

Complaints Against Judiciary

Law Reform Commission of Western Australia Project 102 Discussion Paper September 2012

To

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Table of Contents

Proposals

- 1 Establish formal complaints system
- 2 Establish judicial commission
- 3 Standing to make complaints
- 4 Grounds for removal from office
- 5 Powers of Parliament
- 6 Procedural fairness

Questions

- A Jurisdiction of the proposed judicial commission
- B Sanctions
- C Power to suspend a judicial officer
- D Role of the Corruption and Crime Commission
- E Procedural fairness
- F Publicity of complaints
- G Sharing of resources
- H Membership of the proposed judicial commission
- I Membership of a conduct division
- J Functions of the proposed judicial commission

The Law Society of Western Australia comments on the Proposal/Questions in Appendix A to the Law Reform Commission of Western Australia (LRCWA) Discussion Paper, *Complaints Against Judiciary*, dated September 2012.

Proposals

1 Establish formal complaints system

The Commission proposes that a formal system for investigating and dealing with complaints against judicial officers in Western Australia be established by legislation.

The Society supports this proposal.

2 Establish judicial commission

The Commission proposes that a judicial commission be established in Western Australia, generally based on the commission operating in New South Wales.

The Society supports this proposal.

3 Standing to make complaints

The Commission proposes that any person may complain to the proposed judicial commission about the conduct of a judicial officer.

The Society supports this proposal.

Support for a Judicial Commission carries with it recognition that there is a need for such a body. In accepting such a need there would appear to be no basis to limit the description of persons who may lodge a complaint with the Judicial Commission.

An unlimited approach for any person to lodge a complainant is consistent with other statutory bodies: New South Wales Judicial Commission; New Zealand Judicial Commission; Legal Practitioners Complaints Committee; Medical Practitioners Act 2008 (WA).

However, it is considered that there would need to be a strong filtering mechanism supported by statute for the Judicial Commission to summarily remove complaints which are plainly unmeritorious or which relate to the exercise of judicial discretion (including case management, sentencing and reasons for decision), as this is already managed by the head of the relevant jurisdiction. In any event, there are already appropriate mechanisms to deal with many matters i.e. by way of appeal.

Further, as is the case in New South Wales, the Judicial Commission should have the power to classify a person as a vexatious complainant and disregard a complaint made by that person while a declaration is in force.

4 Grounds for removal from office

Presently, a number of Western Australian statutes provide that judicial officers keep office during 'good behaviour'.

The Commission proposes that the Western Australian Constitution Act and the statutes establishing Western Australian courts and tribunals be amended to provide uniformly that the grounds for removal from office of a judicial officer are misbehaviour or incapacity.

See comments under questions B and C.

5 Powers of Parliament

The Commission proposes that Parliament be the only body capable of removing a judicial officer from office for misbehaviour or incapacity and that removal should only follow an address to both Houses of Parliament.

The Society points out that the proposal would be a change from the present system. Presently, a judicial officer is removed by the Governor after both Houses of Parliament have voted to that effect. This is because it is the Governor who makes the appointment.

6 Procedural fairness

The Commission proposes that standards of procedural fairness be observed at each stage of the complaints process. Rights which should be afforded include:

- (a) the right to be heard;*
- (b) the right of a judicial officer to know the case against him or her;*
- (c) the right to representation by counsel; and*
- (d) the right to put questions to witnesses.*

The Society supports this proposal.

Questions

A Jurisdiction of the proposed judicial commission

Currently, the Protocol covers complaints against judges, masters and registrars of the Supreme Court, the District Court and the Family Court of Western Australia, judicial members of the State Administrative Tribunal and magistrates. Are there any other officers exercising judicial or quasi-judicial functions who should be subject to the jurisdiction of the proposed judicial commission?

