



Regulation and Discipline of the legal profession

By Kay Lauchland

For lawyers in Australia, the regulatory regime includes specific common law rules (for example, legal professional privilege,¹ advocate's immunity²) and specific statutes and rules directed at the profession. A new legislative regime has been,³ or is being,⁴ introduced in all jurisdictions in Australia as part of a national reform of the profession.

The *Legal Profession Act*⁵ (the Act) and rules are based on model legislation and rules developed by the Law Council of Australia, in conjunction with the Standing Committee of Attorneys-General.⁶ The Act allows for rules to be made for practitioners and provides that they will have statutory force.⁷ The common law standard – that one may join and remain a member of the profession only if one is ‘fit and proper’ – is incorporated in the Act. There are three key stages of regulation under the Act: regulation of admission to the profession; annual certification; and discipline for misbehaviour.

ADMISSION TO THE PROFESSION

Only an Australian legal practitioner may engage in legal practice.⁸ This includes lawyers admitted locally and elsewhere in Australia.⁹ An Australian legal practitioner is a person who is admitted to practice and holds a current Australian practising certificate.

Government legal officers and some others are exempt from certification.

One must be both eligible (18 and properly qualified and trained)¹⁰ and suitable for admission. In determining suitability, the court of admission must decide whether an applicant is ‘fit and proper’ and may consider anything, including the suitability matters listed in the Act.¹¹ These include convictions, insolvency, professional discipline history and practising without the right to do so.

It is interesting to note that the first paragraph, (1)(a), refers to ‘good fame and character’, an expression that leaves much scope for court interpretation. The final paragraph, (m), refers to whether the person currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner. This paragraph in the 2004 version of the Queensland Act referred to an applicant having a ‘material physical or mental infirmity’. The current version of the model law, however, focuses more precisely on the relevant issue – ability to carry out the tasks, rather than any particular cause disabling one from so doing.

A common ground for non-admission to practice is dishonesty. This may relate to dishonest behaviour in one’s prior life,¹² or dishonesty in the application for admission.¹³ Anything less than absolute candour and proactive divulgence of relevant material may be fatal to an application for admission. A practitioner already admitted in Victoria had the order for his admission revoked on the ground that:

‘he deliberately or recklessly misrepresented to the Board of Examiners the circumstances in which he came to be awarded a zero grade or mark for his second assignment. His actions, therefore, were the antithesis of a “realization ... of his obligation of candour to the court in which he desire[s] to serve as an agent of justice”. [In *re Davis* (1947) 75 CLR 409 at 426 (Dixon, J); *Thomas v Legal Practitioners Admission Board* [2005] 1 Qd R 331 at 333 (de Jersey, CJ); *Dal Pont, Lawyers’ Professional Responsibility*, 32 [2.75]].’¹⁴

Other prior misconduct unrelated to legal practice may also prevent admission, and this is more likely if that conduct is not fully disclosed.¹⁵ On the other hand, instances of misbehaviour in one’s past life may not preclude admission, if fully disclosed, depending upon the other circumstances of the applicant.¹⁶ Indeed, a lawyer once struck off may successfully obtain readmission in appropriate circumstances.¹⁷

ONGOING SUPERVISION THROUGH ANNUAL CERTIFICATION

Each legal practitioner in practice must take out an annual practising certificate¹⁸ and have the prescribed professional indemnity insurance.¹⁹ Suitability to hold a certificate may be affected by conduct in the previous period. Those matters defined as suitability matters for admission are also relevant to renewing one’s practising certificate. Further matters are outlined for the regulatory authority to consider – for example, failure to comply with a law regulating the legal profession, or a condition of practice, or failure to comply with a court or tribunal order.²⁰

All practitioners must renew their certificates through the relevant regulatory authority. In those jurisdictions with a split profession, barristers apply to the local Bar Association and solicitors to the local Law Society. Certification may be conditional and certificates may be amended, suspended or cancelled.²¹

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Anything less than absolute candour and proactive divulgence of relevant material may be fatal to an application for admission to the profession.

