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Chairperson, Audit Committee

By email to: marie.austin@niassembly.gov.uk

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Dear Mr McCrossan

Thank you for your invitation to submit expert evidence to the Audit Committee's Review of the Governance and Accountability Arrangements for the Northern Ireland Audit Office and the Northern Ireland Public Services Ombudsman. In this response, I will focus on arrangements relating to the ombudsman.

Before turning to the substantive issues, it may be helpful to explain the capacity in which I am submitting evidence. I am a Senior Lecturer in Public Law at the University of Glasgow. My research focuses on the design and operation of administrative justice systems, and I have a particular interest in ombudsman and complaint handling process. I have recently co-edited a [book](#) (with Dr Richard Kirkham) on ombudsman reform, have participated in the [Independent Peer Review](#) of the Parliamentary and Health Services Ombudsman, and I am a [Independent Member](#) of the Ombudsman Association's Validation Committee. Further information about my background and research is available [here](#).

Independence and Accountability Principles

Balancing the need for the ombudsman to be both independent and accountable is one of the central conundrums facing the ombudsman institution. The value of independence is clear. The ombudsman is charged with reviewing the actions (and omissions) of the executive, the largest and most powerful branch of the state. The ombudsman's mandate involves speaking truth to power and, in many cases, being critical of public authorities. The ombudsman can only effectively carry out that role if it is independent and not subject to external pressure.

The centrality of independence as a core value of the ombudsman institution is recognised in authoritative guidance produced by the Ombudsman Association (OA) and the Council of Europe (CoE). The OA's [Guide to the Principles of Good Governance](#), for example, suggests that six principles support effective governance for the ombudsman:

- *Independence*
- *Openness and transparency*
- *Accountability*
- *Integrity*
- *Clarity of purpose*
- *Effectiveness*

The OA suggest that independence should be seen as the "core" value, with openness, accountability, integrity, and clarity of purpose seen as "supporting principles".¹ In terms of accountability, the OA suggest that the ombudsman should:

¹ <https://www.ombudsmanassociation.org/docs/BIOAGovernanceGuideOct09.pdf> (p. 4)

- *Be subject to appropriate public or external scrutiny*
- *Be accountable to stakeholders for operation of scheme*
- *Have financial accountability and appropriate internal controls to demonstrate the highest standards of financial probity*
- *Have robust mechanism for review of service quality*
- *Operate a clear ‘whistle-blowing’ policy*

The OA does not provide prescriptive guidance on what constitutes “*appropriate public or external scrutiny*” or how the ombudsman should be made “*accountable stakeholders*”. However, the Guide notes that in seeking to ensure accountability there must be “*due regard to the independence of the office holder.*”²

At the international level, the predominant concern has not been on accountability as much as preserving the independence of the ombudsman. The Venice Commission (the CoE’s Commission for Democracy Through Law), for example, has expressed:

*“... serious concern with the fact that the Ombudsman Institution is at times under different forms of attacks and threats, such as physical or mental coercion, legal actions threatening immunity, suppression reprisal, budgetary cuts and a limitation of its mandate.”*³

The CoE’s Council of Ministers, in making recommendation CM/Rec(2019)6 to member states on the ombudsman, has similarly expressed:

*“... grave concern about the challenging working conditions, threats, pressures and attacks which Ombudsman institutions and their staff are at times exposed to in member States.”*⁴

It is notable that – while accountability is no doubt implicit in creating the conditions for an effective ombudsman – the CoE’s suggested “*core principles*” for the ombudsman do not explicitly refer to accountability arrangements. Instead the principles are:

- *Independence*
- *Impartiality, objectivity and fairness*
- *Integrity and high moral authority*
- *A comprehensive mandate*
- *Accessibility*
- *Effectiveness*

To the extent that accountability features in the CoE’s Venice Principles, the requirements are light touch in comparison with the arrangements currently featuring in the United Kingdom.⁵ There is for example, a suggestion that the ombudsman should report annually to Parliament:

“20. The Ombudsman shall report to Parliament on the activities of the Institution at least once a year. In this report, the Ombudsman may inform Parliament on lack of compliance by the public administration. The Ombudsman shall also report on specific issues, as the Ombudsman sees appropriate. The Ombudsman’s reports shall be made public. They shall be duly taken into account by the authorities.”

