

**RESPONSE OF THE LEGAL ACTION GROUP  
TO THE WHITE PAPER ON TRIBUNALS:**

Miss Claire Gray  
Administrative Justice Division  
Department for Constitutional Affairs  
Selborne House  
54 – 60 Victoria Street  
London SW1E 6QW

14 October 2004

Dear Madam

**Transforming public services: complaints, redress and tribunals**

The Legal Action Group (LAG) is grateful to the Administrative Justice Division for providing an opportunity for interested parties to comment on the ideas set out in the White Paper on tribunals. As you may be aware, LAG is a national charity committed to improving access to justice, particularly for the vulnerable and socially excluded. LAG works with lawyers and advisers to improve standards and knowledge of social welfare and criminal law amongst practitioners, by publishing a monthly magazine and legal handbooks and providing training for lawyers and advisers. We also comment and campaign extensively on social welfare and criminal law issues, on administration of justice and on the delivery of publicly funded legal services. LAG does not represent any particular interest group: our primary concern is with quality and access to justice for the users and potential users of legal services.

In this response to the White Paper proposals, we have primarily focused on the main themes and ideas rather than discussing points of detail. We assume that there will be further consultations specifically addressing detailed proposals for implementation.

LAG welcomes the ambitious approach taken by the White Paper; we broadly support many of its contentions and welcome many of its proposals. We would like to place on record our support for the White Paper's 'whole system' approach to administrative justice, its commitment to the independence of tribunals and its proposal that the DCA, as a non-decision making department, should take the lead on redress policy. We also support the proposal for a single judicial office; the intention to extend administrative redress to those who do not at present seek it; to establish an Administrative Justice Council; and to commission research and run pilot projects to inform the development of services. The proposals for active case management are also very welcome.

Nonetheless, we do have some concerns about certain proposals in the White Paper and some of the assumptions behind these proposals. We summarise these below (for ease of reference, we have structured this response under chapter headings used in the White Paper). We believe that there are also some fundamental questions to be addressed about the implications for the administrative justice system of the changes contemplated by the DCA. A shift from the language of 'rights' to the language of 'redress', and the proposals relating to mediation, imply that many disputes against the state can be settled by the parties meeting each other half way, each compromising their position to reach agreement. While we accept that there may be a few categories of dispute for which this could be appropriate, for the majority of disputes this is not the case. We do not think it is in the public interest for a public body, making decisions within a statutory framework, to be given leeway to (say) give an unrepresented claimant half the benefits to which he or she claims entitlement, in order for the expense of a tribunal hearing to be avoided; or to give 'humanitarian protection' to an asylum seeker who should have qualified for full asylum.

We also believe that there are important questions to be asked about the effect on the whole justice system of devolving and separating dispute resolution into a variety of alternative processes, some of which involve resolution in private forums. The adage that 'justice should be seen to be done' is important; public justice helps build public support for the rule of law. It also contributes to consistency of decision making. Keeping the full range of dispute resolution options under the close control of the Administrative Justice System (rather than allowing them to be privatised or out-sourced) will help to some extent, but will not overcome all these concerns.

A final but important point: we suggest that an Administrative Code should be developed as a framework against which government departments would take administrative decisions; the Administrative Justice System would also have regard to the code when considering appeals. One possible model is the Australian Public Service Values and Code of Conduct. All public service employees in Australia are bound by this code and sanctions are available if it is breached. A code of this type could increase the transparency of decision making and facilitate consistency of administration between different government departments.

## **Chapter 2: Proportionate dispute resolution**

Para 2.3: We agree that it is important to make the law as clear and simple as possible. Few individuals enjoy conflicts and the White Paper is right to suggest that people should be helped to avoid legal problems and disputes in the first place and that, generally speaking, disputes that cannot be avoided should be resolved with reference to cost effectiveness. We particularly support the suggestion that people's understanding of their rights and responsibilities should be improved. LAG, in collaboration with the Advice Services Alliance and the Citizenship Foundation, has produced a discussion paper *Towards a national strategy for public legal education* which makes out the case for public legal education and argues for a comprehensive, cross governmental strategy to promote and deliver this. A copy of the discussion paper is annexed to this letter, for reference.

