonable steps'. We believe the new Code could significantly help to narrow the gap between legislation and practice, making clear to employers what constitutes harassment and help focus their minds on the problem. In addition, it could potentially afford the alleged victims of harassment another level of protection if it was taken into account in the event of tribunal proceedings. A key challenge is how to effectively communicate the Code to employers of all sizes, especially those who are in most need of clear guidance and advice and harder to reach.

The core issue is how do we significantly raise employers' awareness and understanding of a) their responsibilities and b) the steps they should be taking in their organisation to achieve the necessary cultural shift to build working environments with zero-tolerance for harassment and any form of inappropriate behaviour? At this stage we are not convinced that a new law is necessarily the silver bullet to achieve these aims, and we concur with the Government's thinking in its response to the Women and Equalities Committee that the statutory Code of Practice could significantly improve employers' ability to engage with their existing responsibilities. We agree that its introduction could hopefully have 'the same impact as the proposed mandatory duty in placing more of an onus on employer, rather than individual action' – as we fully agree with the principle of better rebalancing enforcement responsibility so that it doesn't disproportionately rest on individuals.

If enforcement activity in other employment rights areas is anything to go by, simply introducing a new prevention duty on employers would not necessarily achieve the 'ultimate aim' of removing the need for an individual to pursue their own remedy via a tribunal.

A key consideration is how much weight is put behind the Code of Practice, including the resources invested in promoting and explaining its content and status, so it has impact in changing employer practice and employee behaviour on the ground and delivering the 'real world results' to which the Government aspires.

Q3. Do you agree that dual-enforcement by the EHRC and individuals would be appropriate?
Yes/No/Don't know
If 'no', please explain your answer, drawing on any evidence you have.

As we do not think there is a compelling case to introduce a new mandatory duty solution to bring about an effective change in employer behaviour at this time, we address this

question in terms of the wider issue of whether or not the current dual-enforcement approach by the EHRC and individuals is working effectively.

We believe there is scope to improve the balance of responsibility for the enforcement of equality rights (including harassment) between individuals and the state. We are concerned that responsibility for enforcement is too heavily weighted on individuals and echo the difficulties faced by individuals in enforcing their rights highlighted by the Women and Equalities Committee Inquiry on enforcing the Equality Act, including poor knowledge of their rights. Individuals' access to justice in cases of discrimination is also hampered by their inability to obtain legal aid for employment tribunal cases. We therefore support the EHRC's recommendations to Government in its response to this consultation, that Government should produce guidance on Exceptional Case Funding as it's not working as it should for discrimination cases and also fulfil its commitment to reviewing the legal aid financial eligibility requirements.

The CIPD has consistently called for a high-profile, Government-led 'Know your Rights' campaign, through trusted organisations like Acas, to ensure that employees have access to information, advice and guidance (IAG) to help them assert their rights and seek redress if necessary. We believe there is a significant gap in this area. The EHRC also has a key role to play to ensure that employers and employees have access to high-quality IAG that is effectively targeted and disseminated.

We therefore welcome the Government's response to the Women and Equalities Committee Inquiry into sexual harassment that it will work with Acas, the EHRC and employers to raise awareness of appropriate workplace behaviours and individual rights. Obviously, consultation around the planned new Code of Practice, and its eventual publication, provides opportunities in this regard but we need an ongoing, large-scale communications campaign as a matter of priority. We note the Government's intention to 'scope and consider options for public information and campaign activity in this area' and would very much welcome the opportunity to discuss these with Government and play our part to promote awareness and education to help prevent harassment and discrimination at work. With a community of nearly 155,000 people management professionals working across all sectors with significant reach in workplaces, we can use our networks and influence to amplify the Government's campaign work.

In summary, we believe that rather than imposing a new statutory prevention duty on employers, more support could be provided to individuals to help them understand and enforce their rights, as well as a stronger enforcement focus by the EHRC in this area. The consultation paper points out that the EHRC's enforcement role is intended to be 'strategic' – its enforcement powers are wide-ranging but many witnesses to the WEC Inquiry

advocated a more proactive approach to enforcement action. Data in the report show a decrease in enforcement activity over the past 10 years which has increased the burden of enforcement borne by individuals. Bolder and more targeted use of the EHRC's unique enforcement powers, as highlighted by the Inquiry, could help to rebalance the enforcement burden away from over-reliance on individuals. The culture around enforcement also needs to change so that there is greater awareness by employers of the consequences of not complying with their statutory equality obligations.

