WESTMINSTER FOUNDATION FOR DEMOCRACY

PRINCIPLES

of Post-Legislative Scrutiny by Parliaments

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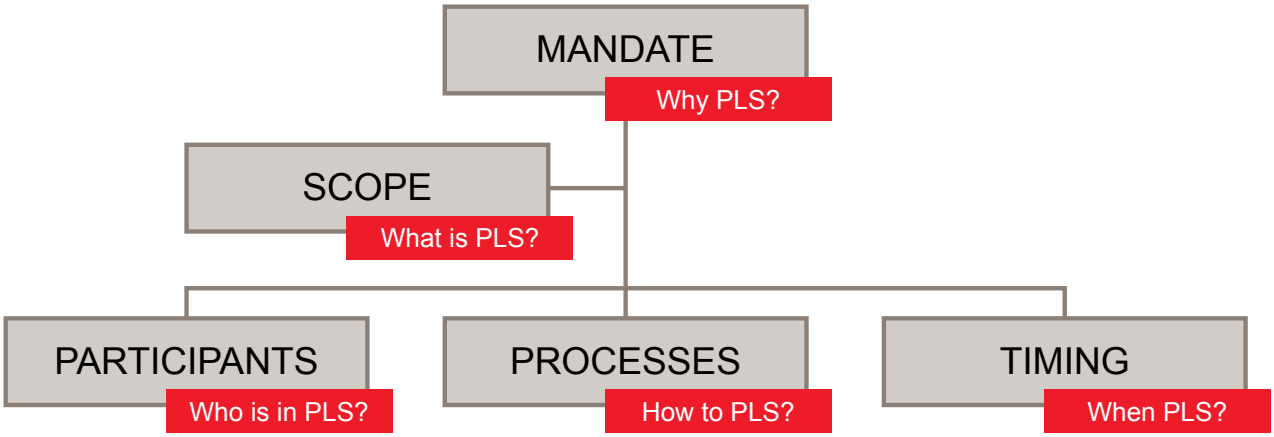
Principles of gender analysis and Post-Legislative Scrutiny were examined at an expert seminar in the Scottish Parliament in November 2017.

The “Principles for Post-Legislative Scrutiny by Parliament” is a policy document aimed at assisting parliaments interested in initiating or strengthening practices of Post-Legislative Scrutiny (Post-Leg). It summarises relevant practices based on lessons learned from parliaments in the UK and partner parliaments of the Westminster Foundation for Democracy (WFD).

The Principles discuss the mandate to conduct Post-Legislative Scrutiny in Parliament (the “why”), the scope (the “what”), the participants (the “who”), the processes (the “how”) and the timing (the “when”).



The document has been written for Members of Parliament (MPs), parliamentary staff, political advisers to MPs and parliamentary strengthening experts. It can be used by parliaments who want to:

- increase parliament’s oversight on policy delivery and consolidate the country’s legislative cycle,
- revise the parliament’s Rules of Procedure to clarify its role in Post-Legislative Scrutiny,
- introduce and guide a pilot-project on Post-Legislative Scrutiny in parliament,
- identify the relevant structures and resources needed to establish Post-Leg capacity in parliament.

The 15 principles are stated in the headline (in bold), followed by an explanatory paragraph for each principle. These principles are not exhaustive nor exclusive, but are intended to provide guidance in establishing realistic Post-Leg practices, in line with the legal and procedural framework specific to each parliament. WFD sees value in the argument that Post-Legislative Scrutiny should be a more integral part of the parliamentary process. WFD is aware of the resource constraints facing parliaments and the need for a flexible approach. These principles therefore seek, as much as possible, to build on existing systems and procedures.

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PRINCIPLES
for Post-Legislative Scrutiny by Parliaments

MANDATE

1. Parliament has a responsibility to monitor that the laws it has passed have been implemented as intended and have had the expected effects. Therefore, Post-Legislative Scrutiny is an important tool for increasing government accountability.
2. Three binding instruments typically provide a mandate for Post-Legislative Scrutiny: ministerial undertakings, review clauses in legislation or sunset clauses.
3. Even when no binding commitment to Post-Legislative Scrutiny is made during the passage of the bill, Parliament should be able to undertake Post-Legislative Scrutiny on any matter that it so chooses.