The proposal that people should have ready access to early and appropriate advice and assistance is also one that we would strongly support. However, to reiterate a point made in our response to the Leggatt review of tribunals, it is important not to under-estimate the complexity of areas of law relating to tribunal jurisdictions. *Early* advice and assistance is only part of the picture; many people also need advice and representation at the *later stages* of a case. We are concerned that the White Paper appears to make little reference to this need. Even for a case that is resolved through mediation, it is usually important for the less powerful party to be advised throughout the process to avoid them reaching an inappropriate or unfair settlement. This is all the more important given that public bodies – including government departments – would usually have access to in-house legal support both before and during a mediation process.

Para 2.6: The subsection of the paper headed *‘What do people want?’* makes the valid point that different people seek different outcomes and favour different processes for their cases. However, it is also important to realise that if someone is out of their depth in an unfamiliar setting they may not know what they want without relying very heavily on advice from someone with more expertise. Thus, the choice between different options for resolving a dispute does not become a real choice unless it is backed up by information and based on genuine understanding. Conversely, inaccurate, misleading or selective information could distort someone’s decision at a time when they are anxious and susceptible to suggestion.

A further concern is that the consumer-focused question of ‘what people want’ is not always the only factor that should be brought into play. It is sometimes in the public interest for a case to be pursued at a hearing so that the tribunal (perhaps at appeal level) can make a clear ruling on a point of law, or otherwise to clarify and improve the standards of administrative decision-making.

Para 2.11: The summary of different ADR processes is helpful, and accurately illustrates the wide differences between various approaches. However, while we accept that early neutral evaluation can be useful in moderating a party’s unrealistic claims, it is worth noting the potential for a similar role to be fulfilled by good and timely legal advice to the party in question.

### **Chapter 3: The Administrative Justice Landscape**

Para 3.9: We wholly endorse the view expressed in the White Paper that government departments should aim to get decisions right first time. This is clearly the most effective strategy for avoiding administrative law disputes in the first place. In Australia, the Administrative Review Council argues strongly that a central element of good decision making is decision makers’ understanding of the legal and administrative framework within which decisions are made. The Council has produced legal training material for primary decision-makers, covering the legal and administrative framework, interpretation of legislation, decision-making processes and administrative law review bodies. This work complements the role of the Public Service Values and Code of Conduct, mentioned above.

However, we have some concerns about the idea that public bodies should necessarily aim to work more flexibly, with decision-makers being encouraged to

take responsibility for delivery and gearing what they do to individuals, rather than to rigid rules. This approach could lead to many decisions being based on the decision-maker's discretion rather than on entitlement to a particular benefit or facility. Experience suggests that giving discretion to decision makers can lead to a presumption against this being exercised in the applicant's favour, especially if a 'culture of disbelief' emerges within the decision-making body – as it has within the asylum division of the Home Office. It is also difficult for applicants to bring successful appeals against adverse decisions based on discretion, unless the appellate body is expressly permitted to substitute its own discretion for that of the decision maker.

We are not necessarily advocating unhelpful rigidity in decision-making. We recognise that, in practice, senior officers may have a certain discretion to bend rules in the favour of applicants and may also have an important overall role in reviewing refusals. However, if this is the case, the hierarchy of decision making should be transparent. On the other hand, we would also argue that the advantages of clarity and certainty within administrative rules should not be overlooked. In this context, it might be useful to consider the rule-based approaches to decision-making that have been piloted in Australia, and which have been found to lend themselves to automated (ie, computer-based) assistance.

#### **Chapter 4: The Development of Ombudsman Services**

Para 4.18: The point is made that many of the private sector ombudsmen have seen an initial rise in complaints being followed by a decline, because firms learn to treat their customers in a way that does not generate ombudsman cases. While we do not dispute this observation and recognise the contribution that feedback mechanisms can make (see our comment on paragraph 6.32), the 'virtuous circle' is likely to be driven in part by the private sector's economic motives for avoiding the time and resources (and often the fee) involved in these cases. We are not convinced that this attitude would be transferable to the statutory sector, as public bodies are not subject to the same direct economic forces. After all, adverse tribunal decisions appear to have had little effect on (say) the decision making of the DWP.

