

No to Violence Submission

Position Paper: Gender-Rights and Intersectional Approach to Human Rights Framework



Contact NTV:

Please forward inquiries about this paper to No to Violence:

Email: JacquiW@ntv.org.au

ea@ntv.org.au

policyandresearch@ntv.org.au

Phone: 03 9487 4500

Men's Referral Service – for men concerned about their behaviour

1300 766 491

Acknowledgment of Country

No to Violence acknowledges First Nations Peoples across these lands; the Traditional Custodians of the lands and waters. We pay respect to all Elders, past, present, and emerging. We acknowledge a deep connection with country which has existed over 60,000 years. We acknowledge that sovereignty was never ceded, and this was and always will be First Nation's land.



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About No To Violence

No to Violence (NTV) is Australia's largest national peak body representing organisations and individuals working with men to end family violence. We are guided by the values of accountability, gender equity, leadership, and change.

NTV provides support and advocacy for the work of specialist men's family violence interventions carried out by organisations and individuals. The work undertaken by specialist men's family violence services is diverse and includes but is not limited to Men's Behaviour Change Programs (MBCP), case management, individual counselling, policy development and advocacy, research and evaluation, training, workforce development and capability building.

NTV also provides a range of training for the specialist men's family violence workforce including a Graduate Certificate in partnership with Swinburne University, as well as professional development for all workforces who come into contact, directly and indirectly, with men using family violence. NTV is a leading national voice and plays a central role in the development of evidence, policy, and advocacy to support the work of specialist men's family violence nationally.

About Our Members

We represent over 160 members Australia-wide. Our membership structure is inclusive of individuals and organisations ranging from specialist services to individuals and others who have an interest in preventing and responding to men's use of family violence.

Executive Summary

No to Violence (NTV) thanks the Parliamentary Joint Committee on Human Rights for the opportunity to comment on Australia's Human Rights Framework.

Our position paper (as submission) responds to the first term of the Terms of Reference (i.e., the introduction of a national Human Rights Act) - of the Inquiry into Australia's Human Rights Framework of the Australian Parliamentary Joint Committee on Human Rights.

As the peak body for organisations and individuals that work with men who use family violence, No To Violence (NTV)'s in-principle position paper aligns with our objectives, remit, expertise, principles of recent submissions and the work of our members rather than a submission based on legal analysis since we are not legal experts.

This paper outlines the importance of incorporating an intersectional and rights-approach to gender and human rights, since there are many who experience compounding forms of discrimination and structural inequality, who face additional barriers or impacts, especially among the experiences of Aboriginal and Torres Strait Islander communities, culturally and linguistically diverse (CALD) or culturally and racially marginalised (CALM) groups, those who are LGBTQIA+ or people with disability.

A HRA could provide a national legal framework for strengthening human rights in Australia. A HRA provides obligations requiring governments to proactively prevent harm and promote equality.

NTV welcomes the model for a Human Rights Act (HRA) proposed by the Australian Human Rights Commission (AHRC). The AHRC model provides a strong, rights-based foundation for informed and accountable decision-making at the national level. It embeds a shared model of responsibility, requiring that all branches of government have regard to human rights when developing policy, making law, and interpreting law.

However, we have also outlined some of the potential gaps of a proposed HRA framework.

Any introduction of a HRA should consider how it could accommodate intersectional experiences of human rights abuses. Proposed rights must not be discrete, and should be provided with mechanisms for *expressly* identifying how multiple forms of discrimination may overlap.

The elimination of domestic and family violence is critical to the full realisation of human rights.

Any proposed HRA needs to incorporate the rights contained in the CEDAW, including, for example a guarantee of gender equality, a general prohibition of discrimination against women, and its extension to the prohibition of violence against women.

Universalist and gender-blind approaches to law render invisible the gendered power imbalances that drive domestic and family violence (Bukauskaite, 2023; Parashar & Dominello, 2017). Gender and women's human rights often remain on the periphery. This detracts from a human-centred approach for victim-survivors in terms of acknowledging their needs and lived experiences; and does not hold **men who use domestic and family violence** to account nor place the burden on them to change their behaviour through **men's behaviour change programs and perpetrator interventions**.