² <https://www.ombudsmanassociation.org/docs/BIOAGovernanceGuideOct09.pdf> P. 7

³ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e) p. 2

⁴ <https://rm.coe.int/090000168098392f> p. 2

⁵ These have been very helpfully summarised in the research report supporting this review:

<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2020/audit/7520.pdf>

And in relation to audit and scrutiny arrangements the Venice Principles envisage a strictly financial audit, clearly restricted from considering matters of policy and performance:

“21. ... The independent financial audit of the Ombudsman’s budget shall take into account only the legality of financial proceedings and not the choice of priorities in the execution of the mandate.”

There have been no suggestions that the ombudsman institution in the United Kingdom has been subject to overt pressure or the kinds of explicit threats referred to by the CoE. However, it is crucial to defend vigorously the independence of the institution given how important this value is in delivering the ombudsman’s mandate. Efforts to improve and perfect accountability arrangements should not come at the expense of the ombudsman’s independence.

Indeed, rather than lacking accountability, a criticism that might be levelled at the ombudsman institution as it has developed in the UK is that it has historically taken a rather conservative and timid approach compared with other jurisdictions. Rather than needing to be reigned in and held more firmly to account, there is a sense that the ombudsman has been too unwilling to push boundaries and use its independent position to highlight more vigorously the scale and nature of injustice in modern government.

Thus, efforts to enhance accountability processes should ensure that they do not have a deleterious effect on the ombudsman’s independence or effectiveness. An overly scrutinised ombudsman may become too cautious in fulfilling its functions, and this may not serve the interests of individuals seeking redress or the broader public interest. The trick is ensuring that accountability arrangements support the ombudsman in delivering its mission and it is here that specific mechanisms for ensuring accountability become important.

At the same time, it is notable that – in the UK’s devolved jurisdictions – the ombudsman has been granted significant additional roles, powers and responsibilities in recent times. All three devolved jurisdictions now feature Complaint Standards Authority powers, while the ombudsman offices in Northern Ireland and Wales also have the significant power of own initiative investigation. In Scotland, the ombudsman has been given new areas of jurisdiction such as conducting reviews of the Scottish Welfare Fund and powers in relation to NHS Whistleblowing Complaints.

Governance and Accountability Structures and Safeguards

Publication requirements

In our recent edited collection, Dr Richard Kirkham and I argue that rather than imposing potentially burdensome and complex legislative requirements on the ombudsman, providing a set of reporting duties is likely to be the best way to ensure that a range of stakeholders can hold the institution to account. Transparency, in other words, provides the means for ensuring that the ombudsman’s independence is not encroached upon, at the same time as providing information that allows relevant actors to understand and ask questions of the ombudsman’s performance. Examples of areas in which a reporting duty might be established include:

- Quality control of standards of decision-making
- Implementation of recommendations
- Analysis of complaints per sector
- Engagement with bodies under jurisdiction
- Results of systemic investigations
- Implementation of the Complaint Standards Authority Role
- Details of any legal developments affecting the office
- Consultation with other oversight bodies
- Statement on the delivery of administrative justice

- Results of periodic peer reviews

Corporate Governance

As Brian Thompson has noted:

“Corporate governance thinking has entered into the ombudsman landscape in recent times. It seeks to provide for more effective governance of private and public bodies by establishing a board to oversee the organisation, composed of executive members supported and challenged by non-executive members who bring experience and expertise. In particular the Board contributes to forward planning, and overseeing audit and risk, remuneration and appointments.”⁶

The most common model of governance in the UK ombudsman sector is the corporation sole. The exception is the Local Government and Social Care Ombudsman for England, where the Commission for Local Administration (of which the ombudsman is the Chair) effectively acts as a board for the organisation. A recent innovation has been the development of a non-statutory board by the Parliamentary and Health Services Ombudsman. While the ombudsman remains a corporation sole, a board has been instituted with the purpose of enhancing the institution’s decision-making and bringing the organisation in line with governance arrangements that are now common across the public sector.