Para 4.21: The idea that a coherent tribunal system would also have the capacity to make a range of interventions and resolve disputes through different processes, as envisaged by the White Paper, is certainly worthy of exploration. However, it would

be important to avoid the potential tension between the new system's role in resolving disputes informally in partnership with government departments, and its role in providing facilities for formal resolution through hearings. The two mechanisms must be procedurally distinct, and in any particular case the 'facilitating' personnel should be distinct from those who formally adjudicate at hearings. However, we recognise the potential benefits of co-locating mediation services and hearing centres; there has been positive feedback from pilot court-based mediation projects at two county courts.

## **Chapter 5: Tribunals: The Service Today**

Para 5.21: We do not disagree that savings in staff costs are possible through economies of scale and by integrating staff in fewer locations, with fewer hearing centres. However, we are concerned about the possibility that IT based contact would be seen as largely replacing telephone and postal contact for members of the public, a development which would create problems for people who do not have access to computers or the skills to use them. Reducing the number of hearing centres, unless carefully planned, could also create problems of geographical access for people living in rural areas and small market towns, especially those who rely on public transport. Travelling to centres would presumably be necessary not just for formal hearings, but also for mediation sessions and perhaps other dispute resolution processes. The DCA should perhaps consider the possibility of outreach services by members of the tribunal judiciary.

There is an implication in the White Paper that judicial costs are currently using a proportion of the tribunals' budget that is unacceptably high. We agree that there is scope for reduction in judicial costs through introducing a single judicial office, a move that we would also support because of the enhanced status and career opportunities that it would bring to tribunal work. However, we would not be happy were there to be a suggestion that potential tribunal users should be placed under subtle or not-so-subtle pressure to turn down the opportunity of a formal hearing as a means of saving the system costs.

## **Chapter 6: Resolving disputes: A new approach**

Para 6.4: The commitment to resolving disputes in the best way possible and to stimulating better decision-making is laudable, but extremely ambitious. It will require

powerful leadership not just from within the DCA, but also right at the centre of government. We hope that there will be sufficient political will and adequate resources for this vision to become a reality.

Para 6.20: We accept that there are many cases where new evidence can lead to a successful appeal; there may also be circumstances where the new evidence could be considered without a formal hearing – especially where the evidence is documentary in nature. However, it is important to recognise, not only that many disputes involve disagreements about points of law, but also that drawing a distinction between factual and legal disputes can sometimes require a high level of judicial expertise. It would be a mistake to think that identifying ‘straightforward’ cases is a task that can be easily delegated to junior staff. At the very least, they would need judicial supervision. One possible option would be to allow non-judicial staff to grant a limited range of applications made by appellants, but not to refuse them.

Another factor is the importance of oral evidence, especially where issues of credibility are involved. Illustrative of this is the evidence in the report of the President of Appeal Tribunals (2003 – 2004), which notes that the appeal tribunal took a different view of the same evidence in 39 per cent of overturned cases, and accepted evidence that was available to, but not accepted by, the decision-maker in a further 21 per cent of these cases. One of the common reasons for the tribunal taking a different view was that the appellant shed new light on the evidence; very often, this was at an oral hearing.

We are also concerned that there may be some confusion between the use of the word ‘reconsideration’ at the end of paragraph 6.20 – which usually suggests some form of internal review by the decision-making department – and the process of mediation or conciliation that is described elsewhere. It is important to be clear exactly what is involved in these pre-hearing processes.

Para 6.21: In our view, the suggestion that staff members should be able to work with delegated judicial powers must be approached with great caution, to ensure that they are not expected to carry out tasks that require detailed understanding of the law or involve judicial skills. As noted above, it is not always clear whether or not a case involves a point of law. It is also important that staff members with delegated

powers are closely supervised through face-to-face contact with tribunal judges, and are able to consult with them as necessary and/or refer complex cases to them.

Para 6.23/Para 6.31: We are pleased that the White Paper confirms the DCA's commitment to ensuring that no appellant will lose the right to a hearing. However, as stated above, it is important to ensure that appellants are exercising a genuine and informed choice between the options available, and are not simply swept along in the direction of informal (or non-hearing) resolution – or even actively discouraged from opting for a formal hearing – if the latter would be in their best interests.

It is also important to ensure that approaches seeking compromise settlements, such as mediation and conciliation, are not inappropriately used for disputes with the state that are not amenable to compromise – such as those relating to applications for asylum, or applications for means tested benefits. However, there may be cases in which pre-hearing settlements can be achieved; we would argue that, first, appellants should have the benefit of legal advice and, second, that compromised settlements should be recorded in a prescribed form of document. This would be similar to a court consent order, which could be reviewed on appeal if there was an issue as to whether or not consent was informed – for example, where the appellant was unrepresented.

