



Memorandum to the Scottish Affairs Select Committee: Post- Legislative Assessment of the Scotland Act 2012

Presented to Parliament
by the Secretary of State for Scotland
by Command of Her Majesty

April 2018

Cm 9604



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MINISTERIAL FOREWORD

The Scotland Act 2012 was one of the largest transfers of fiscal powers from the UK Government since the creation of the United Kingdom. It has also paved the way to even more powers being devolved during my time as Secretary of State for Scotland.

Over the years that have followed Royal Assent of the 2012 Act, ministers and officials have worked hard to ensure the safe and secure transfer of powers to Scotland. As a result, the Act has been recognised as delivering on the recommendations of the independent Commission on Scottish Devolution, also referred to as the ‘Calman Commission’.

The ‘Calman Commission’ made a number of important fiscal recommendations including that part of the budget of the Scottish Parliament should be funded from devolved taxation and the Scotland Act 2012 followed through on this recommendation.

The successful implementation of these powers is testament to the strong working relationship between UK and Scottish Government ministers and officials. Some of the most substantial powers that were devolved included the power to set a new Scottish rate of income tax, the full devolution of stamp duty land tax and landfill tax, the power to introduce new taxes and the formal rebrand of the Scottish Executive to the Scottish Government. This ensured greater accountability to the Scottish public for spending decisions that the Scottish government chooses to take and the consequences of having to fund those decisions. Of course, since the 2012 Act received Royal Assent we have devolved a range of further powers through the Scotland Act 2016 which followed the Smith Commission. These powers include: devolution of income tax powers including the power to set rates and bands on earned income; assignment of VAT; devolution of air passenger tax; devolution of aggregate tax; the power to borrow; and the destination of fines, forfeitures and fixed penalties. We have reported annually to the UK Parliament on our progress on the implementation of the fiscal powers in the 2012 Act, and the powers devolved by the 2016 Act, while the Scottish Government has reported at the same time to the Scottish Parliament.

I am confident that both Governments will continue to work constructively together in the ongoing implementation of the 2016 Act to deliver what is best for the people of Scotland. The implementation of this legislation has been a fundamental building block in making the Scottish Parliament one of the most powerful devolved legislatures in the world.

A handwritten signature in black ink, appearing to read "David Mundell".

Rt Hon David Mundell MP

SECRETARY OF STATE FOR SCOTLAND

Introduction

This memorandum is presented to the Scottish Affairs Committee. It has been prepared in accordance with the Cabinet Office *Guide to Making Legislation* (July 2017) and sets out the objectives of the Scotland Act 2012 but also the context of the Calman Commission which was important in the origins of this legislation.

The process of implementation has been varied. For a number of provisions implementation was relatively straightforward; for others, where there was a need to ensure a smooth transition and integrate complex systems, a greater level of project management was required.

This memorandum summarises the key aspects of the process although the Committee's attention is drawn to the annual reports produced since April 2013, which provide further detailed information on the implementation of Part 3 of the Act, which relates to financial provisions that required a greater level of co-operation and planning in order to ensure that effective systems and processes were in place for the effective operation of these new powers. The annual reports are listed in section (e) below. The memorandum also provides an update on the secondary legislation that has been introduced, the date of implementation and effect of all the provisions, and a review currently being conducted into the sections in the Act relating to the role of the Supreme Court in adjudicating on compatibility issues in the High Court of Justiciary.

(a) Summary of the objectives of the Act

The Scotland Act 2012 followed the report of the Commission on Scottish Devolution, chaired by Professor Sir Kenneth Calman. The Commission was an independent review of the experience of Scottish devolution since 1998, which was supported by the UK Government of the time and the Scottish Parliament. It was set up in March 2008 and had the following terms of reference:

To review the provisions of the Scotland Act 1998 in the light of experience and to recommend any changes to the present constitutional arrangements that would enable the Scottish Parliament to serve the people of Scotland better, that would improve the financial accountability of the Scottish Parliament and that would continue to secure the position of Scotland within the United Kingdom.

