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For the attention of: Mr Francisco Calí Tzay, United Nations Special Rapporteur on the rights of Indigenous peoples

**JOINT SUBMISSION FOR THE REPORT OF THE SPECIAL
RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES
TO THE GENERAL ASSEMBLY -

IMPACT OF COVID-19 ON INDIGENOUS PEOPLES**

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(1) GLOSSARY

APONT - Aboriginal Peak Organisations Northern Territory

APT - Association for the Prevention of Torture

IASC - Inter-Agency Standing Committee

NATSILS - National Aboriginal & Torres Strait Islander Legal Services

NPM - National Preventive Mechanism

OHCHR - Office of the High Commissioner for Human Rights

OICS - Western Australian Office of the Inspector of Custodial Services

OPCAT - Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

SPT - Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

WHO - World Health Organisation

(2) EXECUTIVE SUMMARY

The Special Rapporteur on the rights of [I]ndigenous peoples (the **Special Rapporteur**) has identified a number of issues that may be addressed in the report to the General Assembly, including the '[i]mpacts of lockdown, quarantines and other responses on access to... justice' and '[d]iscrimination and disproportionate impacts of State restriction, confinement measures and other pandemic-related policies on [I]ndigenous peoples.'

This submission addresses the disproportionate and discriminatory impacts of COVID-19 on the rights of Aboriginal and Torres Strait Islander people with regard to the Australian criminal legal system, particularly focusing on places of detention. This submission relates to correctional centres, correctional work camps, youth detention centres, police cells, court cells, supported bail accommodation, places where people are temporarily detained (such as hospitals) and modes of transport.

The submission identifies significant protection gaps, including a lack of Federal, State and Territory Government transparency in relation to places of detention and robust, culturally-appropriate, OPCAT-compliant detention oversight across all jurisdictions during the pandemic.

(3) CONDITIONS OF DETENTION AND TREATMENT OF DETAINED ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE DURING COVID-19

OVERINCARCERATION & THE DISPROPORTIONATE IMPACTS OF COVID-19

The Special Rapporteur has raised concerns that 'COVID-19 is both highlighting and exacerbating current and ongoing human rights situations faced by many [I]ndigenous peoples,' and has requested information on 'how States of emergency may contribute to threats or aggravate ongoing human rights violations against [I]ndigenous peoples.' The Special Rapporteur has noted that issues that may be addressed in the report to the General Assembly include '[i]ncidence, mortality rates and increased risk of infection in [I]ndigenous communities; [d]isparities and obstacles to adequate healthcare... and lack of culturally appropriate and accessible services,' and have asked for examples of 'increased risks and/or disproportionate health impact of the pandemic on [I]ndigenous peoples.' They note that the 'lack of access to adequate health care services' renders Indigenous people 'particularly vulnerable to the spread of disease.'

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN DETENTION

It has been established that places of detention are a high-risk environment with regards to both COVID-19 transmission¹ and its disproportionate impact on detained people (due to their poorer health and the fact that healthcare provision is often not equivalent to that in the rest of the community, despite international law requiring equivalence of care,² and the fact that that the International Covenant on Economic, Social and Cultural Rights explicitly requires that States take steps for the 'prevention, treatment and control of epidemic... diseases'³). Although to date there have not yet been confirmed cases of COVID-19 among people detained in places of detention within the criminal legal system (there have been confirmed cases among staff⁴), there have been outbreaks of COVID-19 in other closed environments in Australia,⁵ and 'the continuing risk of COVID-19 to people held in places of detention should not be underestimated.'⁶

The Office of the High Commissioner for Human Rights' (**OHCHR**) statement that 'ethnic minority and socioeconomically disadvantaged individuals are differentially affected by both the criminal justice system and COVID-19'⁷ applies to the Australian context, with Aboriginal and Torres Strait Islander people being grossly overrepresented in places of detention,⁸ and receiving inferior healthcare in prison compared to non-Indigenous people.⁹

