The silent minority

The voice of the child in family law

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Family law in Australia is an important and unique jurisdiction that directly impacts upon the well-being and future family relationships of children whose families are in dispute over post separation parenting arrangements. The United Nations Convention on the Rights of the Child states that children have the right to participate in decisions that directly affect them. But there are many barriers and tensions to children's participation in the jurisdiction of family law in Australia. Decisions said to be in the child's 'best interests' are influenced by value judgments and beliefs that are informed by dominant western discourses on the needs and competencies of children. In practice under the Family Law Reform Act 1995 children remain marginalised without an effective voice. Failure to hear the voice of the child is of special concern for children who have been traumatised by exposure to family violence and ongoing conflict. It is important to develop new understandings about children and the importance of giving children a voice.

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The principle of the 'best interests' of the child is regarded as the paramount consideration in family law in Australia, but it is important to look beyond the powerful and engaging rhetoric surrounding it, and to acknowledge that, in practice, it does not always serve the rights and interests of the child.

Across all stages of dispute resolution within family law in Australia it is important to make transparent the processes and underlying interests that are being served in the perpetuation of the rhetoric about the rights of the child and the child's best interests. Assumptions about childhood have become absorbed into notions of the best interests of the child in family law, while at the same time the voice of the child is largely ignored (Smith & Taylor 2003). When considering the rights of the child, reference is often made to Australia's compliance with the United Nations Convention on the Rights of the Child (UNCROC) (Redman 1997; Morosini 2000; Rayner 2001). Article 14 of UNCROC creates a dilemma, as it states that the rights and duties of parents are to be respected in providing direction to the child in the exercise of the child's rights. In effect the family law system in Australia privileges the rights of parents who engage in a battle over their own needs and interests (Smart 1989; Altobelli 2000; Moloney 2001). Children become easily objectified in the process (Rayner 1997; Macvean 1998).

Family law in Australia is a confronting and unique jurisdiction that deals with the fundamental unit of our society, the family. Following separation and divorce, parents are encouraged to reach agreements about post separation parenting arrangements that are in the best interests of their children. The *Family Law Reform Act 1995* (Reform Act) (Commonwealth of Australia 1995) placed increased emphasis upon the use of mediation as a process to resolve parenting disputes. While there is a developing recognition of the importance of including children in the mediation process, this rarely occurs in Australia (McIntosh 2000).

Where parents are unable to reach agreement, and matters remain contested, judicial officers make determinations said to be in the best interests of the child. While judicial officers are required under the Reform Act to consider the objects and principles (Section 60B), and the list of factors stated in sub-section 68F(2) of the legislation, how the best interests are determined is highly discretionary and subject to the

values, beliefs and interpretations of adults who are actively involved in the decision-making processes.

Each decision that is made about post separation parenting arrangements is highly significant to the future family life experiences of the child concerned. Yet within family law in Australia, across the range of dispute resolution processes, there are many barriers to the direct involvement of the child. The child's capacity to assert the right to be included in decisions that directly affect him or her continues to be seriously and inappropriately restricted.

The crucial questions need to be asked: where is the voice of the child in decisions that directly affect them, and how does the child exercise his or her rights in the jurisdiction of family law in Australia? There is emerging knowledge in Australia that reflects concerns about how the needs and interests of children from separation and divorce, particularly those who have experienced violence and/or abuse, are marginalised by adult decision-makers who are strongly influenced by the contemporary pro-contact culture.

Recent research studies by Rendell, Rathus and Lynch (2000) and Kaye, Stubbs and Tolmie (2003) discuss how the complex processes of adult decision-making, said to be in the best interests of the child, fail to adequately address the lived experiences of the child, and can often result in situations that seriously compromise the child's well-being, or place the child at risk of harm.

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United Nations Convention on the Rights of the Child

In 1990 Australia became a signatory nation to the United Nations Convention on the Rights of the Child (UNCROC) (1989). Under UNCROC there is a clear emphasis upon the rights of the child both to self determination and to protection (UNCROC 1989, Preamble; Thomas & O'Kane 1998). In practice this apparent dichotomy can create problems as it raises questions as to what weight to give to the stated wishes of the child and stated adult perceptions about the needs and interests of the child, which can be quite different. Under UNCROC, obligations are placed upon governments of signatory nations to protect the individual rights of children. UNCROC remains an important point of reference for those interested in actualising the rights of children to monitor how organisations, including legal institutions, construct and manage the lives of children who are said to have rights. It is therefore significant and revealing that there has not been a full incorporation of children's rights into domestic law in Australia (Rayner 1997).

