

# **A Review of the Sentencing Framework**

## **a response by JUSTICE**

JUSTICE welcomes the establishment of this review as a useful opportunity to discuss the purposes and effectiveness of sentencing. It is helpful to be able to examine what are wide-ranging and topical issues away from the undue influence both of party politics and of the media.

We attach a copy of JUSTICE's report: "Restoring Youth Justice" for its discussions of the processes and outcomes of systems based on restorative principles; recidivism; reparation; and aspects of the Crime and Disorder and Youth Justice and Criminal Evidence Acts.

We include, at Appendix One, some information on sentencing reform in Canada. We refer particularly to the research done on public opinion and measures taken to enhance public confidence, for the parallels with our own situation.

### **1. The Need for a Review**

There can be no doubt about the need for a review of sentencing. There have been several important developments in the last 10 years which seem not to disclose any coherent policy. The Criminal Justice Act 1991 was intended to establish a "just deserts" approach to sentencing, for all but a small number of violent or sexual offenders from whom public protection was thought necessary; it was also intended to reduce the use of imprisonment for less serious types of offence, and in their place to promote greater use of community sentences, and also greater reliance on financial penalties. In fact, the "just deserts" approach failed to take root, because the judiciary soon reinstated deterrence as an aim of sentencing; and other significant changes introduced by the Criminal Justice Act 1993 on previous convictions and on fines altered the direction of the law. From 1993 onwards the judiciary and magistracy increased their use of prison sentences steeply, and the Crime (Sentences) Act 1997 brought some mandatory sentences into the system. There has been a range of other initiatives in legislation and in practice, and the time for reappraisal of the sentencing framework is therefore ripe.

### **2. The Context of the Review**

In the last ten years there has been an unprecedented rise in the use of imprisonment and of community sentences, and yet there is little evidence that this has had significant effects on the crime rate, or upon general feelings of security. It is important to begin by recognising that the steep increase in the use of prison sentences in the mid-1990s was essentially political in nature: in other words, it was driven by the perceived need to be tough on crime, rather than based on any review of the social or penological strategies for dealing with the crisis in public confidence which emerged during the mid-1990s, partly as a response to the killing of James Bulger. Neither the announcement that "prison works" nor the arguments deployed in support of the introduction of mandatory sentencing had a sound basis in criminological evidence. The mid-1990s were characterised by calls for tougher sentences from influential sections of the media, reinforced by the messages of leading politicians. The courts felt they had no option but to respond to these strong

pressures, and the largest part of the increase in prison sentences came during a period (1993-97) when there was little new legislation requiring this.

In early 1993 the prison population was around 40,000. It has been around 65,000 for the last year. It is not clear whether this has achieved greater social protection: the terms of reference of this Review certainly suggest that there is no great public belief that it has done so. The research study on general deterrence, carried out for the Home Secretary by the Cambridge Institute of Criminology,<sup>1</sup> gives no grounds for suggesting that an increase of this kind will have significant effects on the deterrence of offenders and potential offenders. It is therefore time to consider whether the system has been moving in the right direction.

### 3. The Government's Aims: Reducing Crime and Re-offending

The Home Office declared, as one of its aims for 1999-2000, that it would seek to "reduce crime and fear of crime and their social and economic costs."<sup>2</sup> The Review's document refers to the objectives as "to protect the public by reducing crime and re-offending, and to dispense justice fairly and consistently." We are aware of a number of government-led initiatives in the fields of health, education and housing which should make significant contributions to these objectives. For example, programmes to reduce truancy and alcohol and substance abuse, as well as child welfare programmes, are steps in this direction. Crime prevention initiatives which have an impact on the design of housing, of public places and of cars have made considerable strides, and are continuing.

The government's objectives are much more likely to be met by renewed social initiatives of these kinds than by reliance on the criminal justice system to effect reductions in the crime rate. While such initiatives are likely to make perhaps the most important contribution, it is nevertheless worth remembering that even within the criminal justice system imprisonment is only one possible outcome, and others are available. In the meantime the enormous financial resources being poured into the prison system offer little prospect of contributing towards the government's objectives. There should be explicit recognition that imprisonment is unlikely to improve an offender's subsequent chances of law-abidance, and may indeed worsen the prospects. This is not to ignore or oppose the important initiatives in recent years in launching offending behaviour programmes in prisons; what must be recognised is that the existence of these programmes does not justify the use of imprisonment at the present rate, and that, in any event, there has been no proper evaluation of the success rate of these programmes.