Para 6.31: We agree that it is important not to lose the opportunity of observing the quality of the administration behind the decision that is the subject of the appeal and to allow tribunals to give guidance on administration. However, if members of the tribunal judiciary are to make 'obiter' (ombudsman-style) comments on the way the decision was administered, this role must be approached with care. There might be a danger of inconsistency; some judges would pay close attention to such factors (perhaps spending too much time on them), whereas others might consider it a distraction from the issues of fact or points of law central to consideration of the appeal. Such comments could also, and perhaps more systematically, emerge from an earlier consideration of the case by non-judicial staff.

Para 6.32: We would strongly endorse the idea that the new tribunal organisation should develop effective feedback to departments. However, we are wary of the suggestion that the organisation should share government-imposed targets and objectives with decision-making departments. In the criminal justice system, this has led to an unfortunate blurring of roles between the different constituent parts of the

system, including the DCA - which should, in our view, maintain a more neutral stance. For example, the list of strategies for meeting the Justice Gap targets on increasing the rate of criminal convictions includes the recent changes to the rules of evidence introduced by the Criminal Justice Act 2003.

Para 6.67: We suggest that the role of non-legal members may continue to be important at hearings, especially where the credibility of oral evidence needs to be assessed. The role of non-legal members on panels is not so much to represent 'particular interests' as to help ensure that there is a balance between different perspectives and backgrounds within a fact-finding panel and to ensure that the 'human' elements of the case are properly recognised. If it is proposed that the role of lay members be reduced, we suggest that as a minimum they should continue to be used when the tribunal directs, either on the application of one of the parties or on its own initiative with the consent of at least one of the parties.

We agree that having an expert on the panel, as opposed to giving evidence to the tribunal, creates problems for the parties (who cannot question him/her as a witness). There may also be a problem if other members of the panel tend to accept the expert view of their fellow member without challenge. Expert assessors, on the other hand, are quite distinct from lay members. In certain types of case, it would be possible for tribunals to appoint an expert assessor at the request of either party or on its own initiative. However, in order to avoid incompatibility with Article 6 of the European Convention of Human Rights, the tribunal would have to ensure that both the questions it raises with the expert and the expert's advice to the tribunal is made known to the parties early enough to allow them to comment. Another possibility is that, in types of case that turn entirely on expert assessment, the parties could agree to binding arbitration by an expert rather than adjudication by the tribunal.

Other than in the context of formal hearings, we accept it is less likely that lay members would continue to have a role within the new tribunal system

Para 6.74: We agree with the proposal that there should be a strong emphasis on training in judgecraft skills for tribunal members, and we accept the possibility that their role might evolve with the emergence of new forms of dispute resolution. However, it is important to recognise that the skills involved in most ADR processes differ significantly from traditional judgecraft skills – and from each other. It would not be appropriate for a tribunal judge to assume the role of (say) mediator without

proper training in the skills that this involves. Maintaining separation between the different roles of the judge would also be important: the parties should not arrive in the expectation of a mediation session only to find that the judge abruptly switches into formal hearing mode! In any event, we would argue that once a judge has been involved in attempting to achieve a mediated settlement, any formal hearing of the case should be determined by someone different.

Para 6.78: We accept that appraisal can have a valuable role in maintaining and improving the standards to which judicial members work. However, a clear distinction should be drawn between appraisal and supervision of individual case decisions, as the latter could easily compromise judicial independence. If appraisal reveals inadequate performance, the judicial member in question should receive additional support and training and be subject to re-appraisal at regular intervals. Extreme or persistent cases of poor performance should lead to removal from office. We note the absence of research into styles of judicial decision-making, and hope that this will be remedied in the near future.

Para 6.95: In our view, retaining the word 'tribunal' in the title of the new organisation could serve as a means of reminding users that the right to a full hearing of their dispute, should they wish to have one, had not been taken away. Titles such as 'Administrative Justice and Tribunal Service' or 'Redress and Tribunal Service' might be considered.