It published its first report, *The future of Scottish devolution within the Union: a first report*, in December 2008 and its final report, *Serving Scotland better: Scotland and the United Kingdom in the 21st century: final report*, in June 2009. The Coalition Government indicated its commitment to implementing the recommendations of the Commission in the Queen's Speech of 2010 and published a Command paper, *Strengthening Scotland's Future*, which set out in detail how the Government intended to implement the recommendations by bringing forward a Bill. This Bill became the Scotland Act 2012.

It made changes to the devolution settlement for Scotland and gave effect to many of the Commission's recommendations. Changes to the devolution settlement were made to alter the powers of the Scottish Parliament, the powers of Scottish Ministers and to fiscal aspects of the devolved settlement with the aim of achieving the Commission's intention to strengthen the financial accountability of the Scottish Parliament. While some of these changes, such as the formal renaming of the Scottish Executive as the Scottish Government, recognised a situation that already pertained, the fiscal elements were complex and required a lengthier and more coordinated period of implementation, working with the Scottish Government. The approach to this is set out below.

The Act also made a number of technical amendments to the Scotland Act 1998 not related to the Calman Commission's report, but which updated the operation of the devolution settlement. It also contained provisions that responded to the case of *Cadder*. These provisions aimed to clarify the appropriate role of the Supreme Court in adjudicating on whether ECHR rights or EU law had been contravened in particular Scottish criminal cases. This had been considered by a review conducted by Lord McCluskey on behalf of the Scottish Government and an expert group convened by the then Advocate General, Lord Wallace of Tankerness. Both reviews concluded that the Supreme Court should have some role, although there were differences in view as to the extent of that role.

(b) Implementation

The Act comprised a wide range of provisions, which were implemented over the course of several years. A number of the provisions, notably the fiscal provisions, were complex and had significant operational implications. Therefore, they required co-ordinated oversight and project management in order to oversee their implementation. This was provided by the High Level Implementation Group which was established during the passage of the Bill and continued to be responsible for implementation. This group was supported by technical groups led by HMRC and HMT.

The financial provisions were implemented over a number of years, in line with the timetable that the Government set out in its Command Paper. This ensured that appropriate transitional arrangements were put in place. In order that both the UK and Scottish Parliaments were fully informed throughout this process, the Government introduced a statutory requirement, in section 33, that the Secretary of State for Scotland and Scottish Ministers would report annually on the implementation of this part of the Act.

(c) Secondary legislation

The following sections confer powers to make secondary legislation: s.25; s.29; s.31; s.38; s.42; s.44.

The Scotland Act 2012, Section 25 (Appointed Years) Order 2015 was made on 8 December 2015.

The Scotland Act 2012, Section 29 (Disapplication of UK Stamp Duty Land Tax) (Appointed Day) Order 2015 was made on 9 March 2015.

The Scotland Act 2012, Section 31 (Disapplication of UK Landfill Tax) (Appointed Day) Order 2015 was made on 9 March 2015.

Section 38 (4) confers the power on the Secretary of State to amend the provision made by sections 34 to 37 and to make further provision in relation to any matter dealt with by those sections. Before doing so he must take into account the report made by a review of these provisions, conducted under section 38 (1) (b). The review is currently being conducted (see section (d) below) and, therefore, there have been no grounds to use the order-making power in section 38 (4).

Section 42 enables the Secretary of State or the Treasury to make consequential, transitional and saving provisions, and section 44 enables commencement provisions to be made. A number of such provisions have been made under the powers conferred by this section in order to bring the Act into force.

(d) Legal Issues

Sections 34-37 of the Act were introduced following the case of *Cadder* in order to clarify the role of the Supreme Court in relation to Scottish Criminal Proceedings. Until the Scotland Act 1998, the Supreme Court (then the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council) had no role in respect of Scottish criminal proceedings. The final domestic appeal was to the High Court of Justiciary. By making Acts of Scottish Ministers subject to the limits set out in the Scotland Act 1998, the Supreme Court was given the role of adjudicating on whether ECHR rights or EU law had been contravened in particular Scottish criminal

cases. This led to a series of cases (including *Cadder*, which led to substantial changes to the law on rights of access to a solicitor) in which decisions of the Scottish High Court were effectively over-turned by the Supreme Court.

The provisions in the 2012 Act aimed to clarify the appropriate role of the Supreme Court in this respect. This had been considered by a review conducted by Lord McCluskey on behalf of the Scottish Government and an expert group convened by the then Advocate General, Lord Wallace. Both reviews concluded that the Supreme Court should have some role, although there were differences in view as to the extent of that role.