The Society recommends as follows:

- The jurisdiction of the Judicial Commission should cover any persons who hold office acting judicially or quasi-judicially, including Registrars and mining wardens, whether acting judicially or not.
- The term 'judicial officer' for the purposes of the Judicial Commission should be defined.
- Non-judicial members of the State Administrative Tribunal (SAT) do not fall within the *Public Sector Management Act*. Questions of complaint against conduct fall to the head of jurisdiction. This duplicates the functions and powers of the proposed Judicial Commission. Accordingly, the powers in the *SAT Act* providing for investigation and discipline should either be amended or their exercise ought to be referred to the Judicial Commission.
- The Judicial Commission should have jurisdiction over conduct by anyone who is a 'judicial officer' regardless of whether the conduct in question occurred when the judicial officer was acting as a judicial officer. This is the case for legal practitioners under the *Legal Profession Act 2008*. Whilst the

preponderance of complaints is about practitioners' conduct as a lawyer, the jurisdiction of the Legal Profession Complaints Committee is not limited to conduct in the practitioner's capacity as a lawyer.

In s 121 of the Criminal Code, the term **holder of a judicial office** includes an arbitrator or umpire and any member of any board or court of conciliation or arbitration. The Society does not recommend that the jurisdiction of the Judicial Commission be extended to arbitrators and umpires. Arbitrators do not hold judicial office. They are governed by the *Commercial Arbitration Act* and act as a one-off engagement rather than an ongoing appointment. Umpires likewise do not hold judicial office and are likewise the subject of a one-off engagement rather than an ongoing appointment.

B Sanctions

Should there be a power to impose formal sanctions short of removal from office (eg, disciplinary measures) and, if so, what sanctions may be imposed and who may exercise that power?

The Society does not support the imposition of sanctions on a judicial officer short of dismissal from office. It is the Society's view that the concept of sanctions is not compatible with judicial independence. In this regard, there is a significant issue of terminology which is not merely semantic.

The Society does support provision of education and other support that empowers the judicial officer to improve their conduct.

The relevant distinction is between external imposition of adverse consequence(s) on the one hand (ie 'discipline' or 'sanction') and education, counselling, advice etc that allows or even encourages self-reflection and internally driven change of behaviour on the other.

The UK model incorporates 'sanctions', those sanctions being formal advice, formal warning or a reprimand. In the Society's view, publication of such 'sanctions' (especially reprimands) has the potential tendency to undermine confidence in the judiciary without ensuring improvement of behaviour.

The 'sanctions' contemplated in the LRCWA Discussion Paper are open ended. It is submitted that suspension, fining or other punitive forms of 'discipline' have the potential to impact on both the independence of the judiciary ie. if an administrative body (being an arm of the executive) were able to impose sanctions upon the members of the judicial arm of government.

Moreover, any 'education' and other potential remediating steps that might be recommended by or imposed by the Judicial Commission (depending on its power) ought not to be viewed as imposed by way of 'sanction'.

Former Chief Justice Murray Gleeson delivered a speech in 2005 which spoke to the difficulty in Australia of prescribing a scheme of judicial sanctions, noting the importance of judicial independence and the danger of punishing judges for what the executive may consider bad decision making, which could include unpopular decision making.

The Society considers that application of relevant education or counselling is an appropriate way of dealing with behaviour falling short of that required for a finding of unfitness for office. Failure on the part of a judicial officer to 'absorb' that education etc and repetition of the conduct in question might be an indicator of a lack of fitness for office in respect of which a further complaint may precipitate dismissal

C Power to suspend a judicial officer

Should there be a power to suspend a judicial officer from the exercise of any power of office following a charge of a serious offence, or while an investigation by the judicial commission is pending. If so, under what circumstances should a suspension be available, and on what terms may suspension be directed? Should each head of jurisdiction be entitled to exercise the power of suspension in respect of judicial officers in his or her jurisdiction?

The Society does not support the suspension of Judicial Officers.

Suspension of a judicial officer is an act of discipline. It is inappropriate on that basis for the reasons set out above under 'sanctions'.

It ought to be noted, at least anecdotally in respect of other jurisdictions, that a power to remove a judge from the point of interaction with the public may already exist. If it is considered that it is inappropriate for a judicial officer to sit (say, if there were pending criminal charges of significant seriousness), the head of the relevant jurisdiction is not obliged to allocate them cases. Accordingly, if 'suspension' is proposed to protect the integrity of the judiciary pending a full investigation, the end can be achieved by allocating the judicial officer in question 'judgment writing time'.