DISCIPLINE FOR MISBEHAVIOUR

A significant change for the legal profession in three states is the loss of self-regulation. The Act, as set out in the model legislation, does not prescribe independent regulation by introducing a Legal Services Commission and Commissioner. Such entities have, however, been in place in NSW,²² Queensland,²³ and Victoria²⁴ for several years now. This approach has not been adopted in the other jurisdictions, which continue to leave regulation in the hands of entities dominated by practising lawyers.

In the ACT, the investigation of complaints against lawyers rests with the Bar Council and the Law Society Council.²⁵ Complaints in the Northern Territory will be investigated by the Northern Territory Law Society.²⁶ The South Australian Legal Practitioners Conduct Board will deal with complaints against practitioners in that state.²⁷ In Tasmania, a Legal Profession Board of Tasmania²⁸ has the power to deal with complaints.²⁹ In Western Australia, investigations are conducted by the Legal Profession Complaints Committee.³⁰

A complaint may be made about a lawyer in writing.³¹ Complaints should generally be made within three years of the conduct that is the subject of the complaint.³² The relevant authority must deal with complaints as efficiently and expeditiously as is practicable.³³ The practitioner must be notified of the complaint³⁴ and the relevant authority should keep both the complainant and practitioner informed.³⁵

The relevant authority may dismiss a complaint summarily (for example, if the complainant fails to provide evidence or the complaint is vexatious),³⁶ investigate further or, in some jurisdictions, refer the matter to another entity to investigate.³⁷ The investigative body has extensive powers to investigate, including the power to require answers from a practitioner. A failure to comply may result in a penalty,³⁸ and may amount to actionable misconduct, even if the conduct originally complained about is not found to be misconduct.³⁹

After investigation, the relevant authority may impose penalties,⁴⁰ or refer the matter to a tribunal or court (which may make orders against the legal practitioner, or may dismiss a complaint).⁴¹ Serious matters are referred to the Legal Services Tribunal,⁴² which has the power to order greater penalties, including suspension and striking-off.⁴³

Statutory penalties and remedial and preventative measures

Under the legislative regime, both barristers and solicitors may be subject to a wide range of penalties. Although barristers retain the protection of advocates' immunity from civil action for court-related negligence, misconduct can effectively be addressed with tailored remedies under the Act. The Tribunal orders are largely directed at improving practice, rather than being merely punitive.

In the writer's opinion, only fines are solely punitive in nature. The courts have always maintained that suspension and striking-off are intended to protect the community rather than be punitive.⁴⁴ A wide range of other orders are available, including the imposition of conditions on practice; compulsory further legal education;⁴⁵ practice supervision; limits on the nature of work that can be done; management, inspection and mentoring. Orders can be tailored to the specific circumstances of each case. Tribunals can also make compensation orders.⁴⁶ Disciplinary action must also be publicised on the internet and may be publicised in other ways.⁴⁷ This openness to public scrutiny is important, especially in jurisdictions where the discipline of the profession rests largely in its own hands. And it also promotes the regulation of an increasingly national profession by making information about misconduct more readily available across state borders.

The wide range of orders is largely directed to improving law practice systems and the personal practice of individuals. A combination of orders can address the needs of a client/complainant; satisfy any community desire for retribution; and allow the practitioner in most cases to continue in practice, but with improved systems and capacity to provide proper legal services and avoid further complaint.

Section 4.7.2 of the Acts provides for dismissal of a complaint or investigation if 'it is in the public interest to do so'. It is interesting to review the approach developed by the Legal Services Commissioners in the three states where they have been operating under this regime for some years. The Queensland Legal Services Commissioner, for example, interprets this to allow for a legitimate complaint to be dismissed where the practitioner recognises the problem, satisfactorily resolves the client's concerns and is prepared to address systemic and practice issues to avoid further such problems.⁴⁸ A similar approach has been adopted in NSW.⁴⁹

Such an approach is very much in the interests of the profession and the public generally in improving professional practice over the long term. In the Queensland Commissioner's Report for 2006–2007, he said:

'We believe one reason the number of complaints has gone down is that many more "complaints" are being nipped in the bud by being dealt with informally as telephone inquiries and resolved to the callers' satisfaction in that way, expeditiously and efficiently and with the least possible fuss.'⁵⁰

The Legal Services Commissions have also taken the lead in education, with a view to reducing complaints and the circumstances leading to them. For example, the Victorian Commissioner has said:

Openness to public scrutiny is important, especially where the discipline of the profession rests largely in its own hands.