SCOPE

4. Post-Legislative Scrutiny reviews both the enactment of law and its impact on society, and hence contributes to improve the law itself and people's well-being.
5. To make use of time and resources in the most effective way, parliament needs a transparent process for identifying the pieces of legislation that are selected for Post-Leg review.
6. To understand the implementation and impact of legislation, it is useful to review secondary or delegated legislation at the same time as reviewing the primary act.
7. Post-Legislative Scrutiny provides an opportunity to assess the impact of legislation on issues which cut across different Acts, such as gender or minorities.

PARTICIPANTS

8. Parliament should consider whether responsibility for Post-Legislative Scrutiny should lie with its standing (permanent) Committees or with a dedicated body. Post-Legislative Scrutiny should be an inclusive process in which all party groups are able to participate.
9. For parliament to conduct Post-Legislative Scrutiny inquiries effectively, it needs to empower its human resources and enable them to work with appropriate ICT systems and applications. Parliament may consider whether to establish a specialised Post-Leg parliamentary service or to outsource this function to an external independent review panel that must report to parliament
10. Public engagement in Post-Legislative Scrutiny enables access to additional sources of information, increases the credibility of the findings and enhances public trust in democratic institutions.

PROCESSES

11. Inclusion of Post-Legislative Scrutiny in the parliamentary rules of procedures contributes to generating clarity, purpose and resources to Post-Leg activities.
12. Post-Legislative Scrutiny processes avoid a simple replay of policy arguments from the time when the merits of the law were debated.
13. Effective Post-Legislative Scrutiny requires full and timely access to governmental information, as well as to the views of a wide range of stakeholders, including civil society organizations.
14. Parliament should have processes in place to ensure consideration of the findings of Post-Legislative Scrutiny so that, where necessary, changes to legislation and policy can be made in a timely manner.

TIMING

15. Post-Legislative Scrutiny should generally take place at least three years after of enactment of the law in question.

MANDATE

for Post-Legislative Scrutiny by Parliaments

1 Parliament has a responsibility to monitor that the laws it has passed have been implemented as intended and have had the expected effects. Therefore, Post-Legislative Scrutiny is an important tool for increasing government accountability.

As parliaments put a large part of their human and financial resources to the process of adopting legislation, it is not uncommon that the aspect of reviewing the implementation of legislation may be overlooked. Implementation is a complex matter depending on the mobilization of resources and different actors, as well as the commitment to the policies and legislation, coordination and cooperation among all parties involved.

Implementation does not happen automatically and several incidents can affect its course, including: changes in facts on the ground, diversion of resources, deflection of goals, resistance from stakeholders and changes in the legal framework of related policy fields. Implementation of legislation and policies may also be undermined by power asymmetries, exclusion, state capture and clientelism.

Despite these challenges there are four overarching reasons why parliaments should prioritise monitoring and evaluating the implementation of legislation:

1. to ensure the requirements of democratic governance and the need to implement legislation in accordance to the principles of legality and legal certainty are being met;
2. to enable the adverse effects of new legislation to be apprehended more timely and readily;
3. to improve the focus on implementation and delivery of policy aims; and
4. to identify and disseminate good practice so that lessons may be drawn from the successes and failures revealed by this scrutiny work.

Therefore, Post-Legislative Scrutiny is an important tool for increasing government accountability, and is part of the oversight role of parliament.

2 Three binding instruments typically provide a mandate for Post-Legislative Scrutiny: ministerial undertakings, review clauses in legislation or sunset clauses.

The most effective mechanism to guarantee that Post-Legislative Scrutiny takes place is securing binding requirements to the review of the implementation of legislation prior to the adoption of the law by parliament. There are various ways to establishing this binding requirement, or mandate, prior to the adoption of the law:

- First, at some point during the passage of the bill, ministers of the executive may be asked to make a commitment (ministerial undertaking) to conduct a review of legislation, indicating what it should cover and when.
- Alternatively, as a second option, MPs could table amendments during the passage of a bill which seek to insert a review clause. Review clauses require the operation of the act or part of the act to be reviewed after a specified time. A review clause may be a useful tool because it is enshrined in statute and therefore has the force of law. It may provide for a general review or specify the specific provisions that should be reviewed, the timescale for review and who should carry it out.
- A third option is sunset clauses, which go one step further. Under a sunset clause an act or provision automatically ceases in its effect after a certain time, unless another criterion is met, e.g. a review that keeps it in place.