Human rights laws, traditionally, were designed to protect the rights of the individual from the State. However, in the past 30 years, recommendations by the United Nations (UN) have clarified that these protections can extend to protect individuals from other individuals.

Domestic and family violence – which disproportionately affects women – are serious human rights violations.

Our position paper focusses on the connection between human rights and ending men's use of domestic and family violence.

What NTV Supports In-Principle - Human Rights Act

NTV strongly supports the following aspects and principles of the AHRC's proposed HRA (Human Rights Act):

1. **The safeguards in place to balance human rights.** The AHRC's proposed HRA balances both individualistic and communitarian conceptualisations of rights. Human rights are not absolute and at times must be balanced against competing individual and public interests. The AHRC draws on domestic case law to demonstrate how rights can be proportionately limited in circumstances where derogation is reasonable and justifiable.
2. **The interdependence of rights.** The AHRC's proposed HRA recognises that civil and political rights (often considered 'hard' rights) and social and economic rights are interdependent in terms of the obligations they create for government. ICCPR and ICESCR rights are "intrinsically linked" and provide mutual opportunities for reinforcement, particularly for groups that experience marginalisation (e.g., via the equal access to justice and participation duties).
3. **The 'progressive realisation' of rights.** The AHRC's proposed HRA supports the internationally recognised principle of the 'progressive realisation' of rights, "which occurs primarily outside of the courts" and is "most relevant to upstream decision making about policy and resourcing". Different mechanisms for oversight and monitoring within and outside of Parliament provide opportunities to realise key rights and "to addressing overarching, systemic policy concerns".
4. **Shared responsibility for human rights.** The dialogue model emphasises shared responsibility between all branches of government. Courts interpret the HRA but must maintain the intent of Parliament when doing so. Parliament must publicly justify policies and decisions affecting human rights, and these are subject to further scrutiny and debate. Unlike countries with constitutionally entrenched rights, the balance of power for enforcing human rights does not rest primarily with the Courts.

In addition to the above, NTV strongly supports the following to address the **potential gaps of a 'universalistic', gender-blind or gender-neutral HRA model.**

5. **Intersectionality provisions.** Any introduction of a HRA has to reflect intersectional experiences of human rights. Proposed rights must not be discrete, and instead be provided with mechanisms for expressly identifying how they may overlap. Any proposed 'participation' and 'equal access to justice' duties need to recognise that priority groups are subject to compounding forms of discrimination and additional impacts of structural inequality, requiring a means of addressing barriers to justice

and consultation. How gender is factored into these duties must be made clear. An intersectionality provision that is attached to the positive duty to consider human rights needs to capture and remediate the full scope of violations.

6. **Recognition of gender and family violence.** The elimination of domestic and family violence is critical to the full realisation of human rights. International law has brought family violence out of the sphere of 'private' harm and into the realm of human rights. General Recommendations 12, 19 and 35 clarify that the CEDAW extends to violence against women and recognises its prohibition as a norm of international law. Domestic and family violence are major human rights violations that disproportionately affect women. Any proposed HRA needs to incorporate the rights contained in the CEDAW, including, a guarantee of gender equality, a general prohibition of discrimination against women, and its extension to the prohibition of violence against women. Gender-blind approaches to law render invisible the gendered power imbalances that drive domestic and family violence (Bukauskaite, 2023; Parashar & Dominello, 2017). It also detracts from a human-centred approach for victim-survivors in terms of acknowledging their needs and lived experiences; and does not **hold men who use domestic and family violence to account** nor place the burden on them to **change their behaviour**.

NTV also strongly supports:

7. **Compliance with HRA.** A requirement that all Commonwealth bills, regulations and new policies be assessed for their compliance with the HRA by a Statement of Compatibility or a reporting on any non-compliance, including the prevention of domestic and family violence and other forms of gender-based violence against women, with an intersectional approach to multiple forms of discrimination; along with **holding men to account for their behaviour and ending men's use of domestic and family violence**.