D Role of the Corruption and Crime Commission

Should the Corruption and Crime Commission retain its jurisdiction in relation to complaints against judicial officers if a judicial commission is established? If so, what should the limits of that jurisdiction be and to what extent would it be co-extensive with the jurisdiction of the proposed judicial commission?

It is the Society's view that the WA Police and the CCC should maintain their concurrent jurisdictions to investigate criminal allegations against judicial officers and that the Judicial Commission not conduct criminal investigations. Consequential amendments to the *Corruption & Crime Commission Act 2003* (CCC Act) and any replacement protocol for complaints against judicial officers are recommended (see below).

At present both the WA Police and the CCC may investigate complaints of criminal misconduct against judicial officers, however the CCC's role is limited to:

- allegations relating to the offence of judicial corruption under s 121 of the *Criminal Code* (WA); and
- allegations, that if established, would constitute grounds for removal from office.

Further, such CCC investigations must be conducted in accordance with 'conditions and procedures formulated in continuing consultation with the Chief Justice'.

The LRCWA does not see any reason by the CCC's jurisdiction to investigate alleged criminal misconduct of a judicial officer should not operate concurrently with that of the proposed judicial commission but has opened the question for public submission.

Relevant legislative provisions are:

Criminal Code (WA)

121. Judicial corruption

Any person who —

- (1) *Being the holder of a judicial office, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in his judicial capacity; or*
- (2) *Corruptly gives, confers, or procures, or promises or offers to give or confer, or to procure or attempt to procure to, upon, or for any person holding a judicial office, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person holding the judicial office;*
is guilty of a crime, and is liable to imprisonment for 14 years.

The term ‘holder of a judicial office’ in this section includes an arbitrator or umpire and any member of any board or court of conciliation or arbitration; but in the case of an offence committed by or with respect to any such person, the longest term of imprisonment is 7 years.

A prosecution for an offence under paragraph (1) cannot be begun except —

- (a) by a public officer acting in the course of his duties; or
- (b) by or with the consent of the Attorney General.

Corruption & Crime Commission Act 2003

27. Allegation about Commissioner, Parliamentary Inspector or judicial officer not to be received or initiated

- (1) *An allegation about the Commissioner must not be received by the Commission.*
- (2) *An allegation about a person in his or her capacity as the Parliamentary Inspector, or an officer of the Parliamentary Inspector, must not be received or initiated by the Commission.*
- (3) *An allegation about a person in his or her capacity as the holder of a judicial office must not be received or initiated by the Commission unless the allegation relates to —*
 - (a) *the commission or attempted commission of;*
 - (b) *the incitement of the commission of; or*
 - (c) *a conspiracy to commit,**an offence under section 121 of The Criminal Code or is of a kind that, if established, would constitute grounds for removal from judicial office.*
- (4) *The Commission, when performing its functions in relation to the conduct of a holder of judicial office must proceed having proper regard for preserving the independence of judicial officers.*
- (5) *When investigating a holder of judicial office, the Commission must act in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice.*
- (6) *In this section —*
‘holder of a judicial office’ has the same meaning as it has in section 121 of The Criminal Code.

Current process

Allegations of three types may be made to a police officer:

- criminal misconduct;
- misconduct not involving suspected criminal behaviour; and
- conduct that may attract the jurisdiction of the CCC.

Under paragraph 18 of the current *Protocol for Complaints Against Judicial Officers in Western Australian Courts* (Protocol), allegations made to police should be reported by the officer receiving the complaint to the Assistant Commissioner (Corruption Prevention and Investigation), who will report the complaint to the Commissioner of Police and the relevant Head of Jurisdiction.

The protocol notes the jurisdiction of the CCC but does not provide any guidance as to how it interacts with that of the WA Police.

Effect of creation of a Judicial Commission

The likely possible effect of the creation of a Judicial Commission is that there will become three bodies within Western Australia that hold some jurisdiction with respect of complaints against the judiciary where such conduct would appear to amount to corruption of an offence of such seriousness so as to constitute grounds for removal, being:

- WA Police;
- Corruption & Crime Commission;
- Judicial Commission.

In the Society's view it is not desirable to have considerable overlap or multiplicity of bodies that may conduct investigations or deal with such complaints. Further, in order to maintain transparency, it should be clear, which body performs which role.