Often a review clause or a sunset clause reflects a political compromise, representing the price the government will pay for getting a bill through parliament. It is desirable that parliaments establish as a binding requirement, or mandate, the review of the implementation of legislation -- as much as possible.

It is worth mentioning that in the UK there is an agreement between the UK Government and UK

Parliament in relation to Post-Legislative Scrutiny, which foresees in the government submitting a Memoranda to parliament 3 to 5 years after the enactment of the law on its implementation. It might not be possible to set up such system in all parliaments, but it could be useful to explore a system in which the government commits to provide information to parliament and thus sets the foundations for what parliaments and executives expect from the process.

3 Even when no binding commitment to Post-Legislative Scrutiny is made during the passage of the bill, Parliament should be able to undertake Post-Legislative Scrutiny on any matter that it so chooses.

Binding requirements to conduct Post-Legislative Scrutiny are not possible or desirable in all circumstances. An alternative approach is to make the decision to review a piece of legislation reactively, post-enactment. There are different triggers for Post-Legislative Scrutiny, and parliament has a primary responsibility to trigger Post-Legislative Scrutiny. Parliament should be able to undertake Post-Legislative Scrutiny on any matter that it so chooses.

While government could play an important role in kick-starting a review process by identifying, post-enactment, legislation that should be reviewed, a relevant committee in parliament may decide to review an act or provisions within an act at any given time. Trigger points for the parliament might include:

1. requests by citizens or organizations that a piece of legislation be reviewed;
2. media reports or petitions indicating the need for Post-Legislative Scrutiny;
3. members of the judiciary commenting that a piece of legislation faces gaps, loopholes or contradictions and should be revisited;
4. regular parliamentary committee work and inquiry into an issue.

There is a real foreseeable value to the possibility of parliament initiating Post-Legislative Scrutiny based on concerns raised by citizens with regards to the accuracy, applicability, implementation and timeliness of specific laws. At times when a Post-Leg process has been triggered by citizen-related concerns a parliament should ensure that relevant publics are engaged with during the process.

While the first option plans for Post-Legislative Scrutiny in advance of the enactment of the legislation, the second option accommodates Post-Legislative Scrutiny when no prior commitment was made, and therefore relies upon post-enactment triggers for review. The two options are complementary and together represent a convenient set of opportunities for parliament regarding how Post-Legislative Scrutiny could be undertaken more systematically. When developing a policy framework for Post-Legislative Scrutiny, it is useful to anticipate that either of the two options could be applied.

It is recommended for parliament, in case no binding requirement to the review of implementation of legislation has been established, to identify trigger points for Post-Legislative Scrutiny and trigger Post-leg of specific laws accordingly, based upon requests and inputs from citizens, amongst others.

Presenting the WFD comparative study on practices of Post-Legislative Scrutiny in Myanmar in July 2017.

SCOPE

for Post-Legislative Scrutiny by Parliaments

4 Post-Legislative Scrutiny reviews both the enactment of law and its impact on society, and hence contributes to improve the law itself and people's well-being.

As Post-Legislative Scrutiny is a broad concept, it is recognized that it might mean different things to different parliaments and stakeholders. In a narrow interpretation, Post-Legislative Scrutiny looks at the enactment of the law, whether the legal provisions of the law have been brought into force, how courts have interpreted the law and how legal practitioners and citizens have used the law. In a broader sense, Post-Legislative Scrutiny looks at the impact of legislation; whether the intended policy objectives of the law have been met and how effectively. These are two dimensions of Post-Legislative Scrutiny: (1) to evaluate the technical entrance and enactment of a piece of legislation; (2) to evaluate its relationship with intended policy outcomes. It is recommended that parliaments seek to carry out both forms of Post-Legislative Scrutiny, the enactment of law and its impact. In this way, Post-Legislative Scrutiny contributes to improving the law itself and people's well-being.

5 To make use of time and resources in the most effective way, parliament needs a transparent process for identifying the pieces of legislation that are selected for Post-Leg review.