National Aboriginal & Torres Strait Islander Legal Services (**NATSILS**) has identified that testing of and provision of immediate, appropriate medical treatment for detained Aboriginal and Torres Strait Islander people who develop symptoms is crucial to preventing deaths in custody, and has called for families and the Aboriginal and Torres Strait Islander Custody Notification Services to be immediately notified of COVID-19 cases. NATSILS has recommended that the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) be incorporated into domestic law in all Australian jurisdictions, as a matter of priority, particularly noting the UNDRIP obligation to provide Aboriginal and Torres Strait Islander people the highest attainable standard of physical and mental health, regardless of where they live.¹⁰

Given the fact that 'widespread community transmission of COVID-19 within a correctional institution is likely to result in a disproportionately high COVID-19 mortality rate,'¹¹ the high risk to the health and lives of detained Aboriginal and Torres Strait Islander people, including children, makes essential the immediate implementation of preventative measures.

ABORIGINAL AND TORRES STRAIT ISLANDER COMMUNITIES

Places of detention are not insulated from the rest of the community; they are porous,¹² and should be understood and treated as such. People in detention are regularly released back into the community, whether on bail, parole or on the completion of their sentences, people enter detention upon arrest or sentencing, and staff and contractors enter and leave places of detention on a daily basis.

It has been well-established that an outbreak in detention would have catastrophic public health implications for the rest of the community.¹³ Containing COVID-19 in detention is thus integral to the broader efforts to contain COVID-19 throughout the rest of the community.¹⁴ This is of particular importance as Australia begins to ease restrictions, with other countries having experienced second COVID-19 spikes related to outbreaks in overcrowded and unsanitary environments.¹⁵ Australia's luck in containing COVID-19 thus far could quickly change with an outbreak in detention.¹⁶

Due to a number of entrenched and systemic factors, including the ongoing impacts of colonisation, Aboriginal and Torres Strait Islander people are over imprisoned in Australia. Any outbreak in detention would in turn have a disproportionate effect on their communities (which are forced into poorer health outcomes and poorer access to healthcare than the rest of the community¹⁷), to which they will return. Failure to take preventative steps through early and temporary releases (discussed below) undermines the efforts of the 'Aboriginal community-controlled health sector [which] has reacted swiftly and effectively to the COVID-19 outbreak.'¹⁸ As Aboriginal Peak Organisations Northern Territory (**APONT**) has noted, '[t]here is little doubt that without the leadership and agility of NT Aboriginal organisations and the willingness of the

NT Government to respond quickly, the situation in the NT could have been very serious with catastrophic outcomes for its vulnerable Aboriginal population.¹⁹

**TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT OF DETAINED
ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE DURING COVID-19**

The Special Rapporteur has noted that '[c]urfews, lockdowns, quarantine and other imposed isolation measures imposed as a response to the pandemic may cause additional hardships... Increased State security measures imposed during emergency situations... may also directly impact [I]ndigenous communities.'

The UN Human Rights Committee's statement reaffirming that States must not derogate from the prohibition of torture during the pandemic,²⁰ the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment's (**SPT**) advice regarding the non-derogable prohibition of torture during the pandemic,²¹ the World Health Organisation (**WHO**) guidance in relation to routine intake quarantine²² and the Inter-Agency Standing Committee's (**IASC**) guidance regarding de facto solitary confinement during COVID-19²³ all echo the rights and obligations under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment²⁴ and the United Nations Standard Minimum Rules for the Treatment of Prisoners,²⁵ and the Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment's position on solitary confinement.²⁶ Despite this, and the Communicable Diseases Network Australia's guidance regarding lockdown,²⁷ solitary confinement and excessive lockdown have formed part of Governments' responses to COVID-19 in places of detention.²⁸

The recent submission to the *Select Committee on COVID-19 to inquire into the Australian Government's response to the COVID-19 pandemic*, 'OPCAT, places of detention and COVID-19' by an alliance of civil society organisations and academics (the **Select Committee submission**)²⁹ and the submission by Danila Dilba Health Service (**Danila Dilba**)³⁰ both called for the prohibition of the use of solitary confinement and other 'practices that amount to torture or cruel, inhuman or degrading treatment or punishment.'³¹