In order to obtain the least overlap, clearest transparency and minimal cost in any Judicial Commission structure, the following is proposed:

1. Where the Judicial Commission receives a complaint against a judicial officer of a criminal nature, it should be referred to the WA Police in the first instance.
2. The WA Police and CCC maintain their concurrent jurisdictions.
3. Where the WA Police receive a complaint against a judicial officer, any replacement Protocol (likely issued by the Judicial Commission), state that instead of the Assistant Commissioner reporting the complaint to the relevant head of jurisdiction, it instead be reported to the Judicial Commission.
4. Any replacement Protocol or a Memorandum of Understanding between the WA Police and CCC contemplate that where the Commissioner receives a complaint that falls within the jurisdiction of the CCC under s 27(3) of the CCC Act, such complaint be referred to the CCC.
5. Section 27(5) of the CCC Act should be amended to refer to the Judicial Commission, rather than the Chief Justice.
6. The Judicial Commission should publish the conditions and procedures it formulates for the purposes of s 27(5) of the CCC Act.

7. Assuming the complaints model currently utilised in NSW is recommended, consideration should be given to modifying it for circumstances where the complaint against a judicial officer received or notified to the Judicial Commission is of a criminal nature and the Police or CCC are pursuing an investigation, so as to ensure that any such investigation is not jeopardised by the informing of the judicial officer concerned of the complaint until an appropriate time.
8. Where a complaint investigated by the WA Police or CCC does not result in the laying of charges, the WA Police or CCC should report the outcomes of their investigations to the Judicial Commission, for consideration as per the normal complaints procedure.
9. Where charges are laid against a judicial officer, the Head of Jurisdiction should be notified.
10. Where a complaint investigated by the WA Police or CCC results in charges being laid, the Judicial Commission may act upon the outcome of such criminal process as it sees fit.

The Society is of the view that the potential alternative of a Judicial Commission taking on the function of investigating criminal type complaints against judicial officers in the first instance would impose a heavy administrative and cost burden on a Judicial Commission and merely serve to duplicate the powers and resources already available to the WA Police and CCC.

E Procedural fairness

Are there any other standards of procedural fairness that should be required in the investigation of any complaint?

The Society submits that the rights afforded (as listed under Proposal 6) should also include the right to bring evidence.

F Publicity of complaints

To what extent should the complaints jurisdiction and activities of the proposed judicial commission be a matter of public record? In particular:

- (a) *Should details of complaints, the identity of judicial officers, the subject matter of complaints and their disposition be announced publicly?*

In the Society's view the answer to (a) should be no as the number of baseless complaints may suggest to the public that there are more problems with the judiciary than really exist. Although this reduces transparency, in this instance the public interest favours a lack of transparency.

- (b) *If so, at what stage in the complaint process and on what, if any, conditions?*

In response to (b) it is the Society's view that ordinary complaints and behavioural issues should mimic the Legal Practitioner Complaints Committee process whereby initial investigations and 'summary' dismissal are closed and confidential. More serious complaints that would result in dismissal should be akin to SAT proceedings with respect to legal practitioners, which are open to the public.

As a baseline, statistics on complaints should be published annually.

- (c) *Should a complainant be able to lodge a complaint with a non-binding request for confidentiality of the complaint, or of the identity of the complainant?*

To ensure appropriate checks and balances and to prevent vexatious litigants, initial complaints to the commission should, unless there is a demonstrated need for anonymity, not be anonymous.

There may be cause for anonymity as between the complainant and the judicial officer, but it is difficult to identify a reason for anonymity as between the complainant and the judicial commission.

Once the commission accepts the complaint for investigation, there should be protection of the complainant if the complainant requests protection. This is common in other complaints regimes (e.g. Auditor General).

- (d) *Should there be special provisions as to publicity of evidence considered during an inquiry into incapacity, for example, medical reports as to the condition of a judicial officer?*

The Society considers that there ought to be restrictions on publication of evidence in relation to capacity during the course of the Judicial Commission's investigations. Upon resolution of the complaint:

- (a) there is no reason for publication of a report that finds incapacity, absent the consent of the Judicial Officer in question – once a finding of incapacity is made, it is difficult to see that further examination of the basis of incapacity is in the public interest;
- (b) there is no reason to publicise a report that falls short of establishing incapacity, as such publication would only serve to undermine confidence in the administration of justice.