While in principle there may be benefits to carrying out Post-Legislative Scrutiny on most acts, a careful selection of legislation for review will be needed given the time and resources required, which presents a challenge for even the world's most resourced parliaments. It is preferable for limited resources to be applied in a manner that enables quality and effective post-legislative review of a few pieces of legislation a year, rather than less thorough evaluations of multiple acts. For the same reason, it may be desirable to review just one provision or section(s) of an act. This approach may be a particularly appropriate for large acts that contain different parts, and which serve different purposes. The decision as to whether an act is suitable for review should be taken on a case-by-case basis.

However, it is possible to identify the types of acts that, in general, may or may not be suitable for Post-Leg review. Legislation which is generally not suitable for Post-Leg review includes:

1. appropriation acts;
2. consolidation legislation;
3. legislation that makes minor technical changes only; and,
4. legislation where the scheme of the legislation contains its own method of independent analysis and reporting.

On the other hand, legislation related to a state of emergency in the country, particularly where it affects civil liberties, and legislation adopted under fast-track procedures should always be subject to Post-Legislative Scrutiny.

In addition, it is useful to consider the cumulative effect of legislation; and hence consider looking at several pieces of legislation within the same policy area.

6 To understand the implementation and impact of legislation, it is useful to review secondary or delegated legislation at the same time as reviewing the primary act.

Acts of parliament often grant ministers powers to make delegated or secondary legislation. It is ideal to review secondary legislation post-enactment at the same time as reviewing the parent legislation from which it owes its authority. This is particularly the case at times when most of the provisions giving effect to a piece of legislation are held within the secondary, rather than the primary legislation, and might lead to contradictions or gaps. In some parliaments, a

committee on delegated powers and regulatory reform or committee on regulations has been given this task (Canada). As with primary legislation, it would be open to parliamentary committees to commission research on the effect of specific secondary legislation or to undertake an inquiry.

7 Post-Legislative Scrutiny provides an opportunity to assess the impact of legislation on issues which cut across different Acts, such as gender or minorities.

A system of Post-Legislative scrutiny of past legislation allows a parliament to look at cross-cutting impacts which it has decided to treat as a priority. Interesting topics to look upon could be gender or human rights, regulatory or environmental burdens etc.

For example, legislative initiatives frequently affect men and women differently. Systematic analysis and evaluation of law and policy, based on how they impact women, men and other relevant demographic groups can help to identify and avert or redress any potential disadvantages they may create. This technical approach, referred to as gender analysis, also helps to ensure women and men have access to the same opportunities and legal protections. Gender analysis is also used to safeguard value for money and promote government efficiency and transparency.

Gender analysis requires the collection and analysis of evidence, such as sex-disaggregated data or qualitative assessments of government services. It also requires policy makers to challenge assumptions about how a government programme or service should be structured, and to ask detailed questions about who is affected by a problem or issue and how they would be impacted by proposed solutions. It is therefore preferable to plan for this process during the early stages of the legislative process, prior to adoption of the law, to ensure systems are in place to collect and collate necessary evidence and information.

Sharing the UK approach to post-legislative scrutiny with representatives from Indonesia and Myanmar in April 2017.

PARTICIPANTS

for Post-Legislative Scrutiny by Parliaments

8 Parliament should consider whether responsibility for Post-Legislative Scrutiny should lie with its standing (permanent) Committees or with a dedicated body. Post-Legislative Scrutiny should be an inclusive process in which all party groups are able to participate.

Parliament needs to decide on the role and responsibility of its existing standing (permanent) committees to conduct Post-Legislative Scrutiny inquiry, with the assistance of regular committee staff (as is the case in the UK House of Commons), and what can be the usefulness of explicitly assigning the remit of Post-Legislative Scrutiny to a dedicated committee (as is the case in Scotland and Lebanon) or to ad hoc Committees (as is the case in the UK House of Lords). In some parliaments such as Indonesia, the Legal or Legislative Committee conducts the review of the enactment of legislation – whether secondary legislation has been issued and what are relevant court rulings related to the law - while the thematic committees assess the impact of the law, if and how its objectives are met. Each option has value; and the approach chosen depends on issues such as the parliamentary rules of procedure; the appetite and the capacity of committees; parliament's oversight culture; established practices, and the available human resources.