One element in the sentencing review ought to be a close analysis of the types of offender now being imprisoned, and the length of their sentences. The recent Wedderburn report on women's imprisonment<sup>3</sup> demonstrates that, as soon as one looks closely at the types of person in women's prisons, and the offences for which they are imprisoned, doubts about the appropriate use of imprisonment loom large.

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<sup>1</sup> A. von Hirsch, A.E. Bottoms, E. Burney and P.-O. Wikstrom, Criminal Deterrence (Oxford: Hart Publishing, 1999).

<sup>2</sup> Home Office, Overarching Aims and Objectives of the Criminal Justice System of England and Wales (1999).

<sup>3</sup> Prison Reform Trust, Justice for Women: the Need for Reform (London: Prison Reform Trust, 2000)

Few of these women's sentences have been "dictated" by legislation: they are just symptomatic of general trends in sentencing in the 1990s. JUSTICE not only supports the conclusions of the Wedderburn report in relation to the sentencing of women, but also suggests that the report's principles and detailed approach should be adopted in this Review.

Turning to the other limb of the Government's objectives, "to dispense justice fairly and consistently", two points may be raised. First, the rise in the use of imprisonment has not diminished the proportion of non-white offenders in the prison population. In June 1998 ethnic minority groups made up 18 per cent of the male prison population and 24 per cent of the female prison population. It remains a serious cause for concern, from any fairness perspective, that black people (in particular) are imprisoned at such a disproportionately high rate. There have been initiatives to tackle this, but they have had little evident effect. The increased use of custody by the courts has exacerbated the problem in practice. Secondly, JUSTICE would argue that a minimum element in this should be to ensure that sentencing policy and legislation complies with the United Kingdom's international obligations. Reference is therefore made at appropriate points below to the European Convention on Human Rights, soon to be brought into English law by the implementation of the Human Rights Act 1998, and to the Council of Europe's Recommendation R (92) 17 on "Consistency in Sentencing", adopted by the Committee of Ministers on 19 October 1992.

#### 4. The Sentencing Framework

It is common ground that the 1991 Act has not worked in the way intended; and indeed has led to a much greater emphasis on punishment and deterrence than was envisaged by the drafters.

An evidence-led sentencing policy ought to have regard to the careful study of general deterrence produced for the government by the Cambridge team. Without going into fine detail here, it is clear that the report casts severe doubt on the existence of any link between changes in sentencing levels and changes in crime rates; it also casts severe doubt on the operation of "marginal deterrence" in most situations, i.e. on the efficacy of increasing the severity of sentences for particular crimes; and it shows the importance of the certainty of punishment, so that deterrent effects are unlikely to be achieved if the prospects of avoiding detection are (thought to be) quite high.<sup>4</sup> It is the prospect of getting caught that has deterrence value rather than the length of sentence. In summary, the prospects for achieving the government's aim of crime reduction by using general deterrent sentencing policies seem to be slender – a poor investment in financial terms, and an unnecessary sacrifice of the liberty of individual offenders.

Rather than continue the association with failed penal policies, the Government should renew its commitment to the principle of proportionality, which would support its objective of "dispensing justice fairly". The 1991 Act should be re-drafted to make it clear that courts should never impose a sentence more than is proportionate to the seriousness of the crime (with a limited exception, in the form of a tighter version of section 2(2)(b) of the Act), and that deterrence is not an acceptable reason for increasing a sentence above that level. This would be in line with principle A.4 of the Council of Europe's recommendation on consistency of sentencing, that

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<sup>4</sup> See note 2 above.

disproportion between the seriousness of the offence and the severity of the sentence should be avoided.

Proportionality is a key human rights concept, and this will mean in practical terms that once the Human Rights Act is implemented sentencers will have to express both the purposes of sentences, and the means by which they are to be achieved. Proportionality, as it has been interpreted in human rights jurisprudence, also involves using the least intrusive means to achieve the aim pursued. This means that there will need to be good reasons for disregarding alternatives to imprisonment, and sentencers will have to be satisfied that they will not achieve the purpose. This in itself is a good argument for including objectives in legislation.