The Select Committee submission highlighted that:

Solitary confinement has a particularly detrimental impact on Aboriginal and Torres Strait Islander people, with the Royal Commission into Aboriginal Deaths in Custody noting the 'extreme anxiety suffered by Aboriginal prisoners committed to solitary confinement' and that 'it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention.'³²

As already noted, Aboriginal and Torres Strait Islander people, particularly Aboriginal and Torres Strait Islander people with disabilities, are overrepresented in places of detention, and these lockdown and quarantine measures directly and disproportionately impact on them.

RELEASE OF DETAINED ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE AND CURBING ADMISSIONS TO DETENTION

Numerous UN bodies, WHO, International Committee of the Red Cross (ICRC), Council of Europe³³ and health experts internationally have called for early and temporary releases of detained people and for curbing of admissions to detention.³⁴

The Select Committee submission recommended that:

Federal, State and Territory Governments must take immediate action to reduce the number of people held in places of detention. This should include responsibly releasing people who are at higher risk of significant harm should they contract COVID-19, including Aboriginal and Torres Strait Islander people, elderly people, people with chronic health conditions, people living with disability, people with mental health conditions, children, young people, pregnant women, primary caregivers for young children...³⁵

NATSILS has called for:

the immediate release of Aboriginal and Torres Strait Islander adults and young people who are: most at risk, with pre-existing health issues, including elderly people, people with chronic health conditions, disability, and/or mental health conditions; on remand, including by fast-tracking bail applications; imprisoned for a term of six months or less, and those who have six months or less left to serve, with expedited parole processes.³⁶

Change the Record (Australia's only national Aboriginal led justice coalition of Aboriginal peak bodies and non-Indigenous allies),³⁷ Danila Dilba³⁸ and the Australian Medical Association have echoed the above recommendations.³⁹ The Australian Medical Association's submission to the Senate Select Committee supported 'actions that reduce the number of people held in places of detention', recognising that Aboriginal and Torres Strait Islander people are 'at higher risk of contracting COVID-19.'⁴⁰

The above recommendations are supported as a means by which to protect the human rights, health and lives of detained Aboriginal and Torres Strait Islander people. Measures must be put in place (eg supported bail accommodation) to facilitate more releases, and supports including housing and medical must be provided to all people who are released.

Given that 'Aboriginal and Torres Strait Islander people are less likely to be granted bail than non-Aboriginal and Torres Strait Islander people,⁴¹ it is imperative that bail decision-making processes are 'reviewed and reformed to promote equitable and culturally responsive decision-making processes; and that gaps in culturally appropriate bail support services and programs be identified and addressed,⁴² and that 'additional support be provided to Aboriginal and Torres Strait Islander people in seeking bail-supported accommodation.'⁴³ In light of COVID-19, it is critical that Aboriginal and Torres Strait Islander people are not imprisoned as a result of entrenched social and economic disparities.

(4) IDENTIFIED PROTECTION GAP – LACK OF CULTURALLY APPROPRIATE, OPCAT-COMPLIANT DETENTION OVERSIGHT DURING COVID-19

RISK OF DETAINING AUTHORITIES AND GOVERNMENT ACTING WITH IMPUNITY WHEN VIOLATING ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE’S RIGHTS

The Special Rapporteur has noted that the ‘impact of COVID-19 on [I]ndigenous peoples should be researched and documented to guide States’ responses and to ensure these exceptional times do not exacerbate or justify impunity for violations of [I]ndigenous peoples’ rights.’

Those who are marginalised are more vulnerable to torture and ill-treatment⁴⁴ and detained Indigenous people are at a higher risk of torture and ill-treatment.⁴⁵ As discussed above, these risks are heightened during COVID-19. Across Australia, detention oversight mechanisms are currently inadequate, limiting the opportunities to prevent torture and ill-treatment and to ensure detaining authorities do not act with impunity.