Q4. If individuals can bring a claim on the basis of breach of the duty, should the compensatory model mirror the existing TUPE provisions and allow for up to 13 weeks' gross pay in compensation?
Yes/No/Don't know. If 'no', can you suggest any alternative models?

Not answered as our response says that we don't think a new mandatory duty is the right approach at the current time

Q5. Are there any alternative or supporting requirements that would be effective in incentivising employers to put measures in place to prevent sexual harassment?
Please provide evidence to support your view.

Proposed new Code of Practice on sexual harassment and harassment at work

A Code of Practice would be useful to set out what is expected of employers and the action they need to take to prevent harassment, and we look forward to providing input to the EHRC's forthcoming consultation on the new Code. We want employers to create long-term, sustainable cultural and behavioural change, and a new statutory code could help to achieve this in workplaces.

The Code needs to set out what would be considered 'reasonable steps' at a tribunal. However, Government still needs to consider:

- How would a Code of Practice be effectively communicated to employers in a way they will read it and take action? We believe a substantial amount of resources needs to be allocated to the awareness-raising and education of employers about how to embed a zero-tolerance approach to sexual harassment (and all types of harassment) and foster the appropriate culture and behaviours.
- Utilising the reach and influence of professional bodies, trade associations and trade unions could be beneficial. Professional bodies like the CIPD can help to raise awareness of what is expected by employers and changes to legislation. The CIPD will very soon publish its own comprehensive good practice guide for members and organisations on how to prevent and deal with sexual harassment at work.

- It could be helpful for Government/the EHRC to also communicate the possible consequences of inaction and how the organisation would be viewed at tribunal if they had not taken reasonable steps and/or observed the Code of Practice.
- Would a code cover organisations of all sizes? We believe this is vital.
- In addition to the Code, Government/the EHRC should provide **practical resources for employers** about how to prevent sexual harassment/harassment – this should include concrete examples of what constitutes harassment and what doesn't. It should also make clear that it's not just women who experience sexual harassment and it's not age-dependent. The examples need to be inclusive; for example, that sexual harassment experienced by a trans person may be different from that experienced by someone who is bi or a lesbian. For **employees**, the Code also needs to communicate how to report incidents or complaints, and what they should do to seek redress.

Transparency, data and reporting

Greater transparency and stronger corporate governance have an important role to play in how organisations can successfully tackle sexual harassment at work and promote gender-inclusive working environments. Inspiration can be taken from the work we are seeing in this regard to closing the gender pay gap. We therefore welcome the intention to gather regular data from employers on the prevalence and nature of sexual harassment in workplaces set out in the Government's response to the Women and Equalities Committee Inquiry, but believe this should cover all types of harassment at work. We agree that tribunal data will reveal only a very small part of the overall picture, and so if employers are required to formally report on the prevalence and nature of (sexual) harassment complaints, it's important to balance the regulatory demand put on employers with providing advice and guidance to help them understand issues in their particular organisation to improve policy and practice.

Careful thought needs to be given to ensure measures that employers report on act as a driver for change: this can't be a tick box exercise. Some learning could be garnered from gender pay gap reporting experiences and the importance of narrative reporting. The key aims behind any form of data collected in this respect should be to encourage good practice and to enable government to focus attention where it's needed, working with stakeholders with influence in the employment context to facilitate that change.

We would also support employers being encouraged to publish their sexual harassment policy on their website. As a first step, employers need to have a policy on sexual harassment, or a wider bullying and harassment policy that covers sexual harassment. All employees need to know it exists and how to access it. Publishing the policy on their

external website can send a clear signal to all stakeholders, including future employees, about the standard of behaviour expected in the organisation and what won't be tolerated. This is another area where guidance and example policies could be beneficial, especially for those employers without a HR professional.

Government can also play a stronger role in nudging and supporting employers to improve their people management capability and inclusive working practices at a national, sector and local level. At a national level, government can work with key stakeholders to ensure that the UK's corporate governance framework provides greater incentive for businesses to report on the diversity of their workforce, understand current workforce capability and consider how to develop the HR and people management practices organisations require to deliver progress. At a sector level, government can help initiate action by ensuring that sector deals are dependent on sectors setting out clearly how they propose to improve the quality of people management, including the practices that support greater levels of both diversity and inclusion.