There was some debate about this during the passage of the Bill, particularly with regard to whether the High Court should certify appeal cases before they could be heard by the Supreme Court. For this reason the Government introduced section 38 which provided that a review of the provisions should be conducted. This review is ongoing and is being conducted by the Lord President of the Court of Session.

In line with commitments given by Lord Wallace when the provisions were passing through Parliament, the Secretary of State for Scotland asked the Lord President of the Court of Session to arrange the review. This was to provide the appropriate degree of independence and expertise to enable a credible review to take place. The Lord President has identified the membership of a review body, which comprises the following:

- The Lord President, as chair;
- Lord Reed;
- The Lord Justice Clerk;
- Roddy Dunlop Q.C., as a senior member of the Faculty of Advocates;
- John Scott Q.C., as a solicitor-advocate who is a senior criminal defence lawyer; and
- David Harvie, as a senior Crown Office official.

The review has published a consultation paper and is expected to report in due course.

(e) Other reviews

Section 33 of the Scotland Act 2012 requires the Secretary of State for Scotland and Scottish Ministers to report annually on the implementation of part 3 of the Act, relating to the financial provisions. In accordance with this requirement six annual reports have been published by the Secretary of State and laid before Parliament:

First Annual Report, published April 2013

Second Annual Report, published May 2014

Third Annual Report, published March 2015

Fourth Annual Report, published March 2016

Fifth Annual Report, published April 2017

Sixth Annual Report, published April 2018

Section 38 requires the Secretary of State to arrange for a review of sections 34 to 37 of the Act, which relate to appeals to the Supreme Court on issues of compatibility with EU law or the European Convention of Human Rights. Details of this review are set out in section (d) above.

(f) Preliminary Assessment of the Act

Part 1

Part 1 concerns the administration of elections to the Scottish Parliament, Scottish Parliamentary processes, and clarifies certain issues of reserved competence.

Sections 1-3 gave effect to recommendation 5.1 of the Calman Commission that the powers then held by the Secretary of State for Scotland relating to the administration of elections should be devolved. These sections devolved power to Scottish Ministers to make provisions about aspects of elections to the Scottish Parliament,

including the power to make provisions on the conduct of the Scottish Parliament elections, the questioning of such elections and the consequences of irregularities, and to enable Scottish Ministers to make orders as regards the designation of regional returning officers.

These sections were in force at the time of the most recent Scottish Parliament elections in May 2016. The Electoral Commission concluded that ‘the Scottish Parliament election on 5 May 2016 was well-run and evidence from our research with voters shows that they had a positive view of the electoral process.’¹

Following the Smith Commission report the Scotland Act 2016 devolved further powers to the Scottish Parliament relating to the administration of elections, and repealed sections 1 and 2 of this Act.

Sections 4-8 devolved a number of powers relating to the administration of the Scottish Parliament. This followed recognition by the Parliament and the Calman Commission that the arrangements should be amended to provide the Scottish Parliament with extra powers and responsibilities to enable it to shape more of its processes and procedures. The powers granted by these sections relate to the election of deputies to the presiding officer, the requirement to give a statement of competence when introducing a Bill, Members’ interests and the appointment of MSPs to corporate bodies.

These sections came into force at different points during 2012. The Scotland Act 2016 subsequently made further provisions about the administration of the Scottish Parliament.

Sections 9-11 made provision about the legislative competence of the Scottish Parliament.

Section 9 amended section 30 of the 1998 Act to provide that where there is an alteration to reserved matters or to Schedule 4 of that Act, the effect of which is that a provision of an Act of the Scottish Parliament ceases to be within legislative

¹ https://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/214888/2016-Scottish-Parliament-election-report.pdf.pdf

competence, the provision does not for that reason cease to have effect, unless an enactment provides otherwise.

Section 10 implemented recommendation 5.13 of the Calman Commission that the regulation of airguns should be devolved to the Scottish Parliament.

Sections 9 and 10 came into effect on 3 July 2012.