NEED FOR THE IMPLEMENTATION OF OPCAT AND ROBUST DETENTION OVERSIGHT DURING THE PANDEMIC

WHO and numerous UN bodies have recommended that independent oversight of places of detention continues throughout the pandemic,⁴⁶ as has the ICRC,⁴⁷ Council of Europe,⁴⁸ civil society internationally⁴⁹ and civil society in Australia.⁵⁰ WHO and UN bodies have also emphasised that access of oversight bodies to places of detention must be guaranteed during the pandemic,⁵¹ and although National Preventive Mechanisms (NPMs) in other countries have adapted their inspection methodology to enable continued oversight⁵² in compliance with the SPT’s advice to continue visits while observing the ‘do no harm principle’,⁵³ most Australian oversight bodies have suspended inspections⁵⁴ at a time when Aboriginal and Torres Strait Islander people are at an increased risk of torture and ill-treatment. This has impacted on Aboriginal Community Controlled Organisations’ ability to access information. For example, Change the Record has noted that it has been difficult to ‘get up to date information about the conditions in adult and youth correction facilities due to restrictions on legal and family visits and the withdrawal of independent oversight bodies and external scrutiny in many states and territories.’⁵⁵

Australia has ratified the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), but has deferred its implementation.⁵⁶ Thus far, in relation to the criminal legal system, NPM designations have been limited to the Commonwealth Ombudsman (the NPM coordinator and NPM responsible for inspecting Australian Federal Police cells⁵⁷) and the Western Australian Office of the Inspector of Custodial Services (OICS) (responsible for inspecting justice-related facilities in Western Australia⁵⁸). However, Change the Record has stated that the ‘COVID-19 pandemic presents an opportunity to... fully realise the vision of [OPCAT] regarding... best practice oversight and transparency of places of detention.’⁵⁹

The Select Committee submission made recommendations that ‘Federal, State and Territory Governments... urgently designate and/or establish [NPMs] as part of their response to the

COVID-19 pandemic' and that 'Governments... engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations during this process.'⁶⁰ It also recommended that oversight bodies be guaranteed 'unimpeded access to all places of detention and persons detained throughout (and beyond) the duration of the COVID-19 pandemic.'⁶¹ The submission highlighted that oversight bodies 'are essential not only to facilitate transparency and accountability, but to make expert recommendations that will guide the detaining authorities in improving conditions and treatment in detention, and limiting the transmission of COVID-19.'⁶² NATSILS has similarly, in two recent submissions, called for the establishment of NPMs and that oversight bodies continue to have access to all places of detention during the pandemic,⁶³ as has Change the Record.⁶⁴ While it is encouraging that the NT Government has recently announced an independent review of a serious incident at Darwin Correctional Centre,⁶⁵ more must be done to ensure robust detention oversight across Australia.

CULTURALLY APPROPRIATE OPCAT IMPLEMENTATION

The Special Rapporteur has identified issues that may arise include '[p]articipation of [I]ndigenous peoples in the elaboration of State and provincial response to the pandemic as well as implementation of programs and policies developed by [I]ndigenous programs and institutions.' The Special Rapporteur has asked how Indigenous peoples are 'given the possibility to shape the national COVID-19 response to ensure it does not have discriminatory effect on their communities.'

Detention oversight is an integral aspect of achieving a truly just criminal legal system for Aboriginal and Torres Strait Islander people, particularly during the pandemic. Australia must commit to establishing and/or designating NPMs that are culturally appropriate for detained Aboriginal and Torres Strait Islander people.⁶⁶

ABORIGINAL AND TORRES STRAIT ISLANDER CONSULTATION AND PARTICIPATION

Although the Commonwealth Ombudsman's civil society Advisory Group's recommendation that the Group should include an Aboriginal and/or Torres Strait Islander representative⁶⁷ is commendable, this does raise concerns that Australia's coordinating NPM failed to identify this need in the first instance. As NATSILS has recently emphasised, oversight bodies and NPMs must have 'strong Aboriginal and Torres Strait Islander representation, including from the legal assistance services and the health sectors.'⁶⁸ As OPCAT implementation in Australia progresses, this recommendation must be respected. NPM staff must include Aboriginal and Torres Strait Islander representation across genders and disciplines⁶⁹ and include people with lived experience of detention.⁷⁰ NPMs must be culturally safe workplaces for Aboriginal and Torres Strait Islander people.⁷¹