## **Chapter 7: Procedure and process**

Para 7.4: We accept that Employment Tribunals, being a party v party jurisdiction, require distinct treatment, as they are not strictly part of the administrative justice system (see our comment to Paragraph 8.8). However, we are surprised about the intention to allow the DTI, anomalously, to retain control over the employment tribunal procedure rules. The department is far from being in a neutral position, as its primary mission is to 'drive up UK productivity and competitiveness' – not necessarily always compatible with facilitating resolution of employee disputes. Recent changes to the ET rules introduced by the DTI, especially those relating to costs awards, do not appear to have been formulated with proper regard to the interests of unrepresented tribunal users, particularly applicants. We are also concerned about the potential for consistency between ET rules and those of other tribunals. We believe that the task of approving ET rules should be transferred to the

Secretary of State for Constitutional Affairs, with the new tribunals procedure committee, in due course, taking on the job of formulating them.

A further, general point about tribunal rules is that they must be user-friendly and flexible. For example, if an applicant lodges a claim in a non-standard format (which often happens if someone is unrepresented), this should not be rejected out of hand; the applicant should, instead, be given a period of time in which to submit an amended version.

Para 7.12: The suggestion that appellants in all administrative jurisdictions should be able to lodge their appeals electronically to both the tribunal and the department at the same time is a sensible one. However, it would be very important to ensure that users who do not have access to IT facilities are not prejudiced by such an arrangement. Possibly the fairest approach would be to accept receipt by either the tribunal service or the department itself; no doubt most applicants would follow the preferred method of service, in any event.

Para 7.18: In our view, setting up the Asylum and Immigration Tribunal as a single tier jurisdiction is an anomalous arrangement that contradicts the commendable efforts of the DCA to move towards a more coherent tribunal system. The allegation in the White Paper that the present system is being 'abused' by appellants is out of keeping with the careful and balanced tone in the rest of the document. It also ignores the success rate of appeals to the Immigration Appeal Tribunal; last year, nearly a third of cases were granted leave to appeal, and nearly 60 per cent of cases heard were allowed or remitted back to the adjudicator.

Para 7.27: It is a fundamental principle of the rule of law that inferior courts and tribunals be subject to the supervision of the higher courts. The proposal that the supervisory role of the courts should be transferred to the Court of Appeal is acceptable, provided that the Court of Appeal has a similar role to that of the High Court at present and is not restricted to considering appeals seen as raising an important point of law. For example, the Court of Appeal would need to be able to supervise the procedure rules of the inferior tribunal and ensure that it conducts its proceedings lawfully, according to both administrative law principles and the requirements of the Human Rights Act 1998.

We agree that, at the very least, the refusal of leave to appeal by the appellate level of the tribunal should be subject to statutory review by the Court of Appeal.

## **Chapter 8: Employment Tribunals and the Employment Appeal Tribunals**

Para 8.5 We are not convinced that it would be an appropriate use of resources to train ET judges as mediators. This is one of few jurisdictions where there is already an established mechanism for ADR, ie, through ACAS which is already comparatively well resourced. Offering additional ADR options through the ET could be very confusing for users.

Para 8.8 We accept that, to a large extent, the ET is a distinct jurisdiction requiring a somewhat different approach. However, introducing case management reforms into the ET system, based on the civil procedure rules, might prove to be over-burdensome for unrepresented users and does not sit well with the DCA's reluctance to extend the scope of legal aid to ET representation. The expectation that parties will submit written witness statements is already difficult for many users to comply with. If complex and onerous procedure rule requirements were to be backed up by the sort of costs sanctions that already exist in the ET rules, this would have a dramatic deterrent effect on applicants' decisions about whether to pursue a case.

## **Chapter 9: Tax Appeals**

Para 9.14: We note the observation that tax cases can be complex and legally contentious. However, in our view many cases relating to areas of social welfare law are equally complex – it is simply that fundamental rights or small (but nonetheless important) amounts of money are at stake. We do not agree with the implication that cases relating to disputes of the rich should be given different treatment by the judicial system.

