The Shopfront
YOUTH LEGAL CENTRE

NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

7 September 2012

By email

Dear Sir/Madam

Sentencing: Question Paper 9: Alternative approaches to criminal offending

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this reference.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront's main area of practice is criminal law. Two of our solicitors are accredited specialists in criminal law; one is also an accredited specialist in children's law. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's, District and occasionally Supreme Courts.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to nearly all of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

Although the Shopfront is a youth legal service, and has expertise in children's matters, the majority of our clients are in fact young adults aged 18 to 25. We therefore have an extensive working knowledge of adult sentencing law and practice. In accordance with the terms of reference, our submission is confined to adult sentencing issues.

Time does not permit us to make a more comprehensive submission. However, we would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact me, preferably by email at jane.sanders@freehills.com

Yours faithfully

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army

THE SALVATION ARMY
Mission Australia
Freehills

Sentencing: Question Paper 9: Alternative approaches to criminal offending

Question 9.1: Early diversion

Should an early diversion program be established in NSW? If so, how should it operate?

We support, in principle, the establishment of an early diversion program for adults in NSW.

The *Young Offenders Act*, which has been operating for juveniles in NSW since 1998, provides a sound model that could be adapted for adult offenders.

Presumably the scope of offences eligible for diversion under an adult scheme would not be as broad as those currently covered by the *Young Offenders Act*. The scheme would also need to be adapted to recognise that there are differences between juvenile and adult offending, and differences in the way a criminal justice system responds to such offending. However we are of the view that many features of the *Young Offenders Act* (including the system of checks and balances which aim to ensure that diversion is appropriately utilised and that accused persons' rights are protected) could be successfully adapted to adults.

It would be important that a diversionary scheme, with the exception of informal warnings and unconditional cautions, be run by a body independent of the police.

While we support some features of the conditional cautioning system which operates in England and Wales, we are strongly opposed to such a system being run by the police, DPP or any other prosecuting authority. While we have no issue with police administering informal warnings or unconditional cautions (as is currently the case with the *Young Offenders Act* in NSW), we see a real danger in allowing a policing or prosecuting body to impose conditions.

In our submission on *People with cognitive and mental health impairments in the criminal justice system* (Consultation Paper 7: Diversion) we made some comments about the potential for a police cautioning scheme (see our response to Issues 7.1 and 7.2). We note that a pre-court diversion scheme for people with cognitive and mental health impairments has been recommended by the NSWLRC in its recent Report 135 on *People with cognitive and mental health impairments in the criminal justice system: Diversion.*

It would be important for any pre-court diversionary scheme to be accompanied by appropriate funding so that people are diverted to support services when necessary. If the pre-court diversion model requires the person to admit the offence, it is also vital that there be funding for people to obtain legal advice before making admissions and agreeing to participate.

Question 9.2: CREDIT program

Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

In our limited experience with the CREDIT Program at Burwood (the only metropolitan Local Court where it currently operates) the program is operating very effectively.

CREDIT helps break down barriers that disadvantaged people often face when seeking access to services. Crucially, CREDIT can provide support at an early stage of criminal proceedings, without the need to enter a plea. In our experience, disadvantaged people are often subject to bail conditions such as residential, reporting and curfew conditions, without the necessary support to enable them to comply. It is not uncommon for these conditions to be breached and for the defendant to be refused bail as a result. These issues have been discussed in some detail in our submission to the NSWLRC's recent reference on bail law. The provision of support via a program such as CREDIT or MERIT greatly assists with bail compliance, and indeed sometimes alleviates the need for courts to impose such prescriptive bail conditions.

In our experience, the CREDIT Program has also assisted the courts by providing evidence of a defendant's capacity for rehabilitation, and gives the court more confidence in imposing non-custodial sentencing options.