For NPMs 'to be effective, [they] must achieve legitimacy among the [Aboriginal and Torres Strait] community (which extends to those who are detained, with whom the NPM will need to engage)'.⁷² '[Aboriginal and Torres Strait Islander] communities and Aboriginal Community Controlled Organisations must be consulted in a transparent and inclusive process of the NPMs' designation,⁷³ design,⁷⁴ operations⁷⁵ and evaluation.⁷⁶ Additionally, once 'Treaty/Treaties are finalised, the... NPM(s) must be responsive to the resulting obligations.'⁷⁷ NPMs 'must make targeted efforts to inform the [Aboriginal and Torres Strait Islander] community' of their findings and recommendations in order to not 'perpetuat[e] [Aboriginal and Torres Strait Islander]

people's marginalisation and disempowerment in a criminal justice system that disproportionately impacts on their lives and communities.¹⁷⁸

ABORIGINAL AND TORRES STRAIT ISLANDER WORLDVIEWS, CULTURE AND LAW

The Association for the Prevention of Torture (**APT**) has asserted that 'States should systematically implement international standards with regard to the rights of [I]ndigenous persons in the context of criminal justice and detention.¹⁷⁹ NPMs must be in a position to appropriately apply international human rights law⁸⁰ (including laws relating to the prohibition of torture⁸¹ and UNDRIP⁸²) to the experiences and treatment of detained Aboriginal and Torres Strait Islander people.⁸³

The APT's advice that an inclusive approach to detention inspection involves 'ensuring that the issues of vulnerable groups are mainstreamed into preventive work'⁸⁴ should be consistently applied across all Australian jurisdictions, with respect to Aboriginal and Torres Strait Islander people. This requires that NPMs apply 'a critical lens in assessing the cultural appropriateness of all aspects of conditions and treatment in detention.'⁸⁵ In good practice, the Western Australian OICS has a set of Indigenous-specific detention standards, although it has not been revised for some time.⁸⁶

NPMs, as part of their preventive work, should:

- 'consider what factors contribute to the overrepresentation of [Aboriginal and Torres Strait Islander] people in places of detention, recognising the increased risk of torture and ill-treatment of those who experience socioeconomic and sociocultural marginalisation.'⁸⁷
- '[w]hen making recommendations regarding the overrepresentation of [Aboriginal and Torres Strait Islander] people in places of detention... consider [Aboriginal and Torres Strait Islander] community-driven solutions, particularly in relation to diversion and alternatives to custodial sentences.'⁸⁸
- 'highlight the importance of incorporating [Aboriginal and Torres Strait Islander] world views into legislation and policy in a meaningful way.'⁸⁹

NPMs should appreciate:

- 'that an [Aboriginal and Torres Strait Islander] perspective of what constitutes torture, or cruel, inhuman or degrading treatment or punishment, may diverge from that of non-Aboriginal people. The suffering experienced by an individual, the significance that they attribute to particular conduct or a situation in detention, and their emotional response, will be determined in part by how their culture shapes their worldview.'⁹⁰
- 'that [Aboriginal and Torres Strait Islander] people may experience imprisonment differently.'⁹¹
- that Aboriginal and Torres Strait Islander culture is a protective factor and strength.⁹²

RACISM AND DISCRIMINATION

The OHCHR has noted that '[r]ising disparities in how COVID-19 is affecting communities, and the major disproportionate impact it is having on racial and ethnic minorities... have exposed alarming inequalities within our societies.'⁹³ Public Health Association Australia has stated that '[i]t is indisputable that racism is a real and ever-present public health issue. Racism in Australia

obviously precedes COVID-19, and has a massive continuing impact on the health and wellbeing of Aboriginal and Torres Strait Islander people.⁹⁴ Aboriginal and Torres Strait Islander people, communities and organisations and the Black Lives Matter movement in Australia are advocating that the criminal legal system's systemic racism be addressed, particularly focusing on Aboriginal and Torres Strait Islander deaths in custody.⁹⁵

