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The Indigenous Constitutional Secretariat
C/- Department of FaHCSIA
PO BOX 7576
Canberra Business Centre ACT 2610

Dear Expert Reference Panel,

Proposals for constitutional recognition for Aboriginal people

The Central Australian Aboriginal Congress (Congress) supports the need for constitutional recognition of Aboriginal and Torres Strait Islander People. Congress believes that constitutional recognition of our peoples rights underpins the health development of Aboriginal people. Our health will not improve if our specific cultures and our unique status as the nations first peoples is not specifically recognised in the Australian constitution.

A few years ago Congress provided a submission to the NT statehood process and there are some parallels in the issues we raised in the consultation process for statehood and this process. If the NT was ever to have its own constitution as a state then Congress would also be seeking specific recognition of the special status of Aboriginal people including our unique cultures. In 2002, Congress developed a position paper on "Treaty and Health" and again many of the issues discussed in that paper are relevant to the current proposals for constitutional recognition of Aboriginal people in Australia.

The health of people in all populations, especially marginalised minority populations, has been linked to the development of constitutions which give legal recognition to human rights. The public health literature discusses this link in a number of different ways relevant to this consultation.

Human Rights and Population Health

The relationship between the protection of human rights and the health of populations is outlined in a number of important journals that publish scientific literature specifically on this link. The two most important of these journals come from the Francois-Xavier Bagnoud Centre for Health and Human Rights at Harvard University and the Center for Public Health and Human Rights at the John Hopkins University school of Public Health. Both these centres are devoted to explaining the impact of

this link and the mechanisms by which human rights and constitutional recognition of human rights impacts on health development. However, that fact that there is a link is beyond doubt and it is why these centres were set up in the first place.

Constitutional Recognition and Health Improvement for Indigenous Peoples

There is also the evidence from Stephen Kunitz¹ and others about the links between constitutional recognition of the rights of indigenous peoples and health improvement. This has been explained thus:

“Every Aboriginal person born in Canada possesses rights that no other Canadians possess. These rights are found in the *Constitution Act, 1982* (hereinafter referred to as ‘the Constitution’). The Constitution not only protects existing Aboriginal and treaty rights, but it should be noted that, by virtue of their entrenchment within the Constitution, these rights are recognized as part of the Supreme law of Canada. Aboriginal constitutional rights include the right to health and to self determination over knowledge, heritage, culture, and traditions that encompass all aspects of Aboriginal societies.²”

The Assembly of First Nations in Canada explains the importance of the constitutional recognition of indigenous rights in this way:

“When properly understood, constitutional rights impose certain positive social, fiscal and legal obligations on governments. These obligations in turn permeate legislative and social policy development and place a positive duty on governments to fulfil their obligations”.

The fact that the gap between the life expectancy of Indigenous populations and the non-indigenous populations in the colonial settler societies of Canada, USA and NZ/Aotearoa is smaller than that between the Australian population as a whole and the Aboriginal population is often remarked upon. Yet too few seem to draw the connection that is there between these differences and the level of constitutional recognition of Indigenous people in these different countries. While no one has suggested that the differences in health status is *only* explained by the differences in constitutional recognition – few would disagree that this is *part of* the explanation. So how great are these differences in health status?

¹ Kunitz, S *Disease and Social Diversity: The European Impact on the Health of Non-Europeans*. Oxford University Press, NY, 1994

² M. Battiste & J.Y. Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Saskatoon: Purich, 2000) at 212–213 [*Protecting*]. As cited by Yvonne Boyer in the Discussion Document for the Aboriginal Dialogue: *Self Determination as a Social Determinant of Health*. Vancouver: June, 2006.