In Wales and Scotland, the model involves a more limited element of internal scrutiny, through the use of advisory boards. The Scottish Public Services Ombudsman for example appoints an Audit Advisory Board, with the remit of *“overseeing the management of risk and audit issues”*. These non-statutory and non-executive bodies are designed to provide an element of advice and challenge to the ombudsman, but on a more discrete and limited range of issues than a full board.

Audit

It is uncontroversial that ombudsman institutions should be subject to both internal and external audit arrangements. In keeping with the Venice Principles,⁷ these arrangements should be restricted to financial expenditure.

Parliamentary Scrutiny

The role of legislatures in relation to the ombudsman institution is two-fold: to scrutinise the work of the ombudsman and to use the outcomes of that work to enhance scrutiny of public authorities. Notwithstanding this dual function, the emphasis is often more on the former than the latter. One area that would benefit from further consideration by the Audit Committee, therefore, is the extent to which the Northern Ireland Assembly is currently making the best use of the information gleaned from ombudsman investigations in order to scrutinise and enhance the performance of public authorities.

In terms of holding the ombudsman to account, there are limits to what can be achieved by parliamentary committees in annual evidence sessions. While such scrutiny is an important part of holding the ombudsman to account, there should be recognition that a range of more detailed accountability arrangements are required. One limitation of the annual scrutiny process is that it is often dominated by input from disappointed complainants who are looking for an opportunity to have their cases re-heard or put forward criticisms largely based on anecdotal experiences.

⁶ B Thompson, ‘The Challenges of Independence, Accountability, and Governance in the Ombudsman Sector’, in R Kirkham and C Gill (eds), *A Manifesto for Ombudsman Reform* (Palgrave, 2020).

⁷ [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)005-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)005-e)

While such evidence is valuable and can helpfully contribute to debate around the ombudsman's performance, parliamentary scrutiny would be assisted by having a range of other objective and independent mechanisms that could be relied on to give confidence about the ombudsman's effectiveness while maintaining its independence. A corporate board, whose members are appointed by Parliament might, for example, provide reassurance of an ongoing independent and external check on the ombudsman.

Other mechanisms might be considered. Some of these already exist and have developed as part of self-regulatory efforts by ombudsman offices to be responsive and accountable to stakeholders (e.g. Independent Service Complaint Reviewers). Other more innovative approaches might include the creation of consumer panels, quality boards, and regular peer review. Having such a range of accountability arrangements, properly overseen by the legislature, would provide parliamentary committees with reassurance and allow them to consider performance more holistically. It would also avoid committees getting bogged down in discussions based on anecdotal data.

Independent Service Complaint Reviewers

Most UK ombudsman offices now employ an independent person to whom complaints about the service received by a complainant can be made. Such complaints are restricted to issues around the standard of service provided, and the merits of the decision reached by the ombudsman's office are excluded. Annual reports by independent service reviewers show any areas of concern arising from complaints.

Consumer panels

Some ombudsman offices use consumer panels or stakeholder forums which provide external advice and feedback on the ombudsman's performance. The Local Government and Social Care Ombudsman in England, for example, has set up a [Public Advisory Forum](#). The forum is made up of a majority of members of the public who have used the service and representatives from local authorities and social care providers, as well as those who act as advocates for the public such as advisory bodies, MPs and councillors. The forum:

- advises on the accessibility of the service
- gives direct feedback about the user experience
- shares views to make sure the service meets needs

Another example (albeit not in the public sector) is the Scottish Legal Complaint Commission's Consumer Panel:

*"The SLCC Consumer Panel is an independent advisory panel, set up to assist the SLCC in understanding and taking account of the interests of consumers of legal services. This includes providing feedback to the SLCC, from a consumer viewpoint, on the effectiveness of policies and procedures."*⁸

The use of panels or forums such as these ensures that users' needs are taken into account in designing policies and organisational changes, as well as making sure that feedback on current performance is analysed and considered from the point of view of users. These approaches also provide a meaningful way of capturing and aggregating user experiences.