Section 11 re-reserved the regulation of activities in Antarctica by removing these activities from the legislative competence of the Scottish Parliament. These were never intended to have been devolved but were omitted inadvertently from the list of reserved policy areas for inclusion in the Scotland Act 1998. This came to light during the drafting of the Antarctic Act 2013. The Scottish Parliament had never in fact exercised this competence and this section of the Act was intended to rectify the earlier error. It came into force on 1 July 2012.

Part 2

Part 2 made a number of provisions relating to the powers of Scottish Ministers.

Section 12 formally renamed the Scottish Executive as the Scottish Government. The UK Government recognised that the term ‘Scottish Government’ was broadly recognised in Scotland and across the UK, and was part of the common parlance of Scottish political discourse. This section ensured that this term could be adopted in contractual and legal matters. It came into force on 3 July 2012.

Section 13 gave Scottish Ministers responsibility for taking forward Orders in Council to specify descriptions of office-holders who are disqualified from being a member of the Scottish Parliament. It came into force on 31 October 2012 but has subsequently been repealed by the Scotland Act 2016.

Section 14 relates to the time limits for bringing human rights actions against Scottish Ministers. As a result of the *Somerville* case a section 30 order gave the Scottish Parliament legislative competence to introduce a time-limit in the Scotland Act 1998 equivalent to that in the Human Rights Act. At the time that the section 30 order was agreed, it was recognised that this was simply a pragmatic solution to

avoid further delay, and that it was in fact more appropriate for any significant amendments to the Scotland Act to be made through primary legislation at Westminster. This section gave effect to that by repealing the section 30 order and removing the competence of Scottish Ministers to set time-limits. It came into force on 3 July 2012.

Section 15 amended section 102 of the Scotland Act 1998 which confers power on a court or tribunal to remove or limit the retrospective effect of its decision, or suspend the effect of its decision, where it has decided that an Act of the Scottish Parliament or any provision of such an Act is not within the legislative competence of the Scottish Parliament; or a member of the Scottish Government does not have the power to make, confirm or approve any subordinate legislation that they have purported to make, confirm or approve. It came into force on 3 July 2012.

Section 16 was a response recommendation 5.4 of the Calman Commission and required a Minister of the Crown to obtain the agreement of Scottish Ministers before making a recommendation for the appointment to the BBC Trust of the ordinary member who will serve as the Trust member for Scotland. It came into effect on 3 July 2012. The BBC Trust has subsequently been replaced by new governance arrangements.

Section 17 amended the Broadcasting Act 1990 to make provision in relation to *Seirbheis nam Meadhanan Gàidhlig* or the Gaelic Media Service. This provided a greater role for Scottish Ministers in the governance of this service and made Scottish Ministers responsible for paying such amounts as they may determine to be appropriate for the purposes of paying into the Gaelic Broadcasting Fund. This section came into effect on 31 October 2012. The Scottish Government provided £1m funding to the MG Alba between 2014-16 and a further £1m in 2016/17.

Section 18 gave effect to recommendation 5.9 of the Calman Commission report by requiring that one of the Crown Estate Commissioners be appointed as the Crown Estate Commissioner with special responsibility for Scotland. This section came into

effect on 1 August 2013. The Crown Estate's Management Duties were subsequently devolved to Scottish Ministers by the Scotland Act 2016.

Section 19 gives effect to recommendation 5.14 of the Calman Commission and transfers to Scottish Ministers responsibility for those aspects of the licensing and control of controlled substances that relate to their use in the treatment of addiction. This section came into force on 31 October 2012.

Section 20 gave effect to recommendation 5.15 of the Calman Commission and provided Scottish Ministers powers to make regulations in relation to the prescribed alcohol limit which applies when driving in Scotland. It came into force on 3 July 2012.

Sections 21-22 gave effect to recommendation 5.16 of the Calman Commission and transferred to Scottish Ministers the power to determine the level of the Scottish national speed limit and the power to make regulations to specify traffic signs to indicate that limit. It came into force on 3 July 2012.

Part 3

Part 3 of the Scotland Act 2012 deals exclusively with the devolution of financial powers. This resulted from the recommendations of the Calman Commission under the heading 'Strengthening Accountability in Finance.' Its guiding principle was that the system of funding should support the desired constitutional relationship between Scotland and the rest of the UK. In particular it concluded that the Scottish Government and Parliament should be more accountable to the Scottish electorate for how revenue is raised in the same way that they are for how it is spent.