'As well as dealing with complaints, the Commissioner has statutory objectives to educate the legal profession about issues of concern and also to educate the community about legal issues and the rights and obligations flowing from the client-practitioner relationship. Our office sees these objectives as the means for taking a preventative approach.'⁵¹

The NSW Commissioner has established effective guidelines for developing 'Appropriate Management Systems' for 'Incorporated Legal Practices'.⁵² The ten compliance areas addressed are also relevant to traditional practices.

Mediation or conciliation of consumer complaints

Complaints that do not fall within the definitions of misconduct may still be legitimate 'consumer complaints', which may be referred to mediation.⁵³ Mediation is a useful tool for encouraging lawyers to deal properly with customer complaints, as well as to defuse and adequately deal with consumer complaints that may or may not be legitimate, but that in any event are better considered as business issues than professional concerns.

Some states have opted to define those consumer complaints that may be referred out of the investigative system to mediation.⁵⁴ Some have simply empowered the relevant authority to mediate or conciliate complaints, or refer them to mediation, where appropriate.⁵⁵

Despite the best education and guidance, some practitioners will misbehave. The definition of actionable misconduct is very broad in the Act.

Definitions and examples of misconduct

The Act provides definitions of 'unsatisfactory professional conduct' and 'professional misconduct'. The NSW Legal Services Commissioner in a speech in 2001 called for the definition of misconduct to be broadened to give his office power to deal with negligent behaviour.⁵⁶ The Act does just this. Given the broad scope of what is defined as misconduct, practitioners should be glad of the preventative and remedial approaches to complaints that regulatory authorities take where appropriate. It is to be hoped that a similar approach will be developed nationally.

The Act provides these definitions:⁵⁷

'4.2.1 Unsatisfactory professional conduct [CU] (cf former 1104; Vic 4.4.2; NSW 496)

For the purposes of this Act:

unsatisfactory professional conduct includes conduct

of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.'

'4.2.2 Professional misconduct [CU (1); CNU (2)] (cf former 1105; Vic 4.4.3; NSW 497)

(1) For the purposes of this Act:

professional misconduct includes:

(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

(2) For finding that an Australian legal practitioner is not a fit and proper person to engage in legal practice as mentioned in subsection (1), regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession under this Act or for the grant or renewal of a local practising certificate.'

Additional matter may constitute unsatisfactory professional conduct or professional misconduct, including conviction, insolvency and failure to comply with discipline orders. Charging excessive fees also may constitute misconduct.

The statutory test for unprofessional conduct now closely matches the standard of care applicable to the tort of negligence: 'to exercise due care, skill and diligence, bringing to the task in hand the competence and skill usually employed among solicitors or barristers (as the case may be) practising their profession and taking proper care...'⁵⁸ Conduct that might once have been considered careless but not misconduct would not have professional consequences for a practitioner and would allow a client to complain effectively only if loss had been suffered and a civil action (for example, for negligence) was available. Now, any carelessness – falling 'short of the standard of competence and diligence' – may form the basis for a professional complaint.

Again, practitioners may be grateful for the approach already developed by the Legal Services Commissioners to deal with relatively minor misconduct by choosing not to proceed with a complaint because it is no longer 'in the public interest' once the client's concerns have been satisfied and the lawyer has convinced the Commissioner that appropriate steps have been taken to avoid future repetition of the behaviour that gave rise to the complaint.