Table 1. Life expectancy in years at birth for selected indigenous populations of NZ/Aotearoa, USA, Canada and Australia. (from Kunitz 1994 & 2000³, Cunningham, J. & Paradies⁴, Y 2000, Ross & Taylor 2001⁵ AIH&W 2000⁶ & IHS 1999⁷)

	<i>Maoris</i>		<i>US Indians</i>		<i>Canadian Indians</i>		<i>Aust Aborigines</i>	
Year	Male	Female	Male	Female	Male	Female	Male	Female
1920's	47	45	NA	NA	NA	NA		
1930's	46	46	NA	NA	NA	NA		
1940's	48	54	51.3	51.9	NA	NA		
1950's	57	58	58.1	62.2	NA	NA		
1960's	61	65	60	65.7	59.6	63.5	50 (NT)*	
1970's	63	67	60.7	71.2	57.8	60.3		
1980's	65	68	67.1	75.1	64	72.8	54	61.6
1990's	67.2	71.6	67.6	74.7	67**	67**	56{53.7 }***	63{58.9 }***
Total pop/ Non- Indigenous	75.3+	80.6+	72.5+ +	78.9++	75++	77++	76++	82++
Gap in life expectancy	8.1	9	4.9	4.2	8	10	20{22.3 }****	19{23.1 }****

- * NT figure only, ** Canadian Inuit average total male & female data Kunitz 2000*** {WA, SA & NT} only data, ****comparison with {WA, SA & NT} data only.
- + Non-Maori population, ++all races (or total population)

Table 1 shows that the gap in life expectancy between Aboriginal and non-Aboriginal people is dramatically larger than between indigenous and non-indigenous populations in comparable countries.

The reasons for this variation lie in the unique experiences of each of the Indigenous populations of these societies. A range of factors must be considered in order to answer why this situation occurs.

*“.....health status improvement is related to a set of factors operating together, rather than to the presence or absence of one particular factor. These factors are environmental health, access to health care, socio-economic status, social inequality and psychosocial factors.”*⁵

Constitutional recognition may have a role to play in these factors through, providing clear and effective institutional arrangements for the provision of health (and other) services, overcoming the adversarial nature of state & territory government relations with Indigenous populations, establishing Indigenous rights in law and through

³ Kunitz, S. 2000 Public Health Then & now: Globalisation, States and the Health of Indigenous Peoples. *AJPH October 2000 Vol.90. No 10.*

⁴ Cunningham, J. & Paradies, Y. 2000 Mortality of Aboriginal & Torres Strait islander Australian 1997. ABS Cat No:3315.0 Canberra.

⁵ Ross, K. & Taylor, J. 2001 Improving Life Expectancy and Health: A Comparison of Australia's Aboriginal & Torres Strait Islander People and New Zealand M.Ori. *J Population Res.*