The Coalition Government in responding to these recommendations set out its intention that the Act would create a new system of financing in order to allow the Scottish Parliament to determine how revenues are raised to supplement its existing responsibility to determine how they are spent. The aim was to increase the Scottish Parliament's ability to make choices that benefit the people of Scotland and to be held accountable for these choices. At the same time, Scotland has retained the

economic benefits of being a fundamental part of the United Kingdom. **Sections 23-32** have established this system by devolving a number of powers.

These include the following measures which came into force in April 2015:

- the disappearance of UK stamp duty land tax in Scotland and provision for the introduction of a new Scottish tax on land transactions;
- the disappearance of UK landfill tax in Scotland and provision for the introduction of a new Scottish tax on disposals to landfill;
- provision for borrowing by Scottish Ministers; and
- the power to devolve further existing taxes and create new devolved taxes.

The Act also provided for the creation of a new Scottish rate of income tax. The Scottish Rate of Income Tax (SRIT) commenced on 6 April 2016. In February 2016, the Scottish Parliament set the SRIT at 10% for 2016-17, thereby effectively matching the tax rates in the rest of the UK at 20%, 40% and 45% for that year. The Scottish Parliament's income tax-raising powers were enhanced by the Scotland Act 2016.

The financial provisions represent a substantial body of work and their implementation has been carefully managed over a period of time in line with the timetable set out in the Command Paper which accompanied the Scotland Bill in November 2010. This has ensured that appropriate transitional arrangements were put in place.

In order to ensure that both Parliaments are kept informed, we committed during the passage of the Bill to publish an annual report on the implementation of the financial provisions, and have reported in accordance with that provision. These reports are listed above in section (e) and detailed information about the implementation of Part 3 can be found these reports. A summary of the process of implementation, including governance arrangements, communication and costs is provided below.

Project governance and assurance

Implementation of SRIT and the further Scottish income tax powers were delivered by HMRC through separate projects with oversight and governance

provided by HMRC's Scottish Tax Devolution Implementation Programme. Both programme and project boards included representatives from HMRC, HM Treasury, Scotland Office and the Scottish Government.

The SRIT project was reviewed several times using the Office of Government Commerce (OGC) gateway process.

The National Audit Office (NAO) published its third annual report on HMRC's work on implementing and administering the SRIT, on 27 November 2017 as it is required to do under the Finance Act 2014. The report's conclusions recognised the good progress HMRC had made to implement the Scottish rate of income tax but reinforced the importance of maintaining an up-to-date and accurate record of the Scottish income tax paying population.

HMRC has continued to provide written and oral evidence to both the UK and Scottish Parliaments on the implementation of Scottish tax powers, with senior HMRC officials appearing before the Scottish Parliament's Finance and Constitution Committee on 29 November 2017 and the Public Audit and Post Legislative Scrutiny Committee on 15 June 2017.

DWP made the necessary changes to its infrastructure for the introduction of the Scottish Rate of Income Tax for tax year commencing 6 April 2016. An exchange of letters between DWP and Scottish Government in December 2015 outlined the financial and practical arrangements agreed between both parties for ensuring DWP administered taxable benefits and associated IT systems recognise and interact with the Scottish Rate of Income Tax, and that benefit recipients, who are also Scottish taxpayers, have the correct tax information recorded for HMRC purposes.

Communications

HMRC undertook an extensive programme of communication around the commencement of SRIT on 6 April 2016 that focused on the importance of taxpayers keeping HMRC updated of changes to address details. Both non-paid for communications and paid for activity have been delivered via: direct

communication with taxpayers, agents and employers; advertisements in a range of local and national Scottish newspapers; a radio campaign broadcast across Scottish commercial radio stations; and a social media campaign on Twitter and Facebook in conjunction with the Scottish Government and Scotland Office.

Since the commencement of SRIT, HMRC continue to communicate SRIT information, in particular reinforcing the key message of taxpayers keeping HMRC updated of changes to address details, through its normal income tax channels.

Implementation costs

Overall estimated costs for implementing the Scottish Rate of Income Tax

The 2017 annual report included overall estimated costs for implementing the Scottish Rate of Income Tax at £20m-25m, down from the previous year's projection of £25m-30m. HMRC current estimate of overall costs is £20m-£23m. This comprises estimated IT costs in the range of £13m-16m and non-IT costs of £7m.