We are aware that pre-plea programs such as MERIT and CREDIT are sometimes criticised because they amount to some form of court-imposed sanction on people who have not been found guilty of any offence, and ultimately found not guilty. We respectfully disagree; although some magistrates may strongly encourage defendants towards CREDIT or MERIT, in our experience, participation in these programs is genuinely voluntary. Further, people who are not guilty of any offence frequently have sanctions imposed on them in the form of onerous bail conditions or even remand in custody. As discussed above, a program like CREDIT can manage the risks of "absconding" or re-offending on bail in a more appropriate way by providing support rather than simply imposing sanctions.

Case study: Thomas

Thomas is an 18-year-old man who arrived at court bail refused on charges of committed were larceny and entering inclosed lands.

The court soon discovered that he was a homeless young man who had been living in a friend's car for 9 months. When Thomas was 16 years old his mother, who struggled financially, moved into a bedsit and Thomas was no longer able to live with her. He lived in a boarding house for a short time, but when he became unemployed he soon became homeless because he could no longer able to afford to pay the rent. He was unaware of his entitlement to Centrelink and had never received Centrelink benefits despite his eligibility from the time he was 16 years of age.

Thomas' charges concerned him entering a service station that had closed down, and collecting scrap metal that he planned to sell to afford some basic necessities.

The magistrate decided that the CREDIT program would be of benefit to Thomas.

The CREDIT program addressed a number of criminogenic areas of concern. Firstly, Thomas was referred to the Shopfront Youth Legal Centre to assist with his legal needs. Thomas was also linked in with Don Bosco Youth Refuge, where he was provided with a level of stability that he had not experienced since leaving home. Further, Thomas was provided with support and guidance in completing the relevant Centrelink forms and soon was in receipt of some income. Thomas was also provided with alcohol and other drug counselling and vocational guidance.

The final CREDIT report described his participation in the CREDIT program as excellent. The referrals made by CREDIT enabled the Shopfront Youth Legal Centre to assist Thomas in successfully making an application for a Work and Development Order with the State Debt Recovery Office in order to settle his many fines (largely for travelling on trains without a ticket) that he had accumulated during his period of homelessness.

Case study: Brian

Brian has a background of abuse, neglect, homelessness, substance abuse, and very poor literacy and numeracy skills. He has a lengthy criminal history, including several offences of driving while unlicensed and subsequently driving while disqualified. Traditional criminal justice interventions were not working to prevent Brian from re-offending.

For his most recent charges Brian was referred to the CREDIT program, which organised a referral to a dyslexia clinic. This paved the way to a full psychological assessment which resulted in him being diagnosed with an intellectual disability and receiving more targeted support services than he had previously received.

Brian's problems (and his offending) are by no means over. In our opinion, he will need ongoing support and case management for years to come. However, CREDIT was an important step in identifying and accessing the support he needs to stop offending and live a more fulfilling life.

We would like to see CREDIT rolled out to more Local Courts. We note that the NSWLRC's recent Report 135 on *People with cognitive and mental health impairments in the criminal justice system: Diversion* recommends the roll-out of CREDIT.

We also support the idea of a program tailored to the needs of defendants with cognitive and mental health impairments, which would also facilitate psychological and psychiatric assessments and the development of case plans for orders under section 32 of the *Mental Health (Forensic*

Provisions) Act. We refer to our discussion in our submission on *Young people with cognitive and mental health impairments in the criminal justice system* (see our response to Question 11.21).

We would also like to see a similar program, adapted to the needs of children, available in the Children's Court.

We have one final recommendation about the eligibility criteria for CREDIT. Currently, people who are under the supervision of the Probation and Parole Service are ineligible for CREDIT. We understand this is based on the premise that these people will already be receiving support from Probation and Parole. Regrettably, we have found that this assumption is often misplaced.

In our experience the Probation and Parole service does not always provide adequate support or make appropriate referrals. We believe this is largely due to resource constraints and to a lack of appropriately skilled probation officers (and also partly due to what we see as a shift away from the social work approach previously adopted by Probation and Parole). The case study below illustrates one such situation, which is not an isolated example.

We would recommend that this exclusionary criterion be removed. The level of support a defendant is receiving from Probation and Parole (or from any other agency) could be a relevant factor in a suitability assessment.