Even a simple lack of diligence, if repeated, may amount to professional misconduct. By definition, really serious carelessness and repeated minor incompetence will amount to professional misconduct, with the consequence that suspension and striking-off are applicable penalties.⁵⁹ One

practitioner who had fallen into a consistent pattern of poor practice in failing to carry out instructions, delay, failing to communicate and respond to clients and then dishonesty to clients, the regulators and the Administrative Decisions Tribunal was struck off. While he made full admissions and was believed to be remorseful, it was his third appearance before the Tribunal for similar behaviour.⁶⁰

Serious personal misconduct, as well as misconduct within the practice of law, may amount to professional misconduct, if it demonstrates unfitness for practice.⁶¹ To suffer the ultimate consequence of striking off, for personal or professional misconduct, one must be found to be not 'fit and proper'. Suitability matters – relevant to admission and annual certification – may be taken into account in determining fitness. Given the adoption of the common law test of fitness, there is unlikely to be any change in the identification of behaviour deserving of striking-off. One recurrent cause of complaint leading to suspension or striking-off of practitioners is overcharging.⁶²

'No amount of costs agreements, pamphlets and discussion with vulnerable clients can excuse unnecessary over-servicing, excessive time charges and over-charging where it goes beyond the bounds of professional propriety.'⁶³

Civil remedies

Actions in negligence, breach of contract, breach of statutory duty and the full raft of civil claims are also available to an aggrieved client. The exception to this remains in relation to claims against advocates for in-court work and other work intimately connected with the conduct of a case in court. Advocates' immunity has been affirmed in Australia, despite its removal in the UK and New Zealand in 2005. Indeed, a decision in the High Court of Australia potentially expands the protection for both advocates and instructing solicitors.⁶⁴

In many cases of complaints by clients, civil action will not be necessary, given the scope of compensation orders that can be made. Mediation may also help to resolve claims without recourse to courts. Indeed, in some jurisdictions, civil action is stayed until a complaint is dealt with.⁶⁵ If the civil component of a claim is resolved, either through mediation or compensation orders, then the complainant need not bring such proceedings.

CONCLUSION

The adoption of a new regulatory regime across Australia has brought some significant changes. Though based on model legislation, the approach remains varied throughout the jurisdictions. Only three states, for example, have chosen to remove disciplinary matters from the profession and place them in the hands of independent commissioners. All jurisdictions have adopted some method of discriminating between matters that deserve charges to be laid and those that might be better addressed in mediation or conciliation. Barristers are subject to a broader range of penalties for less serious misconduct than has been the case traditionally. Greater publicity is also part of the new regime.

A noteworthy issue is the adoption of a definition of misconduct that includes negligence.

The court-elaborated standard – that one may join and remain a member of the profession only if one is 'fit and proper' – is incorporated in the Act. This question of fitness is addressed at all three stages of regulation under the Act: admission, annual certification, and discipline for misbehaviour. While at common law it was always possible for personal misconduct to justify punishment as a professional, the statutory definition makes it clear that personal behaviour can be addressed only when it is so bad as to render the person unfit to practise.

The profession should on the whole be pleased that while the new regime may open up more behaviour to scrutiny, it provides a more flexible approach to resolving complaints. Systemic issues can be addressed early and without charges being pursued, and consumer complaints can be redirected outside the tribunal system. Given the lead of the Legal Services Commissioners in NSW, Queensland and Victoria, a remedial and preventative approach is likely to develop nationally.

One may hope to see not only a reduction in complaints over time, but a growing level of satisfaction among legal service consumers and providers. ■

Notes: 1 *Grant v Downs* (1976) 51 ALJR 198; *Eso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67. 2 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) HCA 12. 3 *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* >>

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The adoption of a definition of misconduct that includes negligence is now part of the new regime.