The Family Law Reform Act 1995

Within family law in Australia significant reforms to the legislation were introduced in 1996 under the *Family Law Reform Act 1995*. These changes were heralded by the Commonwealth Government (1993) in its response to the Joint Select Committee's Report, and by the Family Law Council (1992), as introducing a significant change in attitude towards children and parenting, with the deliberate movement away from the proprietorial notions of parenthood and the articulation of the rights of the child and the responsibilities of parents. These legislative reforms were influenced by its English counterpart, the *Children Act* 1989 (Chisolm 1996). The *Children Act* 1989 also prescribed specific rights for children, stated and promoted the interests of children as being paramount, and removed the notion of parental rights by reframing these as parental responsibilities. Although UNCROC has not been implemented in Australia by specific legislation, it had a considerable influence on the language and intentions of the Reform Act (Kennedy 1996). In particular the right of the child to contact with both parents came from Article 9, Paragraph 3 of UNCROC (Rhoades, Graycar & Harrison 2000). Expectations were thus raised that the rights of the child would govern outcomes in disputed matters. However, the introduction of a child-focused legal standard in family law in Australia has had little noticeable effect in practice (Byas 2003).

The Pro-Contact Culture

One of the most contentious aspects of the Reform Act was the introduction of the child's right of contact on a regular basis with both parents (FLRA s.60B(2)(b)). There is a growing trend, at the stage of interim decision-making, of a non-legally based presumption of contact between the child and the non-resident parent, even in cases where family violence is alleged, and it is now rare for an order for no contact to be made at that stage of proceedings (Rhoades 2000). There has been increasing concern that the right of the child to contact has in effect supported the 'rights' of the non-resident parent, and the right of contact principle has overridden the right to safety. This is now supported by recent research by Rendell, Rathus and Lynch (2000) and Kaye, Stubbs and Tolmie (2003).

Rhoades, Graycar and Harrison (2000) identified concerns about inappropriate orders for contact being made at the stage of interim decision making. This is of great concern as interim orders can remain in place for a considerable period of time and can influence final determinations by the Court.

In cases where children are directly affected by family violence, interim decisions and interim agreements between the parents about contact often need to be changed as child victims of family violence have been adversely affected (Brown, Sheehan, Frederico & Hewitt 2001). Within the pro-contact culture there are growing numbers of disaffected fathers making increased numbers of applications for contact and there is a large increase in the number of contravention applications (Counsel & Kelly 2000; Rhoades, Graycar & Harrison 2000). Where the child's voice is silenced and the right of the child to contact with the non-resident parent is imposed, in cases of children being directly or indirectly affected by family violence, the question has to be asked: who, other than children in the jurisdiction of family law in Australia, has the right imposed upon them to spend time with the perpetrator of family violence? In family law in Australia, children do not have the right to not exercise their right of contact (Staindl 2000). It is clear that this 'right' does not belong to the child but is the vehicle by which the needs of the non-resident parent are met.

THE 'BEST INTERESTS' PRINCIPLE

The best interests of the child is the paramountcy principle of the Reform Act (Section 65E FLRA 1995). This is a legal standard under which judicial officers are required to make determinations that are seen to be in the child's best interests, drawing upon the governing statutes and case law. Caregivers in dispute are not required, but may be encouraged, to focus on this same principle (Altobelli 2000). However, the concept of the best interests of the child has been widely criticized. Common concerns are that it is a vague, indeterminate principle that allows a high degree of adult discretion, such that individual values and beliefs influence what factors to give priority to in reaching determinations about the future of the child (Woodland 1999; Rayner 1997; Landerkin 1997; Dickey 1997). In reality it may only be an expression of hope that decisions will work well for the child (Rayner 1997).