Introduction

The **Australian Parliamentary Joint Committee on Human Rights** is currently conducting an **Inquiry into Australia's Human Rights Framework** (2023), which again, has put a national Human Rights Act (HRA) on the reform agenda. This was last reviewed in 2008 as part of the National Human Rights Consultation. Ongoing advocacy has made strides in making the introduction of a national HRA to a close reality – and bringing Australia in-line with other liberal democracies. There has been considerable momentum in the States and Territories, with Victoria, Queensland, and the Australian Capital Territory (ACT) passing dedicated laws that embed a greater range of human rights protections. [Support for a national HRA](#) is strong and can no longer be overlooked.

The Inquiry is investigating Australia's human rights framework, with a focus on:

- a. Whether the Federal Government should introduce a Human Rights Act;
- b. Whether existing federal mechanisms to protect human rights are adequate and if improvements should be made; and

- c. Whether the various human rights laws and protections adopted by the states and territories are effective.

No To Violence (NTV)'s position paper (as submission) will respond to the first term of reference of the Inquiry, in relation to the introduction of a national Human Rights Act (HRA).

As the peak body for organisations and individuals that work with men who use family violence, NTV's in-principle position paper aligns with our objectives, remit, our expertise, principles of recent submissions and the work of our members rather than a submission based on legal analysis since we are not legal experts.

Our position paper outlines the importance of incorporating a rights-approach to gender and the intersectional approach to human rights, since there are many who experience compounding forms of discrimination and structural inequality, who also face additional barriers or impacts, especially among the experiences of First Nations communities, culturally and linguistically diverse (CALD) or culturally and racially marginalised (CALM) groups, those who are LGBTQIA+ or people with disability.

NTV welcomes the model for a HRA proposed by the Australian Human Rights Commission (AHRC). The AHRC model provides a strong, rights-based foundation for informed and accountable decision-making at the national level. It embeds a shared model of responsibility, requiring that all branches of government have regard to human rights when developing policy, making law, and interpreting law. However, we have also outlined further below some of the potential gaps of the proposed HRA framework.

The proposed HRA expressly incorporates a range of international treaties that Australia has ratified, most significantly the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). An introduction of a HRA represents a big step forward to incorporating Australia's international human rights obligations into our domestic laws for the everyday business of governing.

Despite human rights developments, gender and women's human rights remain on the periphery. A proposed HRA may still do little to recognise the rights contained in the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), including, for example a guarantee of gender equality, a general prohibition of discrimination against women and its extension to prohibit violence against women. A **'gender-blind' approach** obscures the role that deeply gendered issues—such as men's use of family violence—play in perpetuating inequality and violating the rights of women.

This position paper highlights the need for Australia to centre gender in a proposed HRA. The introduction of a Human Rights Act (HRA) signals a pivotal moment in Australia's commitment to uphold human rights, and it is important that we get it right. **Incorporating gender with an intersectional approach (and the prevention of gender-based violence against women) in the HRA will translate to a consistent, upstream approach to gender equality and to ending men's use of family violence.**

The need for a Human Rights Act (HRA)

A HRA will provide a national legal framework for strengthening human rights in Australia. It will contain international legal principles that impose obligations on states to realise key human rights.

These obligations are known as positive duties. They require governments to proactively prevent harm and promote equality (e.g., a duty to prevent workplace sexual harassment). Positive duties are already present in domestic State-based legislation, such as the *Equal Opportunity Act 2010* (Vic).

An introduction of a HRA represents an important step forward to incorporate Australia's international human rights obligations into our domestic laws for the everyday business of governing; involving all branches of government to have regard to human rights when developing policies and making laws and to scrutinise new policies and legislation for their impacts on human rights.

Human Rights Charters affirm human rights in international treaties that a country has ratified. See Footnote 1 for a list of treaties that Australia is a party to.

Traditionally, human rights laws were designed to protect the rights of the individual from the State. However, in the past 30 years, recommendations by the United Nations (UN) have clarified that these protections can extend to protect individuals from other individuals. In practice, this means that States must take active measures to ensure that rights are protected, for example, by improving access to justice.

States have generally been reluctant to incorporate 'positive' rights in law, particularly with respect to family and domestic violence, which is often considered to be a 'private' as opposed to a 'public' harm.