Actual implementation costs

In 2016/17, HMRC invoiced the Scottish Government for £4.5m. This was made up of £3.4m in IT costs and £1.1m in non-IT costs. This compares to a forecasted spend of £4.6m in last year's report.

Final figures for 2017/18 are not yet available. At the time of publication, HMRC has invoiced the Scottish Government for £1.4m for work done during 2017/18. HMRC estimates total costs for 2017/18 will be £3.4m, comprised of £2.7m IT costs and £0.7m non-IT costs. This is £2.0m lower than estimated at the start of the year, primarily due to part of the work relating to Relief At Source for pension schemes being re-profiled into 2018/19.

Since the project commenced, HMRC has invoiced the Scottish Government £17.9m for the implementation of the Scottish Rate of Income Tax.

Running costs

The Scottish Rate of Income Tax became operational in 2016/17. There is a continuing cost to HMRC to maintain accurate records of Scottish taxpayers, deal with enquiries and correspondence, and where necessary to conduct compliance activity to counter attempts to misrepresent Scottish taxpayer status.

HMRC invoiced the Scottish Government for £0.2m for costs associated with running the Scottish Rate of Income Tax during 2016/17.

The Scottish Rate of Income Tax was superseded, for the 2017/18 and subsequent tax years, by the further Scottish income tax powers devolved by the Scotland Act 2016.

Ministers agreed a two-year transitional period, with regard to Relief at Source which ended in March 2018, to allow the pension industry to prepare its systems for the SRIT. A key focus for HMRC during 2017-18 has been to ensure the successful delivery of the next phase of its IT development programme, which will put in place services to allow the industry to check the correct Relief at Source rate to be applied for individuals within a pension scheme.

As the SRIT for 2016/17 has not diverged from rates in the rest of the UK, HMRC compliance work has focussed on checking for errors as part of HMRC's UK-wide compliance strategy that covers employers, high net worth and affluent individuals and agents such as tax advisors. Some analysis has also been carried out on current customer behaviours to provide a baseline for future compliance once rates diverge.

HMRC will continue to test and update its Scottish address data, including through the transition to a business as usual support model, providing ongoing assurance about the accuracy of its Scottish taxpayer data.

Part 4

Part 4 contains provisions relating to the role of the Supreme Court in adjudicating on whether ECHR rights or EU law have been contravened in particular Scottish criminal cases. The provisions were developed taking account of the views of an expert group established by the then Advocate General, Lord Wallace of Tankerness, an expert panel chaired by Lord McCluskey, as well as representations from the then Lord Justice General and Lord President of the Court of Session, Lord Hamilton.

Sections 34-37 make provision for the Advocate General or the Lord Advocate to refer cases to the Supreme Court in criminal cases where a compatibility issue arises. A ‘compatibility issue’ is defined in the Act as ‘a question, arising in criminal proceedings, as to whether a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) of the Human Rights Act 1998, or in a way which is incompatible with EU law, or whether an Act of the Scottish Parliament or any provision of an Act of the Scottish Parliament is incompatible with any of the Convention rights or with EU law.’

Until the Scotland Act 1998, the Supreme Court (then the Appellate Committee of the House of Lords and Judicial Committee of the Privy Council) had no role in respect of Scottish criminal proceedings. The final domestic appeal was to the High Court of Justiciary. By making acts of Scottish Ministers subject to the limits set out in the Scotland Act 1998, the Supreme Court was given the role of adjudicating on whether ECHR rights or EU law had been contravened in particular Scottish criminal cases. This led to a series of cases (including *Cadder*, which led to substantial changes to the law on rights of access to a solicitor).

The provisions in the 2012 Act aimed to clarify the appropriate role of the Supreme Court in this respect. The provisions introduced took account of Lord McCluskey’s review and the Advocate General’s expert group. Following an agreement with the Scottish Government, **section 38** provides for a review to take place three years after the implementation of sections 34-37. This was introduced in order to address concerns about how these provisions would work in practice, and, in particular the

question of whether cases should be certified by the High Court of the Justiciary. This review is under way and is covered in more detail in the reviews section above. Sections 34-8 came into force on 22 April 2013.

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