(Qld); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic); *Legal Profession Bill 2008* (SA), currently subject to dispute about amendments between the two houses. Each jurisdiction also has associated subordinate legislation; for example, in Queensland: *Legal Profession Regulation 2007*; *Legal Profession (Society) Rules 2007*; *Legal Profession (Barristers) Rule 2007*; *Legal Profession (Solicitors) Rule 2007*. **4** *Legal Profession Act 2008* (WA) was proclaimed 27 May 2008, but the bulk of the Act is not yet in force; the *Legal Profession Bill 2007* in South Australia has passed through both houses, but final passage is held up by amendments made in the process. **5** I will refer throughout to the model legislation as 'the Act' without distinguishing between jurisdictions, except where there is significant variation. **6** Further information is available on the website of the Law Council of Australia: <http://www.lawcouncil.asn.au/natpractice/home.html>. **7** The Act ss3.2.2 ff. **8** The Act part 2.2. **9** The Act part 1.2, s1.2.3. **10** The Act s2.3.3. **11** The Act s2.3.4, 1.2.6. **12** For example, *Re B* [1981] 2 NSWLR 372; *Wentworth v NSW Bar Assoc* (1992) ALJR 663; *Thomas v Legal Practitioners Admission Board* [2004] QCA 407. The Thomas case involved an applicant who had, as a young man, pleaded guilty to nine counts of fraudulent misappropriation, with no conviction recorded. His failure to properly disclose the details was significant in his non-admission. **13** For example, *Liveri, Re* [2006] QCA 152, an applicant was told not to come back for at least six months when rejected for failure to properly acknowledge three plagiarism charges in law school. **14** *Re The Legal Profession Act 2004* and *Re Og, A Lawyer* [2007] VSC 520. **15** For example, *Re Hampton* [2002] QCA 129 involved misconduct as a nurse which led to deregistration, and then working while deregistered, not being fully disclosed on application for admission as a lawyer. **16** For example, Debbie Kilroy, a convicted drug-dealer, who had completed her jail term and become a respected prisoner advocate, was admitted to practise in Queensland in December 2007. More details about her story can be obtained from *Australian Story*, ABC Television, <http://www.abc.net.au/austory/content/2003/s1056124.htm>; *The Law Report*, ABC Radio, <http://www.abc.net.au/rn/lawreport/stories/2008/2139627.htm>; 'Inmates Champion Debbie Kilroy Enters Legal Ranks', *Courier Mail*, <http://www.news.com.au/couriermail/story/0,23739,22920406-3102,00.html>. **17** *Edward Poulter Leary v New Zealand Law Practitioners Disciplinary Tribunal*, HC AK Civ. 2006-404-7227 [2007] NZHC 820 (21 August 2007). **18** The Act part 2.4, ss2.4.3-2.4.5. **19** The Act part 2.4, s2.4.6. **20** The Act s2.4.4. **21** The Act part 3.4, divisions 5 and 6. **22** Operative since 1 July 1994, when established by an amendment to the *Legal Profession Act 1987* (NSW). **23** Operative since 1 July 2004, established under the *Legal Profession Act 2004* (Qld) and continued under the *Legal Profession Act 2007* (Qld). **24** Established December 2005 under the *Legal Profession Act 2004* (Vic). **25** *Legal Profession Act 2006* (ACT) ss575, 577. The Law Society Council is established by this Act, s576. **26** The Law Society Northern Territory is established by s635 of the *Legal Profession Act 2007* (NT). **27** This board's existence continues under s488 *Legal Profession Bill 2007* (SA). **28** *Legal Profession Act 2007* (Tas) s589. **29** *Legal Profession Act 2007* (Tas) s591. **30** Established by s555 *Legal Profession Act 2008* (WA). This is a committee of the Legal Practice Board established under s534 of this Act. The Board consists of the attorney-general, the solicitor-general or state solicitor, volunteer Queens Counsel/Senior Counsel and elected legal practitioners. **31** The Act s4.4.2. **32** The Act s4.4.3; ACT s395; NSW s506; NT s473; Qld s430; Tas s428; but see WA s411: 6 years. **33** The Act s4.8.2. **34** The Act