In addition, Post-Legislative Scrutiny should be an inclusive process in which all party groups, ruling parties as well as opposition parties, are able to participate. Because Post-Legislative Scrutiny is part of the oversight role of parliament, an inclusive approach will strengthen the accountability of the governance system and enhance delivery of services to the citizens.

9 For parliament to conduct Post-Legislative Scrutiny inquiries effectively, it needs to empower its human resources and enable them to work with appropriate ICT systems and applications. Parliament may consider whether to establish a specialised Post-Leg parliamentary service or to outsource this function to an external independent review panel that must report to parliament.

If Post-Legislative Scrutiny is to be successful in delivering benefits at a reasonable cost in terms of time and money, it is important that parliaments empower their staff with the requisite authority to interact with relevant institutions and stakeholders in the country. This is important for multiple reasons such as to collect the required information, obtain documents in the required language, or request translations where needed, for instance if some of the old (colonial-time) applicable legislation is not available in the current national language of the country.

Special care needs to be taken to train and allocate skilled personnel on Post-leg activities. WFD suggests that parliaments make full use of the expertise of dedicated committee specialists as well as of their research units or services.

In addition to having in place the relevant administrative structures and processes, parliaments need to design and operate appropriate ICT systems and applications to capture, maintain and handle the necessary data to perform Post-Legislative Scrutiny activities.

Parliament may consider whether to establish a separate secretariat research service for Post-Legislative Scrutiny (as is the case in Indonesia and Switzerland). Alternatively, a parliament may also decide to commission an independent body or expert panel to carry out this legislative evaluation (as is the case in South Africa). Each approach has its rationale and its advantages; and it is up to the parliament leadership to decide which approach is most suitable within the specific national and parliamentary context.

10 Public engagement in Post-Legislative Scrutiny enables access to additional sources of information, increases the credibility of the findings and enhances public trust in democratic institutions.

When committees conduct public hearings or consultations as part of the Post-Leg process, they usually access additional sources of information that increase the credibility of the overall findings of the Post-leg review. In addition, public consultation and engagement can enhance public trust in parliament as well as the democratic institutions. The results of the Post-leg findings, e.g. the Post-leg report, need to be publicly accessible, if possible using open data and document standards.

PROCESSES

for Post-Legislative Scrutiny by Parliaments

11 Inclusion of Post-Legislative Scrutiny in the parliamentary rules of procedures contributes to generating clarity, purpose and resources to Post-Leg activities.

Different countries have established the legal and policy framework for Post-Legislative Scrutiny in different documents, either the constitution (for instance in Switzerland), a Law on Parliament (in Indonesia) or the parliamentary rules of procedure / standing orders (in Canada). In the UK, Post-Legislative Scrutiny is part of established parliamentary scrutiny practice and of the core tasks of committees, and a process to assist the work is agreed with the executive.

When a parliament wants to develop or strengthen its Post-Leg activities, it is useful to embed it in the parliamentary rules of procedure. Such a document provides clarity and purpose to Post-Legislative Scrutiny and often enables allocation of the resources required to conduct Post-Legislative Scrutiny. However, these formal documents are not a prerequisite to Post-Leg taking place and therefore the absence of a separate legal or policy framework, or reference in the parliamentary rules, should not prevent parliament from conducting Post-Legislative Scrutiny as part of its general oversight role. It is nevertheless desirable for parliaments to contain an explicit reference to Post-Legislative Scrutiny in their rules of procedure.

12 Post-Legislative Scrutiny processes avoid a simple replay of policy arguments from the time when the merits of the law were debated.

For Post-Legislative Scrutiny to be effective and its findings to obtain broad support, it should seek to avoid being a simple replay of the policy arguments when the merits of the law were debated, but rather focus on the enactment and impact of the law considering the evidence of how it has worked in practice. While the adoption of the law and the debate on the merits of the policy might have been divisive among political parties and MPs at the time, the discussion on Post-Leg should enable an in-depth look on the impact of legislation, looking at how far the objectives have been achieved. In some cases, for instance Myanmar's review of old legislation, this might also inform an updated discussion as to whether the objectives were optimal.

Emergency legislation may provide an exception to the rule by allowing for the re-examination of the policy behind the bill. Emergency legislation is often adopted without proper parliamentary scrutiny in time-pressured circumstances. Therefore, it is advisable to ensure the inclusion of a sunset clause for emergency legislation.