Quality Assurance Boards

A major dilemma in relation to holding the ombudsman to account relates to the lack of oversight of the quality of substantive decisions. The ombudsman's decisions (subject to judicial review) are final and a key aspect of ensuring the ombudsman's independence is that the merits of decisions are not questioned. At the same time,

⁸ [About the Panel \(scottishlegalcomplaints.org.uk\)](#)

however, this can leave the ombudsman open to criticism for being unaccountable and claims of poor decision-making are difficult to assess meaningfully.

A possible solution here would be the appointment of a quality assurance board, composed of independently appointed members, who would randomly sample and quality assure a proportion of the ombudsman's casework. Such an approach would allow for detailed case file reviews on a substantial enough number of cases to ensure that any systemic problems in relation to decision making processes and outcomes could be identified and remedied.⁹

Peer review

A recent development in the ombudsman sector has been the use of peer review to enhance accountability and parliamentary scrutiny. Peer reviews could be commissioned on an *ad hoc* basis to consider particular issues arising, as well as forming a periodic part of accountability arrangements. Again, the benefits of such approaches are that they allow detailed and expert consideration of the issues, providing data and reassurance for the higher level scrutiny performed by parliamentary committees. I have appended in the Annex the text of a blog which summarises the potential value of using peer review in the ombudsman setting. The most effect approach in this context is likely to be what I have called "hybrid review" in the blog.

Conclusion

The key points I have sought to make above are:

- Independence is a core value for the ombudsman and efforts to enhance accountability must be mindful of the potential for encroaching on the ombudsman's effectiveness
- At the same time, particularly in the context of recent expansions of the ombudsman's powers in devolved UK jurisdictions, it is appropriate to consider how accountability arrangements can be optimised
- Parliamentary scrutiny is important and highly valuable, but needs to be supported by a range of other mechanisms capable of providing objective and credible data
- Such mechanisms include: data publication requirements, corporate boards, service complaint reviewers, consumer panels, audit, and peer review

I would be very happy to provide oral evidence to support this submission if you would find that helpful. In the meantime, thank you for asking me to submit evidence and I wish you well with the review.

Yours sincerely,



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⁹ For elaboration of this point see: R Kirkham, 'Strengthening Procedural Fairness and Transparency Through Ombudsman Institution', in R Kirkham and C Gill (eds), *A Manifesto for Ombudsman Reform* (Palgrave, 2020). The University of Glasgow, charity number SC004401

Annex – Blog Post Published on the UK Administrative Justice Institute Website on 27 September 2019.

<https://ukaji.org/2019/09/27/accountability-and-improvement-in-the-ombuds-sector-the-role-of-peer-review/>

Accountability and improvement in the ombuds sector: the role of peer review

On Monday 23 September 2019, the International Ombudsman Institute and the Parliamentary and Health Services Ombudsman hosted a [seminar](#) aimed at developing best practice in the use of peer review by ombuds offices. In this post, Chris Gill outlines his personal reflections on peer review and its potential contribution to enhancing accountability and learning in the ombuds sector, based on the talk he gave at the seminar.

The growth in ombuds self-regulation

Traditionally, the mainstay of ombuds accountability has been regular appearances before [parliamentary committees](#), focused largely on year-to-year operational matters and performance. These scrutiny sessions can be seen as a form of annual performance review for ombuds. This organisationally focused scrutiny has been supplemented by *ad hoc* reviews, either focusing on a [particular ombuds](#) or taking a more [sectoral approach](#). These reviews take a broader approach aimed at law and policy reform.

A notable trend in recent years, has been for the ombuds sector to develop a range of supplementary [self-regulatory tools](#) of accountability, driven by greater calls for accountability from members of the public, and more intense parliamentary and media scrutiny. More broadly, these developments can be seen as part of a trend of declining trust in state institutions and a need for ombuds to do more to demonstrate their [trustworthiness](#). Self-regulatory approaches include:

- The development of service standards [guidance](#) by the Ombudsman Association.
- The use of Audit and Risk Committees, featuring an independent membership, and providing some independent oversight (e.g. the committee used by the [Scottish Public Services Ombudsman](#)).
- The use of [independent service delivery reviewers](#), to handle independently individual allegations of poor service on the part of an ombuds' staff.
- The use of stakeholder groups, such as the Local Government and Social Care Ombudsman's [Advisory Forum](#), involving former complainants and other stakeholders.