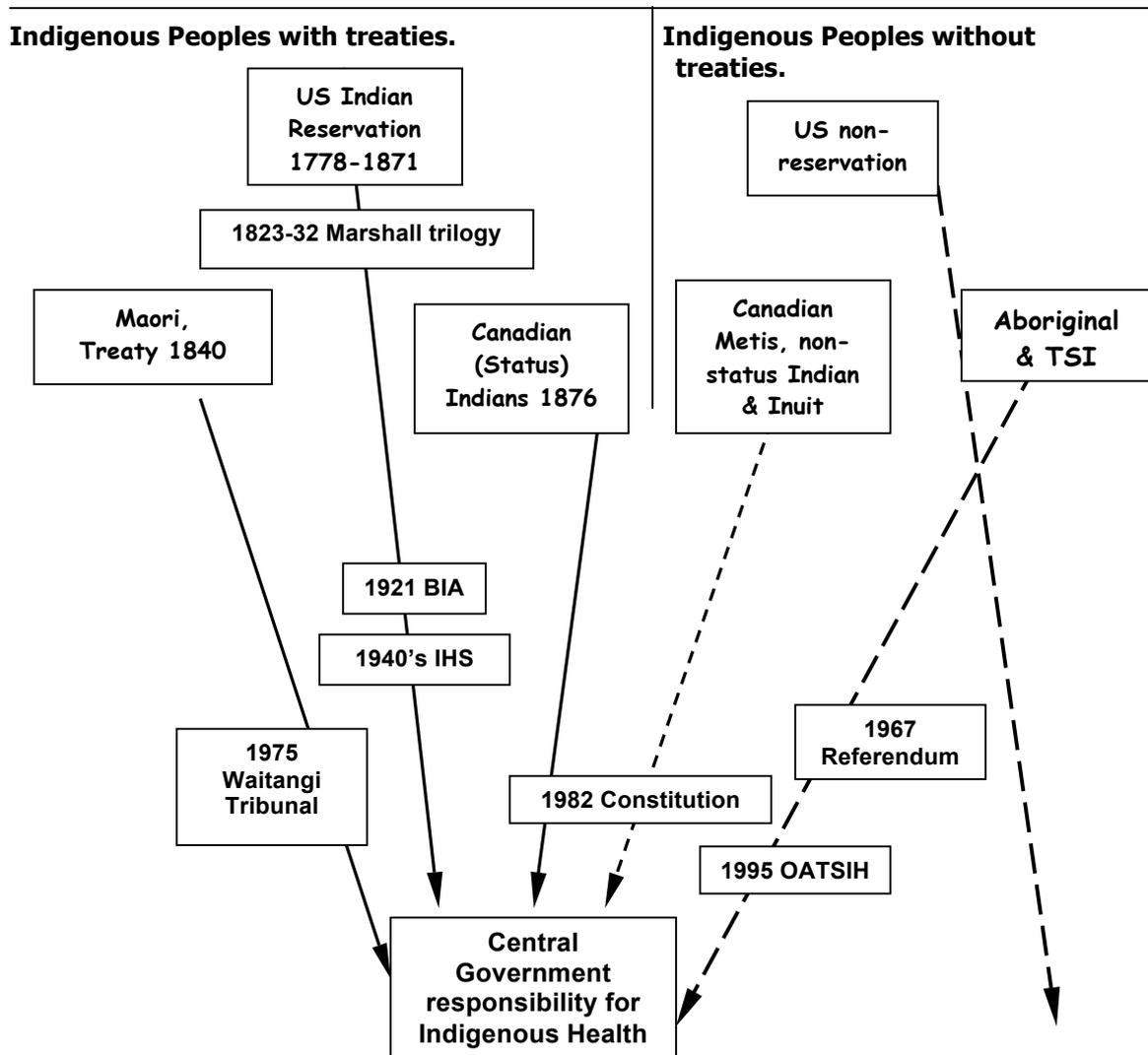
⁶ Australian Institute of Health & Welfare 2000 Australia's Health 2000 AIH&W Canberra

⁷ Indian Health Service 1999 Regional Differences in Indian Health 1998-99 U.S. Department of Health and Community Services.

establishing the rights of peoples giving individuals a greater sense of their own strength within the system and a lessening of a sense of helplessness or powerlessness.⁸

Constitutional recognition can be used by Indigenous peoples to lever commitments from their governments. A treaty can raise the administrative obligations of the Commonwealth Government above parliamentary political will (not the case in the USA) and embed it in a higher authority within the Western system ie the Constitution (Canada) or as an agreement to be interpreted through an Independent Tribunal (New Zealand/Aotearoa). Both of these types of options are under consideration in the ideas being considered in Australia.

Figure 1. Timeline of events related to Indigenous health & treaties (not to scale).



⁸ ibid

In the light of the analysis by Kunitz and others, Congress views the proposed constitutional reform as a potentially useful tool for Aboriginal people to gain recognition of their sovereignty and to codify relations between Aboriginal peoples and the Australian government.

Constitutional Recognition, improved social status and better health

Finally, there is the public health literature on the importance of social status for health and this suggest that formal recognition of Aboriginal people in the constitution will have an impact on health by improving the social status of our people.⁹ This effect is likely to be achieved even if the recognition is only symbolic and not legally binding.

For all of these reasons, Congress therefore believes that the constitutional recognition of the rights of Aboriginal people is an important part of the overall approach to improving the health and well being of our people and we will respond now in detail to the seven proposed ideas in the “You Me Unity” discussion paper.