G **Sharing of resources**

The proposed judicial commission should be independent of other branches of government administration. Are there any other bodies with compatible activities which may share staff, resources or functions with the proposed judicial commission?

The Society is unaware of appropriate branches of government administration to share resources with a judicial commission.

However, costs of a judicial commission are of concern as support services could be significant. Anything that could be done to keep costs down would be supported by the Society subject to the overriding independence of the work of the judicial commission.

H **Membership of the proposed judicial commission**

The Commission proposes that each head of jurisdiction be an ex officio member of the judicial commission. What other members, if any, should be members of the proposed judicial commission? Should there be representatives of the legal profession and lay members, as is the case in New South Wales, and how should they be selected?

The Society is of the view that the membership of the proposed judicial commission should include:

- (a) heads of each judicial body (not the State Administrative Tribunal);
- (b) representative(s) of the legal profession;
- (c) lay representatives of the community.

It may also be appropriate for members of the judiciary who are not heads of jurisdiction to be members of the judicial commission. This is especially so, if the Conduct Division is to be drawn from the membership of the Judicial Commission (as to which see below).

The LRCWA's proposal contains the suggestion that each of the heads of jurisdiction (the Chief Justice, the President of the State Administrative Tribunal (SAT), the Chief Judges of the District Court and the Family Court and the Chief Magistrate) are appropriate as ex officio members. It then queries who else ought to be members.

The Society queries whether the President of the State Administrative Tribunal ought to have a role on the Judicial Commission. The President is a member of the Supreme Court and the Deputy Presidents are members of the District Court. If the proposal in relation to the Judicial Commission does not include a jurisdiction to review the conduct of SAT members, then there is no reason for the President to be a member. If the jurisdiction of the Judicial Commission does include SAT, then it is sensible for the President to be a member.

The Society considers that it would be wholly inappropriate for the membership of the Judicial Commission to be limited to heads of jurisdiction or members of the judiciary. There would be a danger of public perception that the Commission is inherently biased and skewed to the dismissal of complaints.

The Society submits that appropriate membership of a judicial commission for Western Australia would include:

- (a) representatives of the legal profession of Western Australia; and
- (b) given that the community is another key stakeholder, 'community members'¹.

The Society considers that the mode of appointment of representatives of the legal profession, and the community, is a matter of detail rather than of principle and this submission does not attempt to address that here.

However, the question of time commitment is unclear.

If the time commitment is low, it might be expected that participation on the Commission would be 'volunteered'. If it is other than low, the question of appropriate remuneration also arises. Given the significant time commitment likely, there is a question about whether each member other than the heads of jurisdiction ought to be able to appoint an alternate.

¹ In NSW, community members are appointed by parliament; which perhaps means that those representatives reflect the committee's interest of both the community and the parliament (as the third arm of government).

I Membership of a conduct division

How should any conduct division of the proposed judicial commission be constituted and how should members be appointed?

The Society queries whether the volume of complaints justifies a 'conduct division' that is constituted separately from the Judicial Commission. The Society notes that the Legal Practice Board (as previously constituted) formed a complaints committee from its general membership. There seems no reason why the 'Conduct Division' could not be constituted from the membership of the Judicial Commission, subject to the following limitations.

The Society recommends that any conduct division be constituted by three members of the Judicial Commission:

- (i) a current or retired judicial officer;
- (ii) a member of the legal profession; and
- (iii) a community representative.

Under the New South Wales model, a conduct division is appointed by the Judicial Commission to examine and deal with complaints that have not been dismissed following preliminary examination by the Judicial Commission.

Given the volume of complaints identified in the LRCWA's Discussion Paper (approximately 100 per year in 2006 made directly to the Chief Justice), the likely role of the Judicial Commission will be 'filtering' complaints which are not directed to the conduct of or fitness for office of judicial officers. The filtering process needs to be robust to dispose of unmeritorious complaints immediately (including but not limited to frivolous or vexatious complaints). It should also be able to forward other complaints that may have merit to appropriate authorities where the judicial commission is the wrong forum. Any referral of a complaint to the conduct division should be only after an initial assessment and recommendation. Otherwise, complaints will invariably be dealt with by the conduct division with the consequent cost of time and resources.