Difficulties may arise currently because sentencing procedure can be unclear. It is neither adversarial nor inquisitorial. There are no guidelines as to what information should be made available to courts, what powers courts should have to obtain it, and how it should be assessed in determining the appropriate sentence. There is a lack of consensus on how sentencing should be approached. We recommend proper sentencing hearings so as to provide a better opportunity to clarify the aims and purposes of individual sentences. Sentencing should be regarded as a separate exercise in its own right, rather than an addition to the trial. If this were accepted it is likely that more evidence would be called to address the achievement of aims and purposes, as well as to deal with the likely effects of imprisonment in relation to those purposes.

To help structure this, there should perhaps be a code of evidence and procedure that would also deal with the essential human rights requirement to give reasons. In line with our arguments above, judges should also state why they reject other dispositions, and rehearse the relevant factors and circumstances. This would not only assist public accessibility and understanding, but would also help the Court of Appeal in reviewing sentences.

## 5. Progression in Sentencing

We agree that forward-looking measures are desirable, from the points of view both of the rehabilitation of the defendant and the protection of the public. The 1991 Act was misunderstood by some sentencers in this respect, and therefore the Criminal Justice Act 1993 introduced a new formula on previous convictions. This was widely taken to authorise higher sentences for repeat offenders, and many people in practice believe that offenders are now sentenced as much on their previous record as on their current offence. There is already a great deal of “progression” in sentencing, resulting in the increased use of custody.

JUSTICE believes that it would be wrong to place any greater emphasis on previous convictions in sentencing, and that the right course would be to look to the recommendations adopted by Council of Europe. In its principle D, the Council of Europe agreed (1) that previous convictions should not necessarily be treated as an aggravating factor; (2) even when account is taken of previous convictions, sentences should always remain in proportion to the seriousness of the current offence; (3) courts should always consider the circumstances of the particular case, and should give reduced effect to previous convictions where there has been a lapse of time since the last conviction, where the current offence or the previous offence was minor, or where the offender is still young. These principles should be regarded as minimum standards. What is important is that courts should look for an explanation for the repeat offending in each case (perhaps in the pre-sentence

report), because recidivism may be evidence of personal or social maladjustment rather than wickedness.

On the subject of recidivism we refer to JUSTICE's recent report "Restoring Youth Justice" and its discussion of recidivism among young people. This was found to be problematic in each of the systems we examined: although it is right to say that recent research indicates that, as we have already suggested, recidivism is invariably linked with deep rooted social and/or psychological problems. That is why there is a growing consensus that early intervention and preventative work is necessary in these cases. Studies also show that effective intervention in relation to recidivism is cost-intensive.

Two more reasons can be given for a cautious approach to progression. First, the history of the last century shows a succession of failed attempts to identify "career criminals" or "professionals." It is well known that the Acts of 1908, 1948 and 1967 were targeted at serious persistent offenders and in practice were used largely against a motley collection of small-time crooks, many of whom suffered from personal or social problems. The policy of "progression" seems likely to have the same result, especially if it suggests an even tougher policy than the one currently been pursued by many courts. Secondly, there should be greater emphasis on community sentences for offenders whose crimes are persistent but not particularly serious. This was originally an aim of the 1991 Act, and specifically of the new combination orders. But combination orders have come to be used down-tariff whilst many of these persistent offenders have been sent to prison, and so the policy has not been tested. There are innovative schemes being developed in some probation areas, and greater attention should be given to these than to the increased use of custody, in furtherance of the quest "more effectively to reduce re-offending".