Case study: Jamal

Jamal, age 21, has a mild intellectual disability and was placed on a supervised section 9 bond for driving while disqualified. Probation and Parole identified that Jamal had a problem with cannabis and sent him to a group-based alcohol and other drug program. Probation and Parole were apparently unaware of Jamal's intellectual disability, even though there was a comprehensive psychological assessment provided to the sentencing court.

Jamal went to one group counselling session and did not return, partly because he found the group environment very difficult and partly because of difficulties with personal organisation and transport. Probation and Parole breached him for failing to complete the group program, although Jamal had not re-offended and his cannabis problem was not closely linked to his offending.

When Jamal was facing breach proceedings at court, we thought the CREDIT program could be of great benefit to him. At our suggestion, the magistrate deleted the supervision component of the bond (as the court has power to do when dealing with breach proceedings), adjourned the matter for Jamal to complete the CREDIT program, and ultimately took no action on the breach.

Question 9.3: MERIT program

Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

Many of our comments about the CREDIT program also apply to MERIT. However, as MERIT has been running for several years and is now available at most Local Courts, we have had many more clients participate in MERIT than CREDIT.

In our view, MERIT is a very effective intervention which often succeeds after other attempts at rehabilitation have failed. Strengths of the MERIT program include:

- Because it is available at an early stage of criminal proceedings, without the need to enter a plea, it can be put in place when the time is ripe for a defendant to address their drug-related problems.
- By providing streamlined access to alcohol and other drug services, it helps break down the barriers that people often face in accessing rehabilitation programs.
- We have found that MERIT teams have been able to engage some of the most disadvantaged "difficult" clients whose needs are not always met by other services.
- Significantly, MERIT is based on a harm minimisation approach, and recognises that abstinence from drugs is not an appropriate and achievable goal for everyone.

The main change we would recommend to the MERIT program is that it be made available to people whose primary (or only) drug of dependence is alcohol or prescription drugs. Very often,

offenders will have problems with alcohol and with other drugs. However, there is a significant number of people who abuse only alcohol or prescription drugs, and they would also benefit from a program such as MERIT.

Case study: Nathan

Nathan is a young Aboriginal man who, until he was 18 years of age, had a fairly limited criminal history. At 18, while he was intoxicated and in the company of a cousin, he participated in a break, enter and steal. He was placed on a supervised good behaviour bond and has been performing reasonably well under Probation and Parole supervision.

Unfortunately, Nathan got drunk one night and, again in the company of a friend, painted graffiti on a number of local houses and cars. He was charged with several counts of destroy/damage property. It was apparent to us that, although Probation and Parole had provided him with a reasonable amount of support, Nathan required some more targeted assistance with his alcohol and other drug problems.

Because Nathan had a problem with cannabis as well as alcohol, he was eligible for MERIT and was accepted onto the program. Nathan was able to do the MERIT program while his solicitor was reviewing the evidence and negotiating with the police about which charges Nathan would plead guilty to. Nathan has now completed the MERIT program and is due to be sentenced soon. We are optimistic that his performance on MERIT will help persuade the court to impose a non-custodial sentence and not to revoke his bond.

Case study: Daniel

Daniel is a young man with an intellectual disability and mental health concerns that are both complex and chronic in nature. Daniel's diagnoses include mild intellectual disability, Asperger's disorder, anxiety disorder, depression, substance abuse disorder and "possible emerging psychotic illness". He experienced chronic homelessness for a number of years before moving into a community housing property in March 2011. Daniel has a significant problem with poly-drug abuse and has appeared frequently before the courts for various offences connected to his substance abuse disorder.

For his most recent charges, Daniel was referred to the MERIT program. Despite his intellectual disability and the significant challenges associated with this, the MERIT team managed to engage him and he completed the program. For the first time Daniel accepted that he did in fact have a serious drug problem. He demonstrated a greater motivation to address and access support for his drug and alcohol issues. This has included attending a detoxification program at Gorman House and agree to a referral for further counselling regarding his drug abuse. He did not achieve abstinence but reduced his use to a significant extent. As the MERIT clinician pointed out in her final report, this was very significant for a person like Daniel who faced so many challenges.