We see the importance on the **close relationship between human rights and ending men's use of domestic and family violence.**

NTV's policy work involves commenting on laws across different jurisdictions, which tend to take different approaches (e.g., sexual consent laws). A HRA could provide a mechanism or avenue for facilitating greater harmonisation across inconsistent legislation based on human rights considerations, with flow-on effects for best practice.

Gender-rights and intersectional approach to HRA

Inaction on the human rights of women is not new. Often perceived as a cultural or private issue, international law has traditionally reserved women's rights as a matter for states to progress domestically, at their own discretion. The feminist challenge to the gendered nature of the 'public-private' divide in law and policy has laid bare the marginalisation of women's human rights in international law. Traditionally, only the relationship between individuals and the state (the 'public sphere') has come within the purview of international law. The regulation of 'private' matters—where women's rights are most often violated (such as domestic and family violence)—are therefore considered outside the remit of international law. The public/private divide is perhaps most visible in the primacy given to civil and political rights, which aim to safeguard individual liberties from state interference. As a result, the interests that have been defined as human rights, which have also taken on the appearance of 'universality', are primarily based on male experiences that do not adequately acknowledge the systemic and structural nature of gender discrimination.

The Gender Equality Advisory Council (GEAC, 2023, p.2), with their recommendations to the G7 Leaders at the May 2023 G7 Summit in Hiroshima, "unequivocally advocates for the mainstreaming of gender into all policy making to achieve an inclusive and equal society, and it recognises the **intersectional dynamics of gender, such as race, ethnicity, class, sexual orientation, ability, and stage within the life course.**"

“Gender equality is not simply a value in itself, nor is it solely a concern for women: it is central to addressing current global challenges, powering the world economy, and creating a healthy and sustainable future for all. Gender is inextricably connected to social systems and political institutions, to work and family life, to scientific discovery, cultural vibrancy, and economic progress.” (GEAC, 2023, p.2).

The integration of women’s rights into the mainstream of international law has made slow progress. It now recognises that domestic and family violence – which disproportionately affects women – are serious human rights violations. The CEDAW does not explicitly mention violence against women, but General Recommendations 12, 19 and 35 clarify that the Convention extends to violence against women and recognises its prohibition as a norm of international law. The Declaration on the Elimination of Violence against Women (DEVAW) also places a duty on states to “[e]xercise due diligence to prevent ... acts of violence against women, whether these acts are perpetrated by the State or by private persons.”

Scholars have argued that the CEDAW occupies an ‘ambiguous position that adopts both the standard universalising framework of human rights alongside a specifically political women-centred focus’ (Hodson, 2014):

- CEDAW Committee is ‘uniquely positioned to contribute to the transformation of human rights norms, occupying Positions at both the centre and at the periphery of international law’
- ‘the idea and institutionalisation of women’s human rights contributes to the creation of a women’s ghetto marginalised from the mainstream’

The CEDAW Committee (2018) recommended in 2018 that Australia incorporate [a guarantee of gender equality...] in a national human rights charter.

The Convention of the Elimination of all Forms of Discrimination Against Women (CEDAW) is noticeably absent from the Human Rights framework, despite calls from the CEDAW Committee to better incorporate its provisions. This is troubling, especially given the recent NCAS found that 41% of respondents still incorrectly believed that domestic violence is equally committed by men and women and contrary to the evidence that domestic violence is a gendered phenomenon mainly perpetrated by men against women (ANROWS, 2023, p. 241).

Any proposed HRA needs to acknowledge differences in power, to ensure that measures can be taken to secure substantive equality. This would involve an assessment of disadvantage and consideration of the compounding impacts and barriers of intersectional forms of discrimination.

International human rights law has recognised gendered violence as a human rights violation. However, very few jurisdictions incorporate this view. Recent international developments (e.g., the European Court of Human Rights) and commentaries have presented a compelling case for a gender-supportive approach to human rights in Australia (Bukauskaite, 2023; Demir, 2021; McQuigg, 2011).

Potential Gaps in the Human Rights Framework & AHRC’s proposed HRA model

The following list is not exhaustive but only what are considered as potential gaps.