Small and medium-sized enterprises

The Government must be mindful of small- and micro-businesses that don't have the sophisticated HR capabilities that large businesses will, and work out how to engage with them on this agenda. We know that small businesses are a hard to reach demographic, but they are critical given that around two thirds of private sector employees work in SMEs.

Recent CIPD work with SMEs has shown that these businesses typically lack even basic people management guidance and support which is a prerequisite to tackle issues like sexual harassment and discrimination. Funded by JP Morgan, we ran pilots of an SME support programme called People Skills in 2012 in Hackney, Stoke-on-Trent, and Glasgow, providing up to 2 days of free, locally-delivered, basic, transactional HR support to small businesses.
The evaluation shows that small businesses lack basic HR knowledge and people management skills and that even basic 'transactional' HR support improves employee-manager relationships and productivity. Our evaluation evidence highlighted the positive role that face-to-face advice, facilitated by strong local institutions, can play in helping to build the people management 'basics' that small businesses need for sustainable growth. As a result, we recommend that the Government invest £13 million a year to the 38 LEPs in England to roll out the scheme.

Government, regulators and other stakeholders working in partnership

To ensure that sexual harassment is a high priority issue for employers, Government should narrow the gap between legislation and workplace practice by partnering with organisations like the CIPD, Acas and EHRC to make advice and guidance consistent and accessible, also ensuring that sufficient resources are available to boost good practice in the workplace.

Further, we fully agree with the Women and Equalities Committee during its Inquiry into sexual harassment, that sexual harassment (and other forms of harassment) are worthy of the HSE's attention. Given the potential impact of harassment and discrimination on people's psychological well-being and the HSE's responsibility for ensuring that employers provide healthy and safe working environments, there is a clear overlap with the HSE's enforcement activity. EHRC may be the lead regular in this area but it can only improve awareness and strengthen compliance if other regulators also play their role as part of a holistic approach. We therefore welcome the steps set out in Government's response to engage directly with regulators to ensure they are taking appropriate action to address sexual harassment in their areas. We fully concur that the HSE is able to contribute to the measures to move forward on this issue, and welcome the more formal liaison arrangements that will be set up between the two regulators, and look forward to hearing about progress on this front.

We address the EHRC's enforcement role in our response to Question 3, above.

Statutory discrimination questionnaire

We note that the Government (in its response to the Women and Equalities Committee Inquiry) does not think the reintroduction of a statutory discrimination questionnaire would be appropriate in 'present day conditions' but don't wholly agree. We acknowledge that the previous provision had room for improvement, however, and that there was a firm case for exploring whether or not a less bureaucratic process could be introduced as well as stronger guidance to encourage employees and trade unions to use the process appropriately.

Before the statutory discrimination questionnaire procedure was repealed in 2014, if an employer failed to respond to a questionnaire within the prescribed time limit, or gave evasive or equivocal answers, an employment tribunal could draw an adverse inference that discrimination had taken place. It did carry some weight, therefore, and was a potentially powerful statutory tool for someone who thought they had experienced harassment. We know it is still likely that a tribunal would expect employers to respond to reasonable requests for information and any failure to do so could potentially influence the tribunal's decision on which evidence to prefer. As the Government's response points out,

Acas produced non-statutory guidance on Asking and responding to questions of discrimination in the workplace, following the repeal of the statutory procedure. However, given the serious imbalance in the enforcement regime for harassment and discrimination, with responsibility resting heavily on individuals, we believe there could have been merit in considering the reintroduction of an improved version of the statutory discrimination questionnaire. A carefully drafted questionnaire could ask revealing questions of an employer, eg - statistics about the employer's ratio of male to female employees generally and at board level, the racial make-up of its work force and whether complaints of discrimination or harassment have been made either against it or members of the senior management team in the past. From an employee's perspective, the questionnaire helped to address the imbalance that is inherent in most discrimination and equal pay cases where the employer is likely to hold all or most of the information that would tend to support or disprove an allegation of discrimination. It could definitely help to focus an employer's mind if they were served with one and their internal equality processes weren't effective.

Employment Tribunals' wider power to make recommendations on employer practices

We note the decision not to take forward this recommendation at the present time. However, we believe there is merit in giving employment tribunals the power (under section 124 of the Equality Act) to make recommendations in relation to employers' practices affecting the wider workforce. Ultimately we want to see sustainable change in workplace practice at an organisational level and restoration of this power could help. We agree that this provision was not widely used previously, but the proposed new Code of Practice could strengthen this provision if it was reintroduced as part of an holistic package of steps to help prevent harassment and discrimination at work. If organisations aren't prioritising prevention by using the Code at the outset, then Tribunals are another opportunity to raise awareness and education of what they should be doing.