The work done by the MERIT team, including the referrals following completion of the program, provided us with the basis for a case plan for an application under section 32 of the *Mental Health (Forensic Provisions) Act*. Daniel's charges were conditionally dismissed under section 32, a result that would have been highly unlikely without the support provided by MERIT.

Question 9.4: Drug Court

1 Is the Drug Court operating effectively? Should any changes be made?

Although we have had comparatively few clients participating in the adult Drug Court (for reasons that will be further explained below) our observations suggest that the Drug Court is working very effectively.

We are unable to comment on whether any changes are needed to the manner in which the program is run; our recommendations are relate to changing the eligibility criteria.

2 Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?

We support the roll-out of the Drug Court to other geographical areas. We have worked with a significant number of young adults who would have been excellent candidates for the Drug Court but who do not have the requisite connection with the Western Sydney or Hunter areas. We note there is now some limited Drug Court availability at the Downing Centre, but given the very small number of people it can accommodate, most of our clients are unlikely to gain entry to the program unless it is significantly expanded.

Case study – Mandy

Mandy is a 25-year-old indigenous woman who has been involved in the criminal justice system since she was 14. She has a long history of family conflict and homelessness, having been the victim of child sexual abuse and domestic violence. She also has a long-standing problem with alcohol and other drug abuse, and an emerging mental illness.

From a young age, Mandy turned to drug abuse as a way to cope with the trauma that she experienced. Mandy developed a very lengthy criminal history, including several stints in juvenile detention and adult correctional centres. Her record included shoplifting, break enter and steal, common assault and minor drug offences.

At age 23, Mandy broke into a house while under the influence of alcohol and other drugs. She charged with break and enter with intent to steal, and was refused bail. We made considerable efforts to have her assessed for a residential rehabilitation program, but such assessments are very difficult to facilitate while a person is in custody.

Mandy remained in custody on remand, then she pleaded guilty and received a full-time custodial sentence. Had the Drug Court program been available in her area, we believe it would have provided a realistic and appropriate alternative for the sentencing court.

We also support a broadening of the eligibility criteria to include some offences which are traditionally regarded as "violent" such as robbery (*Crimes Act* section 94) robbery in company (*Crimes Act* section 97(1)) and even less serious cases of armed robbery (*Crimes Act* section 97(1)) where the weapon was not used to assault or to inflict injury upon the victim. We would also support the inclusion of offences such as common assault and assault occasioning actual bodily harm. Robberies in particular are offences commonly committed by people who are dependant on prohibited drugs, in order to fund their drug use. If our clients are any indication, we would comment that most of these offenders are not inherently violent by nature, and the level of actual violence involved in such robberies is often low.

We have had many robbery offenders who would have been ideal candidates for the Drug Court had they been eligible. Of these offenders, some of the young men have been sentenced to terms of imprisonment and referred to the Compulsory Drug Treatment Program, and a few of our female clients have been referred to the Biyani program on a section 11 or section 12 bond. However, a significant number of our clients have missed out on these programs and have received custodial sentences which rarely afford them adequate access to alcohol and other drug programs.

Case study - James

James is a young man of 19 years of age who comes from a background of abuse, neglect and homelessness. He has a mild intellectual disability, severe substance abuse disorder and depression.

His father committed suicide when he was 2 years old. Shortly after this, his mother started a new relationship with a man who physically abused James on a regular basis. To cope with the violence he was experiencing at home, James started drinking alcohol and by age 12, he was smoking cannabis and injecting oxycontin and other drugs on a daily basis. James' drug habit quickly spiralled, as did his mental health problems, and James had various hospital admissions for drug overdoses and self-harm injuries. By age 15, James was involved in the juvenile justice system and had convictions for arson and break, enter and steal. James was kicked out of home at aged 16 and was forced into homelessness, sleeping in parks and staying at refuges.