Intersectionality:

Any introduction of a HRA should consider how it could accommodate intersectional experiences of human rights. For example, how the Victorian Charter has been used to address intersecting

concerns, such as tenancy and family violence. Proposed rights must not be discrete, and should instead be provided with mechanisms for *expressly* identifying how they may overlap.

Any proposed 'participation' and 'equal access to justice' duties could be given recognition that identified priority groups are subject to **multiple forms of discrimination** and be provided a means of addressing barriers to justice and consultation. Both duties can help realise substantive rights for priority groups. How gender is factored into these duties must be made clear.

Many have argued that our political and legal institutions **do not represent Australia's diversity**; in particular, the judiciary is largely socially and culturally homogenous. Despite significant progress, women also remain underrepresented. This means that differing perspectives and experiences are left out in the interpretation of law. This includes experiences of family and domestic violence, which often have different meanings for differently situated people (Parashar & Dominello, 2017)

An intersectionality provision that is attached to the positive duty to consider human rights may be needed to capture and remediate the full scope of violations. This is not a radical proposition. Domestic law has increasingly recognised intersectionality, going as far as defining it (e.g., the *Disability Inclusion Bill 2022* (Vic), as have international human rights instruments (UK *Equality Act 2010* (UK)).

Gender and family violence:

The elimination of domestic and family violence is critical to the full realisation of human rights. International law has brought family violence out of the sphere of 'private' harm and into the realm of human rights:

1. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) does not explicitly mention violence against women, but General Recommendations 12, 19 and 35 clarify that the Convention extends to violence against women and recognises its prohibition as a norm of international law.
2. The Declaration on the Elimination of Violence against Women (DEVAW) also places a duty on states to "[e]xercise due diligence to prevent ... acts of violence against women, whether these acts are perpetrated by the State or by private persons."

Domestic and family violence abuses are major human rights violations that disproportionately affect women. Any proposed HRA needs to incorporate the rights contained in the CEDAW, including, for example a guarantee of gender equality, a general prohibition of discrimination against women, and its extension to the prohibition of violence against women.

The CEDAW Committee (2018) recommended in 2018 that Australia incorporate such measures in a national human rights charter. Recent Shadow Reports (which comment on Australia's progress on implementing the Committee's recommendations) released have reaffirmed the recommendations of the CEDAW Committee, and have noted that there remains significant gaps in progress since 2018 (ALHR, 2023; ERA, 2020).

It is unclear why the AHRC (Australian Human Rights Commission) has opted for gender neutrality in their proposed HRA. A guarantee of gender equality would help ensure that 'private' violations of the rights of women come within the regulatory framework of the State.

Universalist and gender-blind approaches to law render invisible the gendered power imbalances that drive domestic and family violence (Bukauskaitė, 2023; Parashar & Dominello, 2017). It also detracts from a human-centred approach for victim-survivors in terms of acknowledging their needs and lived experiences through, for example, specialised legal and social support; and does not hold **men who use domestic and family violence to account** nor place the burden on them to change their behaviour through the funding of **men's behaviour change programs and perpetrator interventions**.

Australian law lacks a consistent framework for gender considerations. Analysis of Australian tribunal case law has shown that gender-related refugee claims have had inconsistent outcomes. Claims that centred domestic violence in recent years, have not been recognised to satisfy the grounds for refugee status under the Refugee Convention 1951, which the *Migration Act 1958* (Cth) partially incorporates (Anderson, 2021). The view that domestic violence is a 'private' harm (i.e., *personally motivated* as opposed to a structural issue) continues to prevail and as Anderson (2021, 59) argues, is largely a "quirk of policy and interpretation coupled with historical attitudes about violence in the so-called private sphere".