Racism, Aboriginal health and constitutional recognition

Racism has recently been recognised in a number of key reports as a threat to public health in Australia¹⁰. As a life stressor, racism directly and negatively:

- affects the cardiovascular system causing high blood pressure/hypertension and heart disease
- seriously affects mental health causing depression, anxiety and other psychological and psychiatric disorders
- contributes to low birth weight of newborns, as well as premature birth

Three out of four Indigenous Australians experience racism in their everyday lives. One study in Western Australia found that 52% of urban residents and 69% of residents of a regional centre revealed prejudice against Aboriginal Australians. Nearly a quarter of the Indigenous children under 12 years surveyed had experienced racism in the previous 6 months. This was associated with increased cannabis and alcohol consumption in these under 12 year olds¹¹

It is very likely that such widespread racism in the Australian community is contributed to by the attitude that Aboriginal people are “not one of us” they are somehow less than “normal” “Australians, they are seen to be very, very different. Racism wherever it occurs is partly a result of the ability to dehumanise people who are not like us. Although Aboriginal people have been given citizenship this is not sufficient to embrace and celebrate the reality that Aboriginal peoples and their distinct cultures are special and unique and warrant very specific recognition as such. Such recognition in the highest legal document of the nation, the constitution, is likely

⁹ Marmot, M 2004 The Status Syndrome How Social Standing Affects our Health and Longevity, London.

¹⁰ Paradies, Y., Harris, R. & Anderson, I. 2008, The Impact of Racism on Indigenous Health in Australia and Aotearoa: Towards a Research Agenda, Discussion Paper No. 4, Cooperative Research Centre for Aboriginal Health, Darwin.

¹¹ ANTaR website <http://www.antar.org.au/node/222> accessed September 26 2011

to assist all Australians value more highly the uniqueness of Aboriginal people which will have an impact on reducing the level of racism in Australia. This will help to remove one of the key institutional barriers to Aboriginal health advancement.

Specific Comments on Ideas 1 to 7 for constitutional reform

Firstly, Congress supports idea 5 – the repeal of the amendment to the Race power.

An unforeseen consequence of the amendment to the constitution after the 1967 referendum was that the Commonwealth has been given powers not only to make laws for the special benefit of Aboriginal and TSI people or other racial groups but also to discriminate against them and make laws that are detrimental. This was not intended at the time but the courts since have made this interpretation. To correct this the Commonwealth passed the Racial Discrimination Act 1975 but this does not have the same power as the constitution and as we have seen with the NT Emergency Response this statute can be suspended and then racially discriminatory laws can be passed by the Commonwealth under the current constitution. This is not acceptable.

Congress supports the repeal of Section 25, in idea 6, as we believe it is totally unacceptable to allow provision in the constitution for state governments to preclude people from voting on the basis of race whether they are Aboriginal people or people of any other race. The Australian nation should have moved beyond this type of provision and hopefully there will be broad agreement to repeal this section.

Congress supports idea 7 that would enable the power for the government of the day to enter into legally binding agreements with Aboriginal people such as the agreement that we referred to earlier in New Zealand. This would enable specific agreements to be entered into by the Commonwealth with Aboriginal and TSI communities that would have the force of law. Agreements could cover a range of issues including agreements on education, the protection of cultural heritage and land rights. This would be similar in power the agreements that the Commonwealth currently enters into with the states on financial arrangements. There are already examples where Framework Agreements have led to a genuine partnership approach between governments and Aboriginal community controlled health services but ultimately these structures are only advisory and could be strengthened if legally binding agreements could be entered into.

Ideas one to four are quite similar in some respects but there are important differences in emphasis and legal implications. All involve adding a Statement of Recognition or Values to the existing text of the Constitution either in a preamble or in the body of the constitution. This will have symbolic value at least and may also have legal consequences, depending in part on form and content. This is a complex area and Congress needs further legal advice on the exact wording proposed and the potential legal positives and negatives of the different options with different forms of words to consider. Congress therefore requests that there is a further opportunity to comment on these four ideas once there is exact proposed wording to consider and legal advice on the implications of the different options.

Yours sincerely,

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Director