'In order to properly assess the risk of torture or ill-treatment of [Aboriginal and Torres Strait Islander] detainees, the [NPMs] should incorporate into [their] expectations/standards an expectation that there is an absence of systemic racism at the place of detention/within the detaining authority,⁹⁶ and should assess whether there are discriminatory practices in places of detention.⁹⁷ Such an approach would align with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment's position that 'States are under a heightened obligation to protect vulnerable persons from abuse and should interpret the torture protection framework against the background of other human rights norms, such as those developed to eliminate racial discrimination.'⁹⁸

HISTORIC-POLITICAL CONTEXT OF COLONISATION

NPMs should have an understanding of how the 'ongoing impact of colonisation on the criminal justice system' has resulted in intergenerational trauma and shaped Aboriginal and Torres Strait Islander people's 'contemporary relationship to the criminal justice system.'⁹⁹ NPMs must appreciate that 'the long-term impact of torture and ill-treatment can be shaped by survivors' culture and the historic-political context of the ill-treatment (including the history of colonisation).'¹⁰⁰

(5) IDENTIFIED PROTECTION GAP – LACK OF TRANSPARENCY IN RELATION TO PLACES OF DETENTION DURING COVID-19

The Special Rapporteur's questionnaire asks whether the State has disaggregated data in relation to Indigenous peoples and individuals during the COVID-19 pandemic.

The OHCHR has stated that '[c]ollection, disaggregation and analysis of data by ethnicity or race, as well as gender, are essential to identify and address inequalities and structural discrimination that contributes to poor health outcomes, including for COVID-19.'¹⁰¹ This statement echoes the Select Committee submission recommendation that Australian Governments should ensure that data is 'disaggregated, in relation to gender, disability status, age and ethnicity.'¹⁰² NATSILS has identified the need for 'independent analysis of police stop data during the pandemic' as essential to 'determine whether COVID-19 related policing impacted upon certain demographics or communities disproportionately.'¹⁰³ Danila Dilba has also identified a need for disaggregated data in relation to police stops and enforcement,¹⁰⁴ as has Change the Record.¹⁰⁵

The Select Committee submission, supporting calls by WHO and UN bodies,¹⁰⁶ also made a number of recommendations with regard to improved transparency of places of detention during the pandemic:

'Federal, State and Territory Governments must provide regular, updated and accurate information to the public and to oversight bodies on its response to the COVID-19 pandemic in relation to each

place of detention. Oversight bodies should publicly report on the information they receive through this process, at regular intervals, and ensure that the voices of people in places of detention are heard in this process’;

‘Federal, State and Territory Governments must not adopt unreasonable measures that will further undermine or limit existing formal and informal mechanisms of oversight and transparency.’¹⁰⁷

The Select Committee submission suggested that information provided by detaining authorities must include:

Information relating to infection prevention and control measures and contingency plans (particularly strategies, policies and data relating to use of medical isolation, quarantine and solitary confinement, staffing, testing, health provision, personal and legal visits, programs and education); information relating to COVID-19 testing and results for people in detention, staff and contractors, infection rates and number of deaths, as well as incidents such as use of force, incidents of self-harm and prison disturbances such as protests.¹⁰⁸

All of the above recommendations are supported as a means of improving the protection of the rights of detained Aboriginal and Torres Strait Islander people during the pandemic.

ENDNOTES

- ¹ Office of the High Commissioner for Human Rights, *Human Rights Dispatches: human rights issues within the context of the coronavirus pandemic*, "Human Rights Dispatch No. 2: COVID-19 and the protection of the right to life in places of detention", accessed 6 May 2020, available at <https://www.ohchr.org/EN/Issues/Executions/Pages/HumanRightsDispatches.aspx>
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