THE SILENT MINORITY

Children remain marginalised in family law in Australia and do not have an effective voice in decisions that directly affect them. In relation to how the wishes of the child are considered in making decisions, case law is influential in reinforcing the maturity of the child as an important consideration (Kordos 2000). Marginalisation of children is demonstrated in many ways. In the Full Court decision in the case of *B & B* (*Family Law Reform Act 1995* (1997) FLC 92-755), it was confirmed that the rights of children under section 60B of the Reform Act are not legally enforceable rights (Morosini 2000). A major finding of the comprehensive report 'Seen and Heard: Priority for Children in the Legal Process' made to Federal Parliament in 1997, stated that Australia had a long way to go in providing proper access for children across all jurisdictions, including family law, for participation in legal processes that directly affect them. The report contended that legal processes have not adjusted to the changing perceptions and understandings about the competencies of children (Australian Law Reform Commission & the Human Rights and Equal Opportunity Commission 1997).

Legal processes are designed for adult participation and extensive barriers prevent or limit the direct participation of children. In family law in Australia children are rarely parties to proceedings in their own right, although that option exists under the legislation (s65C FLA 1975; Human Rights and Equal Opportunity Commission & Australian Law Reform Commission 1996). In order for it to be a real option for a child to initiate proceedings, the law must be accessible and user friendly for the child. This is clearly not the case in Australia where parents remain the principal parties and present their issues as the focus of attention. Even where a child representative is appointed, the child is not present in the Court and is in no position to challenge what the child representative presents to the Court. There remains an important question about the consistency of effective representation for children within family law across Australia (Kordos 2000).

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Contemporary protectionist discourses encourage the belief that legal processes actually assist children by excluding them from directly participating in ways that may cause them undue distress, from compromising their capacity to express their own wishes, and from feeling burdened by perceiving they are responsible for the ultimate decision. These discourses effectively operationalise protectionist beliefs, undermine the agency of the child and prevent the child as an individual, and children as a group, from effectively articulating their claims. Where the protectionist approach that states attitudes of care and protection coexist with discourses that create children as objects of concern, it is very powerful in rationalising the pushing of children to the margins of society (Saunders & Goddard 2001).

CHILDREN'S COMPETENCE TO PARTICIPATE IN DECISIONS THAT DIRECTLY AFFECT THEM

Where opportunities may exist for children to have a voice in post separation parenting decisions, the adult decision-

makers must be able to understand and accept the child's willingness and individual competence to contribute (Smith & Taylor 2003). This is a significant challenge and a critical issue as within contemporary Western society there are powerful discourses about childhood that consistently refer to children's lack of competence and in effect describe children as 'less than' adult (Law 1997). Traditionally the law reflects these perceptions of children and legitimises adult accounts over the accounts of children (Smart 2002). The law attributes a different status to children compared to adults, and the exercise of giving effect to children's rights reflects this status (Ludbrook 1995).

An overview of the literature on obtaining and weighing children's wishes in family law shows frequent references to concerns about the child's competence in making informed stated wishes (Bowen 2000). Understandings about childhood competency are slow to change (Smith & Taylor 2003) and competency continues to be rigidly connected to age and stage of development. Children are not individualised. Childhood is understood as a category of difference from adulthood characterised by stages of development, all of which reflect fewer competencies than adulthood. This contributes to the ongoing marginalisation of children. There is a real need to re-evaluate and reconstruct our view of what childhood means in our society.

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THE SILENT VICTIMS

The Reform Act expressly states that the child has the right to safety and various sub-sections of the legislation are to be considered by the Court where family violence is an issue (sub-section 68F(2)(g), (i) and (j), FLRA 1995). Evidence now exists to support concerns about how the child's best interests are being served in cases where family violence is an issue. Under the new orthodoxy of the pro-contact culture (Rhoades, Graycar & Harrison 2000), in cases involving family violence the child remains the 'silent victim' (Koverola & Heger 2003, p.331).

Children exposed to family violence and ongoing conflict are adversely affected and have special needs (Kelly 1993; Maxwell 1995; Edleson 1999; Sanson & Lewis 2001). Concerns about the special needs of children exposed to ongoing conflict and violence is substantiated by reference to the current literature and recent research on the adjustment of children from separated families. How crucial it is to look beyond the discourses of the best interests and rights of the child in family law in Australia is revealed by recent research studies that examined the effects of the introduction of the Reform Act (Rhoades, Graycar & Harrison 2000), and evaluated the outcomes in the Family Court of Australia for children in cases of child abuse (Brown, et al 2001). The results of these important research studies show that the needs and interests of children who have a special need for protection from exposure to various forms of family violence, have at various stages of proceedings been adversely affected by the delays in proceedings and the imposition of contact arrangements that place them under unacceptable risk.