## 6. Automatic and Mandatory Minimum Sentences

The introduction of these sentences by the Crime (Sentences) Act 1997 was a mistake, and the Review should recommend their abolition. It is the provision for automatic sentences of life sentences for the second serious sexual or violent offence that is most objectionable. Insofar as they are intended to increase general deterrence, this seems highly unlikely to happen. The U.S. evidence gives no confidence that this will be the result. Insofar as they are intended to protect the public from particularly dangerous offenders, the cases since 1997 show that many of the offenders subjected to these sentences could hardly be regarded as "dangerous." The terms of the 1997 Act cover some offences with little danger, and some offenders with two convictions decades apart. Insofar as the provision on automatic life sentences was intended to control the courts, it has largely succeeded in doing so, but at the cost of requiring judges to impose a life sentence in some manifestly inappropriate cases. Moreover, the provision must now be reconsidered in the light of the Human Rights Act. It has been cogently argued that automatic life sentences breach the European Convention on Human Rights,<sup>5</sup> and they will certainly raise issues of proportionality. Therefore this Government ought to repeal it or, at the very least, replace the "exceptional circumstances" proviso with the more flexible "unjust in all the circumstances" proviso written into sections 3 and 4 of the 1997 Act.

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<sup>5</sup> A. Ashworth, in [2000] 4 *Archbold News* 7.

Section 3 is only rarely relied upon, because sentences lower than 7 years for repeat drug dealers are rare. Section 4, the prescribed sentence of 3 years for third-time domestic burglars, is open to all the same objections as the “automatic life sentence” stated above, and like them will be subject to proportionality challenges under the Human Rights Act. It is some consolation that a late amendment to the provision modified it to the extent of allowing a court to go below the prescribed sentence if it would be “unjust in all the circumstances” to impose three years – a proviso which should allow the courts to avoid the kinds of manifest injustice they have felt compelled to perpetrate when imposing some automatic life sentences – but it would be preferable if the whole section were repealed. It is highly unlikely that it will have any deterrent or protective effect, or that it will control the courts.

In summary, it is clear that the government’s objectives of fairness and proportionality are not consistent with mandatory sentences. These sentences do not work, and are likely to be found to breach human rights.

## 7. Reducing Re-Offending

Several important initiatives have been taken in recent years to reduce re-offending. The range of non-custodial measures provided for by law is now wide; if one adds to this the many innovative schemes developed in different areas of the country,<sup>6</sup> the list of alternatives is enormous. These developments are to be encouraged. They are much more valuable and constructive than the increased resort to imprisonment that has been seen in recent years. It is particularly important that such schemes should be developed so as to deal with many of the women who are now sent to prison,<sup>7</sup> and also to deal non-custodially with many of those members of racial minorities who are over-represented in the prisons. It is a longstanding weakness of community penalties and other non-custodial measures that they have not been used sufficiently for non-white offenders.

Strong support for new programmes and schemes in the community should not lead to some obvious dangers being overlooked. First, the efficacy of the various community schemes must be rigorously evaluated. Whilst the “What Works” movement has rightly led to renewed enthusiasm for diverse community-based approaches to tackling re-offending, it remains true that there is little reliable evidence of the success or failure of the various schemes, as a Home Office review frankly recognised.<sup>8</sup> Second, a cautious approach to claiming “effectiveness” for these schemes should lead to similar caution about proclaiming those directing the schemes as “experts” whose judgement of the progress of individuals should be determinative. This has two further implications. One is that it is important to retain the idea of proportionality between the seriousness of the offence(s) and the extent of the obligations imposed by the community sentence or “programme.” The tendency of community sentences to be increasingly demanding should be recognised. The other implication relates to the much-discussed but not yet defined “seamless sentence”, over which it will be essential to maintain overall judicial supervision. It will be equally crucial to ensure that these sentences are used as

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<sup>6</sup> C. Martin, Directory of Community Penalties (London: ISTD, 1997).

<sup>7</sup> See chapters 5 and 6 of the Wedderburn report (above, n. 1).

<sup>8</sup> J. Vennard and C. Hedderman, “Effective Interventions with Offenders”, in P. Goldblatt and C. Lewis (eds), Reducing Offending: an assessment of research evidence on ways of dealing with offending behaviour, Home Office Research Study 187 (1998).

alternatives to imprisonment, rather than as a tougher option for offenders who would not otherwise attract custody. This has been the invariable tendency in the past, giving the UK possibly the highest number of non-custodial alternatives in Europe, together with one of the highest rates of imprisonment.