The vice of establishing a conduct division is primarily its cost. If a conduct division is to be constituted on an ad hoc basis, the cost may be limited but the question arises as to the volume of complaints that are not dismissed following a preliminary examination and the resources required to investigate those complaints. If there are few (and anecdotally it would appear to be the case that few complaints are presently not summarily dismissed), there may be limited call for a separately constituted division. The Society suggests that it would be appropriate for the conduct division to be a sub-committee of the Judicial Commission.

The Society considers that (contrary to the position in New South Wales) the constitution of the conduct division should be two judicial officers and a community representative. That gives the perception of the bulk of the division being vested interests and in a position to overwhelm the community representative. Moreover, that model omits an important stakeholder, being the legal profession.

The Society suggests that a conduct division be constituted by:

- (a) a judge (who must not be a member of the Court in respect of which the judicial officer under complaint is a member);

- (b) a representative of the legal profession; and
- (c) a community representative.

The cost of establishing such a conduct division must be considered, and appropriate remuneration paid to members if their time commitment is other than low.

J Functions of the proposed judicial commission

Should the judicial commission perform any functions other than the investigation and making of recommendations as to complaints as to the conduct of judicial officers and, if so, what should those functions be?

Ultimately, the question of the function of the proposed Judicial Commission is strongly related to the question of costs.

In the Society's view the functions of the judicial commission should also include the following.

Educative role

Accepting that the purpose of the Judicial Commission is to ensure that the current high standards of the judiciary in Western Australia are maintained, then the best way of achieving this is to ensure that members of the judiciary are provided with all relevant resources to enable them to perform their important role. A Judicial Commission which focuses only on complaints will not achieve this aim.

The NSW Judicial Commission principal functions are described as being:

- to assist the courts to achieve consistency in sentencing
- to organise and supervise an appropriate scheme of continuing education and training of judicial officers
- to examine complaints against judicial officers.

The Commission may also:

- give advice to the Attorney General on such matters as the Commission thinks appropriate; and
- liaise with persons and organisations in connection with the performance of any of its functions.

The primary way in which the NSW Commission provides its educative role is through the publication of Bench Books in each jurisdiction which contain a wealth of practical information tailored to the needs of each jurisdiction to assist a judge or magistrate. Bench Books ensure that there is a "house style", and ensure that information regarding the processes of the court is captured for the benefit of both sitting and incoming judges and magistrates. These Bench Books are also available for access by practitioners, which promote the ability for practitioners to appear in jurisdictions with which they may not be familiar,

The NSW Judicial Commission also provides education conferences, seminars and training.

A centralised database for sentencing in Western Australia would also promote consistency in sentencing, and over time could be seen to reduce the work load of the Court of Appeal by reason that appeals based on consistency of sentencing ought to be reduced. In this regard it is noted that access to the NSW sentencing database is by way of subscription, which presumably offsets the cost of establishing and summarising sentencing decisions for input into the database.

It is submitted that a Judicial Commission for Western Australia should have similar functions to those of the NSW Judicial Commission, subject to there being an appropriate funding model to ensure the functioning of the Judicial Commission at an appropriate standard.

Mental health and wellbeing

Anecdotally, a number of complaints against judges are based upon delay in delivering decisions and other conduct that could be symptomatic of underlying mental health issues.

Delivery of counselling, training and support to the judiciary is undoubtedly a matter that is likely to reduce the number of complaints in any event.

Cost

The Society considers that practically all potential functions of a Judicial Commission would be beneficial to the public. However, each function of the commission additional to that of the conduct of judicial officers has a cost additional to that of the 'base model'.

It is noted in the LRCWA's Discussion Paper that courts are left to fund education for judges from their own budgets with little specific assistance from general revenue. The Society agrees that is a problem.

The additional functions of a Judicial Commission are desirable, it being a public benefit to have a body that is responsible for the education, mental health and administrative support of judges. However, the Society observes that it is unclear from where the funding would be sourced and strongly recommends that the required funding of any body be fully considered and a budget proposed before a Judicial Commission model is chosen.

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President

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