In addition, when analysing the impact of legislation, one needs to consider the cumulative effect of legislation, as well as how the state of affairs within a policy area has been shaped by different pieces of legislation. Legislative impact is rarely the effect of one single piece of legislation; hence the usefulness of considering the cumulative effect of legislation.

13 Effective Post-Legislative Scrutiny requires full and timely access to governmental information, as well as to the views of a wide range of stakeholders, including civil society organizations.

When adopting legislation, parliament needs to clarify how it will access governmental information on the implementation of the legislation. One way is to ensure that government departments provide this information on a regular basis or at an agreed point in time. In the UK, the relevant government department carries out an initial review, three to five years after enactment of the law, which is published as a report and laid before parliament. The relevant select committee then reviews the report and if it considers it appropriate may conduct its own evaluation of the impact of that legislation. If

such a framework is not in place –so that parliament itself needs to take the initiative to collect the relevant information– then access to government information remains important. The executive has a vast state apparatus at its disposal, able to generate the data required to analyse implementation and its impact. Parliament would therefore benefit from drawing on its insights by requesting the executive to submit evidence to the relevant parliamentary body dealing with the review. A performance audit by the Auditor General's Office / Court of Accounts can also be a useful source of information.

The ability of parliament to receive, integrate and process governmental and other available data is of paramount importance. Hence, interconnection with governmental databanks, incorporation of open data and the creation of an administrative apparatus for parliamentary support are prerequisites for an efficient implementation of Post-Legislative Scrutiny.

In addition, effective Post-Legislative Scrutiny requires the views of a wide range of stakeholders, including civil society organisations; and parliament should put in place mechanisms and opportunities to access CSO views and information.

Is it worth highlighting that Parliaments are usually at the centre of a broader system of scrutiny and that they should be tapping into that system and working closely with outside organisations, not just for post-legislative work.

14 Parliament should have processes in place to ensure consideration of the findings of Post-Legislative Scrutiny so that, where necessary, changes to legislation and policy can be made in a timely manner.

Parliaments need to ensure that the findings of a Post-Leg review are addressed. Post-Leg findings can be a useful basis for drafting amendments as they provide information about the state of implementation of legislation; these findings can also pre-empt other parliamentary measures. Post-Leg findings can inform parliamentary questions, motions, requests for executive statements and (timely) ministerial responses. For instance, in the UK the timeline for a written response from a government ministry on a Post-Leg report is between 3 and 6 months and is considered a public document under the Freedom of Information Act.

The parliament could review the follow-up to the recommendation of the body that conducted the Post-leg six to twelve months after its completion.

Committees in Indonesia explore the relationship between post-legislative and human rights.

TIMING

for Post-Legislative Scrutiny by Parliaments

15 Post-Legislative Scrutiny should generally take place at least three years after of enactment of the law in question.

While it is hard to establish a general timeframe for review of all types of legislation in all circumstances, it is recommended that acts be subject to review after a period of at least three years of their enactment. There may be cases (for example, emergency legislation) where there is strong political pressure for early review. However, early review may present disadvantages as there may have been insufficient time to permit a mature judgment on the effects of the act. If the act aroused political controversy an early review may result in a continuation of the arguments about the policy behind the legislation, rather than a clinical evaluation of the effects of its implementation. Another factor is that large acts will often contain a series of commencement dates for different parts of the act, which result in the legislation being rolled out gradually over several months or more than a year–in such cases a review may nonetheless be useful to identify clearly which bits have not been commenced and why.

MORE INFORMATION ABOUT WFD'S MATERIALS ON POST-LEGISLATIVE SCRUTINY

The document "Principles for Post-Legislative Scrutiny by Parliament" is part of a wider initiative by WFD on Post-Legislative Scrutiny which includes the "Comparative Study on Post-Legislative Scrutiny" and a guidance document called "Manual on Post-Legislative Scrutiny in parliament". In addition, WFD intends to assist interested parliaments in rolling-out a pilot project on Post-Legislative Scrutiny.

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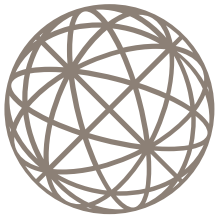

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