## **Chapter 10: Supporting the user**

Para 10.1: The White Paper describes an ideal situation – ie, one where users would have cases resolved with little or no support or assistance – which, we fear, is unattainable while tribunal procedures and the level of legal complexity remain as they are. We accept that the types of support set out in Para 10.2 are 'not absolute

rights' and that, within the present financial climate, full-scale publicly funded representation for every dispute would be unrealistic. However, a substantial proportion of tribunal applicants find it difficult, if not impossible, to prepare and present their own cases. In our response to the DCA's consultation on the Leggatt review of tribunals (November 2001), we argued:

'In its submission to the original consultation, LAG argued strongly that specialist advice should be available to applicants and that representation should be eligible for funding. We are disappointed that the report takes the view that tribunal representation should only be funded in exceptional cases. We believe that representation is part of a continuum of the service to the applicant, from information and advice onwards. Contrary to the view of the report, we believe that appropriate representation helps users to participate in the tribunal, and to overcome difficulties understanding what is happening and any sense of intimidation caused by the proceedings. Representation by an experienced adviser, who need not be a lawyer, not only assists the applicant but also the tribunal, by ensuring that cases are properly prepared and that the relevant information is available. This allows the tribunal to dispose of cases more efficiently and could reduce the number of adjournments and the amount of time spent on individual hearings.'

These are views to which LAG still subscribes. Whilst we accept the reality of the current financial constraints on public funding, we believe that – at the very least – tribunal applicants of limited means who are vulnerable or whose cases are unusually complex (either in terms of points of law or in relation to the facts) should be able to obtain representation free of charge. The complexity of social welfare law is greatly underplayed by the White Paper (for example, in Para 10.11); one need only glance briefly at the Law and Practice pages of LAG's magazine, *Legal Action*, to understand the degree of complexity involved and the extent of legal knowledge required. Areas of discrimination law are a case in point. We do not need to remind the government that, as a matter of public policy, discrimination rights should be enforceable rather than theoretical.

Para 10.9: The suggestion that the government should support external providers, particularly in the Not-for-Profit sector, in providing diagnostic skills and advice to users is one that we would support – although it must be recognised that this work cannot realistically be funded within the existing budget for civil legal aid. It

should also be accepted that a high level of expertise is required on the part of advisers. A further concern is that users, having received initial help with formulating their appeal and completing the application form, might then be abandoned at the later stages of their case. How would they be expected to cope with presenting complex points law that they only partly understand?

Para 10.14: We take issue with the suggestion that funding is available for exceptional tribunal cases under s 6(8)(b) Access to Justice Act 1999. In theory, this is correct; in reality, however, the exercise of the Lord Chancellor's discretion under this provision is rarely, if ever, used for tribunal cases. It is not clear to us why the criteria for public funding for tribunal representation should be different from the criteria for funding representation for comparable cases in the civil courts.

Para 10.15: We agree up to a point with the White Paper's assertion that the case for representation and advocacy is based on assumptions about the nature of the tribunal process; and that as the process changes, so does the need for support. However, the problem is that the current tribunal system presents the government with a 'chicken and egg' dilemma. At present, users are faced with a shortage of high quality initial advice, confusing processes and complex and fast-changing areas of law. In these circumstances, few users can easily prepare and present their own cases. Were tribunal judges to move to a more inquisitorial approach, for example, applicants in person would be more likely to cope with hearings – provided they were properly advised and supported beforehand. However, it would have to be accepted that this shift in approach would throw more costs onto the hearing process.

## **Chapter 11: An Administrative Justice Council**

Para 11.8: Although we broadly welcome the proposals for the creation of an Administrative Justice Council with a wide remit over the whole administrative justice system, it is important that the organisation has enough 'teeth' to be effective. Whilst we accept the need for this body to have a strategic role, there is a danger of it being given such a wide perspective on the tribunals system that it would be prevented from addressing important points of detail, such as commenting on procedure rule changes. We note, for example, that the White Paper suggests (Para 11.11) that the present Council's role in commenting on secondary legislation would need to be reviewed.

We would also suggest that the new Council's remit is not too closely circumscribed; it should be allowed some flexibility to pursue initiatives that could benefit the administrative justice system as a whole. For example, an ability to conduct its own research should not be constrained. The work of the Civil Justice Council in addressing costs disputes in personal injury cases through the 'big tent' initiative is also a useful example of the sort of imaginative and proactive approach that, we hope, the new Council would not be prevented from undertaking.

We hope that these comments are helpful. Should you feel that further information would be useful, we would be more than happy to provide this. We would also be happy to meet with members of the Administrative Justice Team.

Yours sincerely

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