s4.4.5. **35** The Act s4.8.3. **36** The Act s4.4.7. **37** For example, in Queensland the independent Legal Services Commissioner may refer matters to the Law Society or Bar Association to investigate, but retains the power to make decisions about prosecution after receiving the investigation report. **38** For example, *The Legal Profession Act 2007* (Qld) imposes a penalty in the region of \$3,750. **39** The Act s6.4.6. **40** The Act s4.7.3 provides for the initial investigating entity to reprimand or fine the lawyer. **41** The Act s4.7.2. **42** The Act s4.9.1. **43** The Act s4.9.11. **44** For example, see *Legal Practitioners Complaints Committee v Thorpe* [2008] WASC 9 (1 February 2008) [43]. **45** In *Law Society of New South Wales v McElvenny* [2002] NSWADT 166, the solicitor was ordered to undertake and pass the legal ethics course offered by the College of Law, or a substantially equivalent course approved by the Law Society. **46** The Act part 4.10. **47** The Act part 4.11. Publicity is not necessary where action is taken because of infirmity, injury or illness of the practitioner: s4.11.6. **48** See, for example, his comments in a speech to the Bar Association of Queensland 2008 Annual Conference, 17 February 2008, 'Complaints About Lawyers: Regulation, Representation And Restorative Justice' <http://www.lsc.qld.gov.au/speeches/comp-lawyers.pdf>. **49** See, for example, a speech given by Steve Mark, NSW Legal Services Commissioner, 'Regulation: Putting the Profession in Good Order', the 2001 Conference of Regulatory Officers: Towards National Practice, Hyatt Hotel, Canberra, 28 & 29 March 2001, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_canberra_2001. **50** Legal Services Commission, Annual Report 2006-7, <http://www.lsc.qld.gov.au/publications/2006-07.pdf>. **51** Legal Services Commissioner Annual Report 2007 http://www.lsc.vic.gov.au/pdf/LSC_Annual_Report_2007.pdf. **52** See information on the Commission's website at http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp. **53** The Act part 4.5. **54** Consumer disputes are defined in the Acts of: NSW, part 4.3; NT, part 4.5; Qld, part 4.5; Vic part 4.3 – the Commissioner may attempt to resolve or refer a civil dispute to mediation. **55** Mediation or conciliation powers are granted in ACT part 4.3, and the relevant Council can refer to mediation; SA, s362 – permits the Board to conciliate a complaint; Tas, part 4.3 – the Board can refer to mediation; WA, ss417 ff – the Complaints Committee can refer to mediation. **56** Steve Mark, NSW Legal Services Commissioner, 'Regulation: Putting the Profession in Good Order', the 2001 Conference of Regulatory Officers: Towards National Practice, Hyatt Hotel, Canberra, 28 & 29 March 2001, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_canberra_2001. **57** See also s4.2.3, which provides that certain conduct constitutes unsatisfactory professional conduct or professional misconduct. **58** *Vali v Inglewood Shire Council* (1963) 110 CLR 74 at 84; see also *Hawkins v Clayton* (1988) 164 CLR 539; *Rogers v Whitaker* (1992) 175 CLR 479; *Yates Property Corporation v Boland* (1998) 157 ALR 30; *Montague Mining Pty Ltd v Peter L Gore & Ors* [1998] FCA 1334 (23 October 1998); *May v Mijatovic* [2002] WASC 151. **59** See, for example, *Law Society of New South Wales v Witherdin* [2004] NSWADT 237. **60** *LSNSW v Veneris* [2002] NSWADT 135. **61** For example, *Coe v NSW Bar Association* [2000] NSWCA 13. Mr Coe swore a false affidavit in proceedings in the Family Court in a foolish attempt to hide the true extent of his income as a barrister from his wife and the court. He was struck off. **62** *Legal Services Commissioner v Michael Vincent Baker* [2005] LPT 002 (struck off); *QLSI v Stephen Francis Roche* [2003] QCA 469 (suspended 12 months); *In re Roche* [2002] ACTSC 104 (suspended 18 months). **63** Kirby P in *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 422. **64** *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. **65** See Vic, s4.3.2.

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