It is significant to note the findings from recent Australian research that draw attention to the co-occurrence of different forms of violence within contested parenting disputes that come before the Court, and reveal that one form of violence can mask the presence of another (Rendell, Rathus & Lynch 2000; Brown, et al 2001; Kaye, Stubbs & Tolmie 2003). These studies identify and discuss the cross-disciplinary maze between child protection and legal systems, and many other complex barriers that prevent adult decision-makers from being fully aware of and understanding the experiences of the child.

In applying the 'best interests' principle, where children are at risk of direct and/or indirect exposure to violence, it is critically important for all adults involved in the decision-making process to have a comprehensive knowledge about the multiple, interacting risk factors that affect the adjustment of children (Jaffe, Poisson & Cunningham 2002). The child's right to safety must be a priority. Developing an understanding that children are the real witnesses to their own trauma, and are in fact competent social actors, who can accurately identify their needs and ways of coping (Smith & Taylor 2003), is critical to the awareness raising of adult decision-makers about how to hear the voice of the child as an essential part of the process of determining what is in the child's best interests. The emotional context and the expression of the child's wishes must be understood and taken into account (Cantwell & Scott 1995). Failure to hear the child's experiences and their perceptions of their own needs and interests creates a real void in being able to reach informed decisions.

ADULT CONSTRUCTIONS OF THE CHILD'S BEST INTERESTS

Under current processes, if a child's voice is heard at all, it remains filtered through the perceptual lens of the parents, social scientists and/or child representatives who are not

obliged to represent the child's wishes without their own interpretations about what they consider to be best for the child. In contested cases the judicial officer hears the voice of the child via the interpretation of parents, expert witnesses, specialist family report assessments and, where appointed, through the child representative. The child representative may or may not even have met the child. Serious doubts are now being consistently raised about how professionals construct their understandings of the competency of children (Smart 2001; Smith & Taylor 2003). This is important in regard to all children, and is of particular importance when considering the needs of children who have experienced family violence (Rendell, Rathus & Lynch 2000; Kaye, Stubbs & Tolmie 2003; Family Violence Committee 2003).

Even at the stage of primary dispute resolution, children are rarely directly involved in the mediation process (McIntosh 1997; Campbell 2002), and parents rarely consult with their children about their needs and wishes (Smart 2001). This leaves decisions about the future of significant family relationships for the separated child up to the adults involved. Regardless of which adults are involved in the decision-making processes about the child, they are subject to their own cultural and historical insights and blindness that inform their perceptions. Their own lived experiences and the dominant discourses shape the 'realities' through which the needs of children are viewed (Smart 2001). These reinforce the ambiguous status of children in our society. Recent research conducted by the Child Abuse and Family Violence Research Unit at Monash University on the contribution of language to the denial of children's rights, shows that a wide range of academic literature, including law, medicine, psychology and social work, as well as the print media, turn children into objects in the pursuit of adult agendas, and this supports attitudes of indifference and lack of respect for the child (Saunders & Goddard 2001).

In addition, the competence of separated parents has been questioned, particularly when they are asked to make fully informed and reasoned decisions about their children's needs and interests at times of considerable stress (Wallerstein & Kelly 1980; Taylor 1998). Unresolved separation issues of the parents can become embedded in the parenting dispute over the child, and this can lead to a focus on the parents' agendas, rather than on what the child needs or wants (Charlesworth, Turner & Foreman 2000). Within the context of the contemporary rapid diversification of family structures (Wise 2003), there now exists a range of 'scientific' information that has constructed what are the overriding needs of children from separated families (Sanson & Lewis 2001). This information can be selectively drawn upon to justify particular beliefs. This is evident in the growing movement to promote fathers' rights in Australian family law, where there is a strong reliance upon discourses of deficit, that is, harm to the child caused by the erosion of the family unit and specifically the absence of the father (Kaye & Tolmie 1998).