In the early hours of New Year's Eve, James, whilst in the company of two young people, robbed a man whilst he was walking home. James punched the victim a couple of times in the face, without causing any injuries, and stole his mobile phone. James was heavily intoxicated at the time of the robbery and had used drugs some days prior.

James pleaded guilty to robbery in company and was sentenced to an 18-month suspended sentence. It was his first adult conviction.

Within four weeks of receiving the suspended sentence, James has two sets of new criminal charges. At least one of the new offences took place whilst James was intoxicated. It is possible that James will be found guilty of these new charges and his suspended sentence will be revoked. Given James' circumstances, it is unlikely he will be eligible for an ICO, and his offences render him ineligible for home detention.

We are of the view that, if it were available, a suspended sentence in the context of the Drug Court program would have been more appropriate for James. This would have provided James with better support to manage his substance abuse issues which are a key factor in his offending.

We would also support the expansion of the eligibility criteria to include people whose primary drug of dependence is alcohol or benzodiazepines.

We acknowledge that the expansion of the Drug Court in these ways would be very resource-intensive. However, we believe there is ample evidence of the cost savings (both in dollars and in human terms) that flow from funding the program.

Question 9.5: Section 11 adjournment

Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

We are of the view that section 11 is working effectively and provides a valuable tool for sentencing magistrates and judges.

We would comment that section 11 is occasionally used inappropriately, where the outcome would inevitably have been a section 9 bond. In such cases a lengthy bond is imposed after the period of section 11 remand, so that the offender receives a harsher sanction and a longer period under supervision than is really warranted.

However, in the majority of cases section 11 is used appropriately, in circumstances where a few months' demonstrated rehabilitation can make the difference between a full-time custodial sentence and an alternative such as a suspended sentence.

Question 9.6: Intervention programs under the Criminal Procedure Act

1 Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?

In our view it is preferable for intervention programs to have some legislative backing, to promote them being used more widely and consistently by the courts, and ideally to help ensure the continued funding of such programs. Since the Traffic Offender Program has been prescribed as an intervention program, it appears to us that different Local Courts have been more consistent in making referrals to programs; however, we have no "hard" evidence of this.

2 Is there scope for extending or improving any of the programs specified under the scheme?

While the Traffic Offender Program is beneficial for some offenders, and ultimately serves the needs of the community by promoting road safety, it does not serve the needs of most of our clients, who do not have a licence and (due to the legislative regime of mandatory and cumulative disqualification periods, which will be further discussed in our submission on Question Paper 11) cannot hope to obtain a licence for several years.

Our experience of the Forum Sentencing program has been disappointing. In our view it is soundly based on restorative justice principles, and there is no doubt that a well-run forum can meet the needs of victims, hold the offender accountable for their actions and often get to the root causes of

their offending. The program has the capacity to work well when it is able to draw on the offender's existing support networks.

However, the current Forum Sentencing program is unable to effectively deal with disadvantaged offenders, because it is not resourced to provide services, and the forum sentencing staff and facilitators do not always have the expertise to make appropriate referrals. We also have concerns about whether forum sentencing is being run in a culturally-appropriate way for offenders from Aboriginal and other cultural backgrounds.

There are also real questions about where Forum Sentencing should sit in the sentencing hierarchy. Currently it is aimed at offenders who are likely to receive a custodial sentence.

However, we have often seen forum sentencing referrals made in the case of relatively minor offences (eg graffiti) where the offender has little or no criminal history and where a custodial sentence is most unlikely. Some would suggest that forum sentencing is more appropriately directed at these lower level offenders, to provide some intervention before they become entrenched in the criminal justice system, and by the time a person is facing imprisonment there may be a need for more intensive intervention. However, we are concerned about net-widening, as a forum intervention plan can impose onerous obligations on an offender.

3 Are there any other programs that should be prescribed as intervention programs?

We note that MERIT and CREDIT do not appear to be prescribed as intervention programs by the Regulations. We find this a curious omission.