We have briefly referred to the need to tighten S2(2)(b) of the 1991 Act. This section has been the cause of considerable concern to both the legal and the medical profession. Many of the arguments against preventive detention were canvassed in the context of the recent debate on dangerous people with severe personality disorders. They centre on the subjective nature and inaccuracy of risk assessments, and the more relaxed and purposive conditions required in any preventive phase of detention.

## 8. The Interests of Victims

The Review document mentions that one of its objectives is to “take full account of the interests of victims”. In chapter 4 of its report “Victims in Criminal Justice”,<sup>9</sup> JUSTICE recommended that victims should make their own statements as to the effects of the offence on them if they wished to do so. We rejected the idea that victims’ views about sentence should be expressed in court by way of victims’ impact statements, which are a feature of a number of other common law jurisdictions.

Since that report, an evaluation for the Home Office of the experiment with “victim statements” has shown that only around 30 per cent of victims availed themselves of the opportunity to make a statement, and that there was a variety of reactions to the experience.<sup>10</sup> Many of those who did make a statement had hoped that it would have some effect on charge or sentence, but did not believe that it did so. This is a further argument for clarity and purpose in sentencing: to ensure that victims’ contributions are dealt with, and that they, as well as the general public, are fully informed of the reasons and relevant circumstances.

## 9. Reparation

Reparation is an obvious area of interest to victims, and to the community in general. Again, we refer to “Restoring Youth Justice” for a discussion of relevant experience in other countries, as well as of the reparation orders introduced by the Crime and Disorder Act 1998 and the functions of youth offender contracts, to be agreed with the new youth offender panels established by the Youth Justice and Criminal Evidence Act. The main lessons are that if offenders can appreciate the consequences of their actions and agree on a form of reparation, this will help to ensure that such offending is not repeated.

## 10. Conclusions

- **The purposes of sentencing must be properly set out.**
- **Sentencing must be proportionate. It must be the least intrusive means of achieving the aims desired.**
- **There should be sentencing hearings and codes of procedure.**

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<sup>9</sup> JUSTICE, Victims in Criminal Justice, Report of the JUSTICE Committee on the role of the victim in criminal justice (London: JUSTICE, 1998).

<sup>10</sup> C. Hoyle et al, Evaluation of the “One Stop Shop” and Victim Statement Pilot Projects (Home Office, 1998).

- **Automatic and mandatory sentences should be abolished. They are unfair, ineffective, and violate human rights.**
- **Non-custodial sentences should be resourced properly, and used much more frequently as alternatives to prison.**
- **Recidivism merits special attention and enhanced resources, but in any event should not attract disproportionate sentences.**
- **Victims' statements should continue to be voluntary, but victims should be properly informed at all stages.**
- **The disproportionate imprisonment of ethnic minorities should be remedied.**

## APPENDIX ONE

### The Canadian experience

During the 1980s there was a growing awareness in Canada that there were serious problems about the fairness and effectiveness of a sentencing system beset with inconsistencies. The emerging critique, similar in many ways to contemporary attitudes here, created a momentum for reform.

It was decided that, because of the lack of **public confidence**, research on public attitudes and anxieties was essential if it were to be restored. The research revealed that:

- (i) the public did not feel that criminals were punished severely enough; and their fear of violent crime was increased by this perceived leniency
- (ii) the public overestimated the rate of violent crime, underestimated sentences imposed for specific offences, underestimated the severity of prison, overestimated the ease with which parole was granted, underestimated the length of time served before parole was given, and overestimated the number of offenders on parole who committed further offences
- (iii) victims felt alienated and frustrated
- (iv) police, prosecution, courts, prisons, and parole agencies did not adequately share information, leading to a reduction in the quality of decisions and services
- (v) that the inconsistencies derived from the lack of an overall guiding purpose and set of sentencing principles
- (vi) that there were not enough alternatives to prison
- (vii) there was too much reliance on prison, which punishes without deterring
- (viii) there was a need for proper psychological assessments; albeit that their limits needed to be recognised, and sufficient resources needed to be allocated for treatment
- (ix) many prisoners served their sentences and reoffended without having been redirected or having had their needs met
- (x) what was appropriate for the majority may not be appropriate for everyone: women, long term offenders, sex offenders, and the mentally disordered were likely to require different responses
- (xi) some people objected to parole as an erosion of sentence, while others supported it for its reintegrative value

The overall features of lack of predictability, perceived leniency, and an absence of concern for victims were noted as characteristics that would have to be addressed.