Q6. **Do you agree that employer liability for third party harassment should be triggered without the need for an incident?**
Yes/No/Don't know
Please explain your answer, drawing on any evidence you have.

We believe there is a strong case for reforming the law to make more explicit employer liability for harassment by a third party, particularly in the light of the Nailard ruling. It would be helpful if the Government included clear guidance on employers' responsibilities under any new provision in this area, for example as part of the planned new Code of Practice.

We agree that the previous 'three strikes' formula that previously applied under section 40 of the Equality Act was flawed and was a core reason as to why the previous third party protection was not effective. On balance we think that it should be sufficient that a single incident of harassment has previously occurred for employer liability to apply for third party harassment.

We agree it is challenging to determine whether or not an employer should be required to 'know' or whether it should be sufficient that they 'ought to know ' about the previous incident. As the Government points out, both options could prompt certain difficulties but on balance it could be a better way forward to require that an employer should know that a previous incident had taken place. We agree that an employer 'ought to have known' requirement would introduce too much subjectivity into the equation, particularly in some circumstances. However, if the employer did know about a previous incident involving a different employee but the same third party, this should be taken into account in terms of their third party liability.

Q7. Do you agree that the defence of having taken 'all reasonable steps' to prevent harassment should apply to cases of third party harassment? Yes/No/Don't know
Please explain your answer, drawing on any evidence you have.

Yes, we agree that the defence of having taken 'all reasonable steps' to prevent harassment should apply to cases of third party harassment so that the law in this area is consistent with the current employer defence to avoid liability for discriminatory acts if they have taken 'all reasonable steps' under the Equality Act. However, we are mindful of the evidence to the Women and Equalities Committee during its Inquiry into sexual harassment (para 66) that employers rarely defend claims on this ground, partly because employers feel 'they do not know what they are supposed to be able to do.' We therefore urge Government to include clear guidance in the new Code of Practice on what constitutes 'reasonable steps' and what practical steps they should be taking in relation to preventing third party harassment.

Q8. Do you agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns?
Yes/No/Don't Know [If '**no**', please explain your answer, drawing on any evidence you have]

Yes, we agree that sexual harassment should be treated the same as other unlawful behaviours under the Equality Act, when considering protections for volunteers and interns.

Q9. Do you know of any interns that do not meet the statutory criteria for workplace protections of the Equality Act?
Yes/No/**Don't know** [If '**yes**', how could this group be clearly captured in law?]

Q10. Would you foresee any negative consequences to expanding the Equality Act's workplace protections to cover all volunteers, e.g. for charity employers, volunteer-led organisations, or businesses?
Yes/No/Don't Know. Please explain your answer, drawing on any evidence you have.
Possibly
The main potential negative impact relates to the need to avoid any approach that might serve to discourage volunteering and so adversely affect the voluntary sector, the so-called 'chilling effect' outlined in the consultation. The CIPD is firmly committed to the value that volunteering brings to individuals, employers and wider society and we agree that unnecessary red tape on charities and other organisations should be avoided. Therefore, it would be helpful if research was undertaken to help assess the impact of the extension of the Equality Act's protections on volunteering.

We believe this can be addressed to a large extent by expanding the Equality Act protections to some, but not all, volunteers [as outlined in Q11.] If an individual regularly gives of their time freely to support a charitable cause under a formal arrangement they should receive the same level of protection from harassment, discrimination and victimisation as a paid employee of the organisation. This should not place an additional burden on even volunteer-led organisations if they already have in place an inclusive culture that aims to prevent harassment and inappropriate behaviour for its paid employees, even if the paid workforce is small. Providing a safe and harassment-free working environment should go hand in hand with the values of charities that aim to serve their communities, and so it should not be too much to ask of them. Indeed, it should help organisations to attract and retain volunteers.

Q11. If the Equality Act's workplace protections are expanded to cover volunteers, should all volunteers be included?
Yes/**No**/Don't know
If 'no', which groups should be excluded and why?