The AHRC model for a Human Rights Act (HRA)

The Australian Human Rights Commission (AHRC) had argued that human rights have not been adequately protected in Australia. These inadequacies are well-established in literature review and debate:

- **Australia's legal framework for human rights protections is scattered and piecemeal**, and access is contingent on where a person lives in Australia.
- **Existing protections are not readily accessible or easy to understand**. Discrimination law relies on individual complaints to remedy and deter further harm. The AHRC can appear as an intervener in select proceedings, but the law is **largely ineffective at addressing systemic discrimination**. **Gender-based violence** is an example of systemic discrimination.
- **Unlawful discrimination complaints that are not suited to being mediated by the AHRC cannot be taken further** (e.g., to the courts to obtain a remedy).
- **The Australian Parliament passes laws and makes decisions that are not always human rights compliant**.
- **Many international rights conventions that Australia ratified have not been incorporated into Federal (domestic) law**.¹

The AHRC model was drawn from existing domestic (e.g., the Victorian Charter) and international instruments, previous inquiries and consultations. It considered Australia's constitutional

¹ These include the following treaties and some of their Optional Protocols: [International Covenant on Civil and Political Rights](#) (ICCPR); [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR); [International Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD); [Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW); [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT); [Convention on the Rights of the Child](#) (CRC); [Convention on the Rights of Persons with Disabilities](#) (CRPD).

requirements, international obligations, and structure of our legal system. The AHRC has provided a viable and actionable set of proposals to achieve a HRA that:

- Preserves Parliamentary sovereignty through a **'dialogue model'**.
- Strengthens democratic principles of accountability and the rule of law.
- **Provides safeguards** against human rights breaches and pathways for redress.
- Provides **proactive measures** to prevent human rights breaches from occurring.
- Embeds **participation processes** to ensure that groups who experience disadvantage and marginalisation are engaged appropriately in decisions that affect them.

The **express rights** included in the AHRC's proposed HRA are of interest to NTV and supported. These features are summarised below.

The **'dialogue' model** prioritises a preventative approach to human rights protection. It requires each arm of government to consider human rights – that is, when the executive makes decisions, when the legislature makes laws, and when the judiciary interprets law. A key feature is the positive duty that requires public authorities to act compatibly with the HRA in a way that considers the “individual circumstances” of all users of public services (rather than a blanket approach). Having an ‘upstream’ impact on day-to-day decision-making means that courts will have a less prominent role in addressing ‘downstream’ breaches of human rights.

Proactive measures come within the purview of the positive duty, discussed above. Intensive resourcing and education measures are required to ensure that all arms of government are proficient in the implementation of the HRA. The AHRC proposes comprehensive guidance and evaluation measures to entrench cultural change in how public authorities operate, and to maintain ongoing compliance with the HRA.

The **'participation duty'** imposes a procedural obligation for public authorities to facilitate consultation with certain groups in relation to policies and decisions that directly or disproportionately affect their rights. The AHRC identifies First Nations peoples, people with disability, and children as priority groups, and fleshes out standards of participation that are in line with international guidelines, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

An **'equal access to justice' duty** complements the overarching participation duty. It aims to strengthen existing common law and procedural principles (*Dietrich v The Queen*) by requiring the state to provide certain “supports and services within the justice system to protect equality before the law”.

The proposed **rights** to be included in the HRA are primarily derived from the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, AHRC has construed those rights narrowly, with an emphasis on the ‘progressive realisation’ of rights over time through policy, national targets, and measurable indicators. The AHRC's proposed HRA provides a legal framework for *direct causes of action* and not the full and immediate realisation of substantive rights.

Conclusion

The gender-neutrality of any proposed HRA may inadvertently reinforce systemic gender inequality by failing to recognise and address gender-specific human rights issues. A gender-supportive framework, drawing from instruments like CEDAW and its General Recommendations 12, 19 and 35, would help to explicitly address gender-based discrimination and violence.

Human rights abuses in which gender is a primary or related factor have been mostly neglected, and pose the greatest challenge to the field of human rights today. (Bunch, 1990).

Promotion of human rights is a widely accepted aspirational goal and may provide a useful framework for redressing gender abuse, gendered-violence and intersecting multiple grounds of discrimination.

When gender and women's human rights remain on the periphery, it detracts from a human-centred approach for victim-survivors and their needs and lived experiences. This also fails to hold men who use domestic and family violence to account. **It does little to shift the burden onto men changing their behaviour through government investments in men's behaviour change programs and perpetrator interventions.**

Domestic and family violence – which disproportionately affects women – are serious human rights violations.

An introduction of a HRA or Charter has to address the strong connection between human rights and ending men's use of domestic and family violence.

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