The Committee established to consider reform pointed to the necessity for a predictable, understandable, and effective system. They emphasised the proper balancing of competing goals: such as the need to separate offenders from society and the need to reintegrate them productively at the end of their sentences.

The Committee considered that it was essential that the realities of the system were communicated to the public, finding that ultimately the evolution of sound government policy – one that has broad public support – is dependent on an informed public. They accepted that long sentences served only to increase recidivism, and that if prisoners were isolated from society they were likely to behave anti-socially.

Disparity and discrimination were identified as problems, just as they have been in the UK context. It was found that judges had different understandings of the

operation, availability, and likelihood of parole. Secondly, it was recognised that while flexibility and discretion were necessary to fairness (in both sentencing and parole), they might also result in unjustified disparity, violating other fundamental principles of equity and predictability.

In the quest for more effective sentencing and administration, the committee was clear that there is not currently the means or knowledge to reduce crime dramatically or rehabilitate all offenders. However, they thought it important to provide opportunities and incentives for those who might respond. This would necessitate a broad range of sentencing options; and was made more essential by the need to deal constructively with addicts, women, and the mentally disordered. Public security is diminished if offenders are returned to the streets unrehabilitated and unsupervised.

Fairness and accountability were perceived to be lacking in a system that did not require the giving of reasons, and in which there was no effective information base. Given that Court of Appeal decisions were restricted to individual cases, there was no overall guidance as to how balance, proportionality, and totality should be weighted.

Moreover, there was a need for alternatives to prison; and it was essential for these to be developed, and for them to be available, credible, and known to judges. The over-reliance on imprisonment had to be seen as a luxury, and one that society could not afford.

Clear purposes and principles were called for; and there was obviously a balance to be struck between security and justice: the two major purposes of the criminal law. Security was defined as meaning the preservation of peace, the prevention of crime, and the protection of the public; justice as equity, fairness, the provision of guarantees for the rights and liberties of the individual against the powers of the state, and a fitting response by society to crime.

In recognition of these objectives the state should be reluctant to define acts as criminal, and should not do so unless no other response will suffice...."if the criminal law is used indiscriminately to deal with a vast range of social problems of widely varying seriousness in the eyes of the public, then the authority, credibility, and legitimacy of the criminal law is eroded and depreciated".

Furthermore, the aims of sentencing and release were perceived as contradictory, and in need of elucidation and explanation.

Victims, it was decided, should be better informed and have a greater input at every stage of the proceedings. Courts should be able to order restitution.

Imprisonment - whose overuse had been one of the main reasons for the review - should, it was recommended, be imposed only

- to protect the public from crimes of violence
- where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice
- to penalise an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance.

In Canada they have also used **Conditional sentences** to replace suspended sentences. These are supposed to be directed at people who would (in certain circumstances) otherwise be jailed, but where the safety of the community was not thought to be endangered. They took the form of peace bonds with conditions for up to two years. Conditions could include: requirements to report for supervision, to stay within the jurisdiction unless permitted to leave, to remain drugs or alcohol free etc. These were supposed to provide a means of serving sentences in the community; and were thought to satisfy sentencing principles, and to be a saving in economic, social, and human terms.

The position of **victims** was reviewed, and the<sup>11</sup> need for more information, consultation, and participation at every stage was given expression by the requirement to consult them in relation to significant decisions made by the Crown (such as sentence, plea, and withdrawal of charges). Crown counsel must act as a filter for the concerns of the victim, and must balance the victim's right to dignity and some level of participation with the Crown's function as an officer of the court.

The Criminal Code now deals with the admissibility of victim impact statements in sentencing hearings (these describe the physical, emotional, and financial harm that has occurred, but do not entitle victims to express views on sentences), and gives victims a role in some eligibility (for parole) hearings, as well as making restitution orders freestanding, so that they can be filed in civil courts and entered as judgements.

Additionally, victim fine surcharges may now be required from offenders, and these are used for victim services generally.

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