SOME STEPS IN BREAKING THE SILENCE

Awareness over concerns for the well-being of children who have been exposed to family violence appears to be growing within the jurisdiction of family law in Australia. The Family Law Council's (2000) discussion paper on the best interests of the child pointed to the significant numbers of parenting disputes where the child had experienced violence coming before the Family Court of Australia. This report clearly identified the need for the Court to introduce a coordinated and timely intervention strategy. The report by the Family Law Pathways Advisory Group (2001) recommended the increase of resources for legal aid and for the court in order to facilitate timely resolution of parenting disputes where violence is an issue (Dewar 2001).

At a time of reduced government expenditure in the area of family law in Australia, adopting new and effective approaches to the involvement of children in decisions that directly affect them will remain an unlikely outcome without an increased allocation of specifically dedicated funding.

Some steps are now being taken in Australia to bring children who have experienced violence, directly or indirectly, into a sharper focus in family law proceedings. The Family Court of Australia is gradually introducing Project Magellan into more Registries across Australia. This early intervention program resulted from the research conducted by Brown, Sheehan, Frederico and Hewitt (2001) into cases of child abuse within the Family Court. A recent interim report by the Family Court of Australia's Family Violence Committee (2003) has acknowledged the co-occurrence of domestic violence and direct forms of child abuse. The report has made a number of suggestions, including the need for specialised training for a range of professionals about the impact upon children of witnessing family violence.

These steps all show some progress is being made in raising awareness of the special needs of children exposed directly or indirectly to various forms of family violence. However, there remain significant and complex issues that act as powerful undercurrents in keeping children and their individual needs marginalised in parenting disputes. This is demonstrated by the Family Violence Committee Report (2003) that identified a failure within the Court to

differentiate between 'conflict' and 'violence'. This powerful discursive construction diverts attention away from the issue of violence and reframes the problem as one of 'conflict'. Parental conflict is seen as the responsibility of both parents to resolve, and the ongoing risks are denied. By not recognizing the real dynamics of violence within the family, the child cannot be protected.

Professionals who are concerned about the status of children and how society determines their needs, interests and rights will need to focus on the development of new constructions of childhood that reflect a wider horizon, that can then inform the goals of our society and institutional practices, including family law in Australia.

CHALLENGES IN FACILITATING THE VOICE OF THE CHILD

It is important not to become involved in simplistic arguments that encourage the belief that it is a straightforward, simple process to facilitate the child expressing his or her own needs and wishes in separated families that are in conflict or where there is violence (Smart 2002). There are many complex dynamics including power imbalances in relationships within and outside the family of origin, lack of information, and insufficient dedicated resources to allow proper engagement between children and professionals who represent their needs. These factors impact directly and indirectly upon the child's capacity to participate freely in decision-making processes (Smith & Taylor 2003).

Working with children and facilitating their involvement in post separation parenting decisions in ways that are not tokenistic and do not place them at risk, requires the dedication of time and specialist skills, knowledge, and experience in engaging with and relating to the children (Eekelaar 1994; Smith & Taylor 2003). Such processes are resource intensive. At a time of reduced government expenditure in the area of family law in Australia, adopting new and effective approaches to the involvement of children in decisions that directly affect them will remain an unlikely outcome without an increased allocation of specifically dedicated funding.

For professionals and caregivers concerned about ensuring children's rights and best interests, this presents a difficult journey that occurs within a context where traditional beliefs about children's evolving competencies, their need for care and protection, and the value of ongoing family relationships are upheld. How professionals and parents construct the needs of children directly impacts upon the enactment of children's rights. As adults define and participate in the dispute over the child, the rights of the child become secondary to the protection of the child's interests as defined by the adults (Charlesworth, Turner & Foreman 2000). The application of legitimised theoretical perspectives from the social sciences about childhood (in)competencies has added a patina of science to the value position of the professionals involved (James & Prout 1990). This 'knowledge' will be difficult to change.