Question 9.7: Restorative justice

1 Should restorative justice programs be more widely used?

We are in favour of restorative justice programs when they are appropriately run and adequately resourced.

We would support their wider availability, but careful thought needs to be given to the aims of such programs and how they fit into the sentencing process. For example, should a restorative justice process be a sentencing option in itself, should it be a diversionary option (as with conferencing under the *Young Offenders Act*), should it be merely one step in the sentencing process (as with forum sentencing), or should it be an optional procedure following sentence (as with the post-sentence conferences run by the Restorative Justice Unit of Corrective Services)?

We note the comment in paragraph 9.153 of the Question Paper that "the evidence for restorative justice as a means of preventing re-offending is mixed". By way of contrast, we note the reference in paragraphs 9.67 to 9.69 of the question paper about the very positive evaluations of the MERIT program. Not only did MERIT significantly reduce recidivism but also led to substantial cost savings. This illustrates our point that programs are most effective in reducing recidivism when they involve the provision of treatment and support. The unimpressive research findings about recidivism rates after participation in restorative justice programs is reflective of a lack of resources or support to complete intervention plans. We believe that if resources were available to support forum intervention plans we may see the better outcomes in terms of recidivism.

Having said that, we would caution against relying too much on recidivism as a measure of the effectiveness of restorative justice. While reducing re-offending is an important goal of sentencing and diversionary programs, restorative justice also fulfils other important purposes, most notably providing victims with a meaningful opportunity to participate.

2 Are there any particular restorative justice programs in other jurisdictions that we should be considering?

We do not have sufficient knowledge of restorative justice programs in other jurisdictions to comment on this. However, as mentioned earlier in this submission, we believe the *Young Offenders Act* provides a sound model which could be adapted for adult offenders.

Question 9.8: Problem-solving approaches to justice

1 Should problem-solving approaches to justice be expanded?

We support the expansion of problem-solving approaches to criminal justice. It is trite to say that the purposes of sentencing will not be achieved without addressing the social problems that underlie much offending.

Some might argue that it is not the role of the courts to facilitate the provision of social support and services, that more services should be provided before people become involved in the criminal justice system, and that people should not have to be charged with an offence in order to get access to services. However, the reality is that people will inevitably slip through the net. For some people, being involved in the criminal justice system is a motivator for change and may encourage them to engage with services when they were previously reluctant to do so.

There is a risk that too much emphasis on "problem solving" may come at the expense of procedural fairness and may in some cases provide an inappropriate incentive for people to admit guilt in order to access programs. In our view it is still vital that we have a robust criminal justice system that encourages people to defend charges where appropriate. For this reason we favour models such as MERIT and CREDIT which are voluntary and which do not depend on admission of guilt.

2 Should any of the models in other jurisdictions, or any other model, be adopted?

Our Principal Solicitor has visited the Red Hook Community Justice Center in Brooklyn, New York, and was impressed with its apparent success in reducing crime and social problems in its community. In our opinion, this type of model could be successfully replicated here. The choice of appropriate judicial officers and staff, the involvement of the local community, and adequate resourcing would be crucial to the success of such a program.

We have not visited the Neighbourhood Justice Centre in Melbourne, and nor have we visited any similar programs in any other jurisdictions. We are therefore unable to comment on which model would be preferable.

Question 9.9: Any other approaches

Are there any other diversion, intervention or deferral options that should be considered in this review?

At this point we are not offering suggestions for any further programs.

However, we note with disappointment the recent withdrawal of funding for the Youth Drug and Alcohol Court and the Cedar Cottage program for child sex offenders.

Although the Youth Drug and Alcohol Court has not received a thorough evaluation (we understand there are many challenges associated with this), most participants and other stakeholders are of the view that it has been a successful and much needed program.

We note the comments at paragraphs 9.98 to 9.101 of the Question Paper about the Cedar Cottage Program and its positive evaluation. We find it disappointing that an evidence-based program which meets the needs of victims and families as well as offenders has been sacrificed to a wholly punitive approach.

The Shopfront Youth Legal Centre
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