The developing use of peer review

In this context, we are now seeing the beginning of a trend towards the use of peer review among ombuds offices in the UK. This can be seen both as a response to more intense public scrutiny and a development of attempts to meet calls for greater accountability on a self-regulatory basis. There have been four landmarks in the use of peer review to date:

- 2009: Jerry White (former Local Government Ombudsman) was asked to conduct a [review](#) of the Scottish Public Services Ombudsman's handling of a historic case.
- 2013: An [external evaluation](#) was commissioned of the Local Government Ombudsman, which included a panel composed of Jim Martin (the Scottish Public Services Ombudsman at the time), Richard Thomas (a former Information Commissioner) and Richard Kirkham (University of Sheffield).
- 2018: [Independent peer review](#) of the Parliamentary and Health Services Ombudsman, conducted by Peter Tyndall (Ombudsman for Ireland), Caroline Mitchell (Financial Ombudsman Service), and Chris Gill (University of Glasgow).
- 2019: Peer review conducted of the Public Services Ombudsman for Wales by the Local Government and Social Care Ombudsman.

While the use of peers either to conduct (or be part of) external evaluations and reviews of ombuds services can be seen to be at only a nascent phase, there is clearly increasing interest in this area, as shown by the fact

that a workshop on peer review was held at the most recent Ombudsman Association conference and the IOI/ PHSO peer review seminar held this week. As a result, this is a good time to consider the pros and cons of peer review as an approach to accountability and improvement and to bring some analytical clarity to its future use and development.

Why use external reviews: two models of review

There are two main prompts for commissioning external reviews of ombuds: a desire to ensure and demonstrate accountability, and a desire for learning and improvement. Of course, there is overlap between these categories, since the process of ensuring accountability is likely to lead to some learning of lessons, while conducting external review with the aim of improvement demonstrates in itself a commitment to external review that contributes to accountability. The categories are also not exhaustive, and there are other potential drivers for external review, such as the use of review by the leadership of an organisation to achieve change in the face of organisational resistance.

The key features of an *accountability- focussed external review* are as follows:

- *External impetus.* The prompt for the external review is external, for example a request by a parliamentary committee or high profile media criticism.
- *Public findings.* Where the aim is to ensure and demonstrate accountability, public reporting of findings is key.
- *Transparent and robust methodology.* The methodology needs to convince stakeholders that the outcome of the review is based on a clear, transparent, and robust methodological process.
- *Retrospective focus.* Generally, the focus of an accountability-focused review is to establish whether current standards have been met and past practice is acceptable.
- *Review will tend to be independent.* Those conducting the review must be independent of the ombuds being reviewed.
- *Vertical accountability.* The aim of an accountability-focussed review is to demonstrate to an authoritative accountability forum that the organisation is performing well.

The key features of a *learning and improvement-focused review* are as follows:

- *Internal impetus.* The prompt for external review is a desire on the part of the ombuds organisation itself to learn, improve, and develop its practice.
- *Private findings.* Because the impetus of the review is internal, there is less need for public reporting, indeed, generating genuine, open, and transformative learning may be more likely where findings are not being made public.
- *Flexible methodology.* Methodology may be more flexible, pragmatic and outcome-focused where the review is for internal rather than external consumption.
- *Prospective focus.* The aim of review here is improving for the future, so review will not necessarily be restricted to past and current practice and instead can involve experimentation with new practices and a focus on what happens next rather than formal assessment against established standards.
- *Review need not be independent.* Independence may be valued as part of a learning and improvement-focused review, but is less essential and, in some cases, independence may be unhelpful as high levels of trust and shared understandings may be required for open and genuine learning to take place.
- *Horizontal learning.* Learning in this kind of review takes place through dialogue and exchange in a shared spirit of improvement, rather than a hierarchical assessment of past performance.

As this comparison of these two models of review makes clear, quite different types of external review are likely to be required depending on what the fundamental purpose of review is perceived to be.

Types of review and their relative merits

There are three broad types of review considered here: independent review; hybrid review; and peer review. Independent review involves review by an individual or panel that is entirely independent of the ombuds sector. Hybrid review involves review by a panel that is composed of a mix of independent and peer members. Peer review involves review by peers from the ombuds community.