We recognise the practical difficulties in implementing blanket provisions to cover all volunteers and striking the right balance between maintaining the informality of the arrangement in some cases while ensuring the individual is appropriately protected from harassment. As highlighted in the consultation paper, volunteering covers a very wide range of roles ranging from a one-off event in someone's local community to those who

volunteer on a regular and more formal basis for a volunteer-led charity. We agree that any expansion of the protection afforded to volunteers in the Equality Act needs to recognise this distinction.

We do not advocate an approach that carves out an exemption for small employers or for volunteer-led organisations. On principle an individual working in similar volunteering roles should be afforded the same protection from harassment regardless of the size or modus operandi of the organisation. We believe a fairer approach is to base the distinction on the formality of the arrangement, and shape and size of the role rather than that of the organisation. Therefore, we agree with the consultation that there are other approaches in which an expansion of the Equality Act could be achieved without involving blanket protection, such as the distinctions that exist under the National Minimum Wage Act between 'voluntary workers' and other volunteers. For example, a 'voluntary worker' carries out duties under a contract which involves mutuality of obligation [unlike a volunteer] - this could be a useful starting point for applying statutory protection from harassment to the former, as voluntary workers will have a more formal [contractual] obligation to give their time and perform the work.

We also hope that the Government takes steps to ensure that organisations, as well as volunteers and interns, better understand the existing protections they are entitled to and how they can seek legal redress, as indicated in the Government's response to the Women and Equalities Committee Inquiry, particularly if some volunteers are not covered by any new protections that are introduced for some categories of volunteer.

Q12. Is a three-month time limit sufficient for bringing an Equality Act claim to an Employment Tribunal?
Yes/**No**
Please explain your answer, drawing on any evidence you have.

We do not believe that a three-month time limit is sufficient for bringing an Equality Act claim to an Employment Tribunal and agree with evidence given to the Women and Equalities Committee during its Inquiry into sexual harassment, that this time limit could have created a barrier to justice for some people seeking redress following alleged discrimination or harassment. We therefore welcome the Government's proposal to extend the time limit to six months from the date of the last alleged incident. Some types of equality claims already have a six-month time limit and so this would bring the time limits for other claims into line and promote consistency (although we are aware of the Law Commission's consultation on extending the time limit for equal pay claims to the employment tribunal to achieve parity with civil court claims).

We know that Tribunal judges have discretion to grant time extensions for cases to be heard and some evidence shows extensions have been granted (for example, for pregnancy- and maternity-related claims), but this was during the fee regime when there may have been greater leniency. There is no guarantee that time extensions will consistently be granted, thereby affording every claimant the same level of access to justice. And some individuals may have been be discouraged from making a claim in the first place because of the three-month time limit.

We know that early conciliation with Acas allows the process to be paused, but agree with the rationale set out in the Government's response to the Women and Equalities Committee inquiry for not taking forward a 'pause the countdown' on tribunal time limits.

As the consultation paper acknowledges, incidents of harassment or discrimination can be particularly distressing for individuals and it can take time to gain the confidence to report the complaint internally. They may also wish to seek legal advice. Unfortunately some organisations' grievance and investigation procedures can be drawn out and take several months to conclude, by which time many individuals will be out of time to pursue their complaint via a tribunal. We therefore support the EHRC's recommendations to Government in its response to this consultation, that the limitation period for harassment claims in an employment tribunal should be amended to six months from the latest of the date of:

- the act of harassment
- the last in a series of incidents of harassment or
- the exhaustion of any internal complaints procedure.

Q13. Are there grounds for establishing a different time limit for particular types of claim under the Equality Act, such as sexual harassment or pregnancy and maternity discrimination?
Yes/No Please explain your answer, drawing on any evidence you have.

We fully agree with the Government's proposed approach to not focus on reforming the time limit for sexual harassment claims only but to consider extending the three-month time limits applying to Equality Act Employment Tribunal cases as a whole, including pregnancy or maternity discrimination. This is the fairest and most consistent and inclusive approach. Having different time limits for different categories of equality-related claims could create confusion for employees and employers. Claimants alleging any type of harassment or discrimination and following an internal complaints procedure are likely to experience similar barriers and issues in relation to seeking redress.

Q14. If time limits are extended for Equality Act claims under the jurisdiction of the Employment Tribunal, what should the new limit be?
6 months/More than 6 months

Q15. Are there any further interventions the Government should consider to address the problem of workplace sexual harassment?
Please provide evidence to support your proposal.

Please see response to Q5.

CIPD
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