CONCLUSIONS

The rights of the child embodied in UNCROC can be avoided by signatory nations. The rights of the child stated in the Reform Act are easily subverted by the overriding needs and interests of the child's caregivers. Current adversarial processes, in effect, support rights-based conflicts that focus on the needs and interests of parents, not those of the children. The underlying ideology of the Reform Act of equality and shared parental responsibility appears to have established an ongoing issue about the emotional equivalence between the parents that fuels conflicts over parenting and undermines a true focus on the rights of the child.

The child's identified needs and interests can be easily distorted by individual adult perceptions. This is not a transparent process. Traditionally social scientists, politicians, journalists and other adults in positions of authority inform society about what children want and need in regard to their family life, and define what children are capable of knowing and understanding. Children are rarely consulted in this knowledge creating process and many stereotypes continue to exist (Smart 2002; Smith & Taylor 2003). Universalising concepts about childhood have served to systematically order and classify children's competencies and the 'scientific' approach adopted by the social sciences has developed a knowledge base that has become accepted as representing specific known 'truths' about children. Thus, the prevailing dominant ideologies about childhood within our society proclaim that, until children reach a mature stage of development, they are not competent to be involved in decisions that directly affect them, and that children need protection from processes that could cause them undue distress. When this is combined with the rhetoric of the 'best interests' principle it becomes a very powerful and engaging belief that is difficult to challenge. It reassures and encourages people in our society to believe that in the jurisdiction of family law in Australia children are important and that their needs, interests, and rights are being met and that decisions are being made in their best interests.

Until we look beyond these powerful discourses it is not easy to see whose interests are really being served, at the expense of the rights of the child. Society can remain complacent in accepting that outcomes for children in this jurisdiction reflect a system of justice that is meeting its obligations under UNCROC. But where the cultural context in which we live associates having a right to participate in decisions with participative democracy, there is a need to think differently about children and alter the processes that impact upon them in family law (Smart 2001). In order to think differently about children, we need to understand how restrictive and narrow is our existing knowledge base that reflects an objective 'reality' about children. In effect the limitations to our knowledge about children are largely masked behind the patina of science that has created tunnel vision and objectified children as a group. In order to move past the blindness formed from reductionist practices and challenge the dominant rationalisations, we need to bring to conscious awareness the underlying beliefs, values and rationalisations that underpin our social institutions (Donovan 1997). The development of new knowledge is essential as a process in achieving real agency for existing legal reforms, as it is the basis for forming new attitudes and behaviours (Sawicki 1996). It will be important for children to participate in this process. The adults who will interpret what the children say need to adopt a self reflexive approach in order to prevent, as much as possible, the projection of their own perceptions onto the children (Smart 2001).

In order for advocacy for children's rights to succeed, the underlying agendas and assumptions that operate within the system of family law in Australia need to be made transparent. There also needs to be a careful *re-vision* of how we construct the meaning of childhood in our society (Smith & Taylor 2003). Only when children are regarded as unique, individual people in our society, and not as emerging adults, will it be possible to give substance to the fuzzy laws that embody their rights. It is important that the rights of the child are implemented for the child and including the child, as currently children have little right of reply to what is said about them and to decisions that are made on their behalf. The powerful rhetoric operating within the context of family law in Australia that both constructs and reinforces contemporary knowledge and beliefs about the needs, interests, and competencies of children continues to oppress them. The existing constructions of childhood and children's competencies are effectively utilised to support the rhetoric about the best interests of the child in family law in Australia. While these remain unchallenged it is difficult to critically examine how well Australian family law is meeting its obligations under the Reform Act in ensuring the rights of the child, and how closely Australia is adhering to the principles and objectives of UNCROC. This must change if children are to be able to exercise their rights and to contribute effectively to decisions concerning what is in their own best interests.

The family, whatever its form, is the fundamental unit in our society, and how children participate in decisions that directly affect them in their experience of family life is fundamentally important to their wellbeing. But children as a marginalised group are not in a position to assert their rights within the jurisdiction of family law in Australia. Implementation of their rights requires closer monitoring if they are to hold the same importance as adult rights (Rayner 1997). This requires vigilance and insight by the professionals and caregivers involved and a changed culture about how children participate within and outside their families in decisions that directly affect them. Professionals who are concerned about the status of children and how society determines their needs, interests and rights will need to focus on the development of new constructions of childhood that reflect a wider horizon, that can then inform the goals of our society and institutional practices, including family law in Australia. □

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