Independent review is currently the dominant form of external review within the ombuds sector. The policy and law reform reviews referred to above are invariably carried out independently, and in the private sector where external review is more established, independent review is the norm (e.g. [reviews](#) of the Financial Ombudsman Services between 2004 and 2019). So in considering peer review as a developing practice, it is important to be clear about its potential strengths and weaknesses relative to independent review. The table below summarises those strengths and weaknesses.

	Independent review	Peer review
Strengths	<ul style="list-style-type: none"> • Independence • Ability to draw on range of experiences/ expertise • Degree of professionalism/ specialisation in review methodology • Likely to be better resourced (since requires payment) • Can lead to innovation by providing an external, “fresh look” at established practice 	<ul style="list-style-type: none"> • Understanding the context • Asking the right questions • Credibility of findings to reviewed organisation • Fairly well understood concept • Particularly useful where learning and improvement is the goal • Creates cooperative and collaborative communities of practice
Weaknesses	<ul style="list-style-type: none"> • Lack of contextual understanding • Recommendations that are impractical • May lead to defensive organisational reactions • Management consultancies can provide “off the shelf” reports and recommendations • Likely to be more costly (not reliant on good will) • Over-reliant on stakeholder opinion 	<ul style="list-style-type: none"> • Stifling of innovation/ group think confirmation • Little evidence of effectiveness (e.g. in academia) • Peer standards may not be clear to outsiders • Perception of bias and professional insularity • Less credible as a tool of accountability • Lack of time and resources for reviewers • Dependent on good will of ombudsman community

In considering how to overcome the weaknesses of each model and capitalise on their strengths, one option is the use of hybrid reviews, involving panels of independent and peer reviewers. This is the approach used in the external evaluation of the LGO in 2013 and the recent review of the PHSO in 2018. Clearly, the ability of peers to ask the right questions and understand the context has significant potential to enhance the quality and outcomes of a review. There is also potential to ensure that some of the potential downsides of peer review are overcome. For example, transparency and perceived objectivity can be heightened when the

review uses objective benchmarks such as the Council of Europe's "[Venice Principles](#)" (Principles for the Protection of the Ombudsman Institution) or the Ombudsman Association's [service standards](#). However, in order to command public confidence in the outcome of the review, careful attention is also likely to be needed in relation to the composition of the panel. The danger of introducing peer review elements into accountability-focused reviews, is that the peer element overshadows stakeholders' perceptions of the credibility of the review.

Conclusions: the future use of peer review by ombuds

The above analysis of the relative merits of independent and peer review suggests that:

- Independent review is likely to be of most value when the purpose of a review is to ensure and demonstrate accountability;
- Hybrid review is likely to add value in an accountability context, in helping overcome some of the weaknesses of independent review but, despite this, may struggle to command public credibility in an era of decreased public trust;
- Pure peer review is likely to be of most value when the purpose of a review is to develop, learn, and improve.

If this analysis is right, the future use of peer review by ombuds needs to focus on two areas:

- *Developing a robust methodology for using peer review as part of accountability-focussed reviews* (i.e. hybrid reviews) and developing guidance on the composition of review panels. Ultimately, since accountability-focused reviews need to satisfy external stakeholders and accountability fora, there needs to be consideration given to developing a convincing business case for the use of hybrid reviews as opposed to fully independent reviews in this context. A starting point might be some of the advantages of peer review identified earlier in this post.
- *Developing practice in relation to the use of learning and improvement-focussed review*. There appears to be considerable scope to develop peer review as a methodology for sharing learning and developing best practice within the ombuds sector, which could form part of wider moves aimed at professionalising practice within the sector (e.g. training and development initiatives). Developing peer review as a complement to reflective professional practice could lead to substantial innovation, as well as contributing to the self-regulatory efforts of the ombuds sector to demonstrate its accountability.

It is unclear at present how peer review will be used in future within the ombuds sector and current practice is at a very early stage. However, this blog has suggested that there is potential for peer review to contribute to both accountability and learning, albeit that the use of peer review is perhaps more naturally consonant with the latter objective.

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