

## Path to Treaty Bill 2023

**Submission No:** 4  
**Submitted by:** Castan Centre for Human Rights Law  
**Publication:**  
**Attachments:**  
**Submitter Comments:**



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CENTRE FOR  
HUMAN RIGHTS  
LAW

## **Path to Treaty Bill 2023 (Qld)**

*Submission to the Queensland Parliament Community  
Support and Services Committee*

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**March 2023**

## Part 1: Summary and recommendations

We recommend:

1. Redraft clause 6 of the Bill to make clear that the matters listed in cl 6(2) are human rights, with legal obligations attached thereto.
2. The State's conduct must fully reflect the treaty and truth as a process 'in partnership and good faith', cognisant of the history of Queensland's colonisation and the litany of failed reconciliation plans and independent inquiries that the State of Queensland and the Commonwealth has served up for First Nations people. The State must match words with actions more broadly in its conduct with First Nations people in, through, and beyond the path to treaty.
3. Amend the Bill to provide guaranteed government funding of the Treaty Institute to enable it to carry out its work. This funding could be specified in dollar amounts in the Bill but in any event must be guaranteed independently of executive discretion.
4. Provide for management of the earmarked funds by the Treaty Institute, with the oversight of the Treaty Institute Council.
5. Amend the Bill to provide a five-year timeline for the work of the Truth-telling and Healing Inquiry, given domestic experience of similar bodies.
6. Amend the Bill to provide guaranteed government funding of the Truth-telling Inquiry to enable it to carry out its work. This funding could be specified in dollar amounts in the Bill but in any event must be guaranteed independently of executive discretion. Those funds should be managed by the Inquiry for its resourcing.

## Part 2: Background

### 2.1 Castan Centre for Human Rights Law

The Castan Centre for Human Rights Law (**Castan Centre**), based in the faculty of Law at Monash University in Australia, is a research, education and policy centre which aims to create a more just world where human rights are respected, protected and fulfilled, allowing all people to flourish in freedom and dignity.

The Castan Centre has a long history of defending and promoting the realisation of human rights in Australia, and has a strong commitment to research and advocacy on the rights of First Nations peoples. The Castan Centre was founded in 2000 by a group of academics and human rights advocates and was named in honour of the world-renowned human rights advocate, Ron Castan AM QC. Associate Professor Kate Galloway of Griffith University Law School collaborates with the Castan Centre as part of our ongoing research and advocacy on the rights of First Nations peoples.

## 2.2 Terms of reference and submission structure

The Queensland Parliament Community Support and Services Committee (**Committee**) has invited submissions addressing any aspect of the Path to Treaty Bill 2023 (Qld) (**Path to Treaty Bill or Bill**). Our submission addresses the following matters:

<i>Aspects of the Bill relevant to our submission</i>	<i>Part</i>
An overview of the <i>United Nations Declaration of the Rights of Indigenous Peoples</i> (UNDRIP) and the importance of UNDRIP implementation in the treaty and truth process	<b>Part 3</b>
The <b>administering principles</b> of the Bill and the need to reflect the <b>legal significance of the rights of First Nations people</b> .	<b>Part 4</b>
The <b>lack of guaranteed funding</b> of the First Nations Treaty Institute and the treaty process	<b>Part 5</b>
The <b>timing and funding</b> of the Truth-telling and Healing Inquiry	<b>Part 6</b>

## 2.3 A note on perspective

We are non-Indigenous lawyers and legal academics whose research interests include the law affecting First Nations people. We do not purport to speak for First Nations people. Rather, we speak concerning the capacity of the law to deliver justice for First Nations people and rebalance the systemic barriers First Nations people face across all areas of society.

## Part 3: UNDRIP in the Treaty and Truth Process

Since its adoption by the United Nations (UN) General Assembly in 2007, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) has cemented itself as ‘the most far-reaching comprehensive instrument concerning indigenous peoples, elaborated and approved as a result of a process of nearly three decades of active engagement of indigenous leaders within the United Nations system’.<sup>1</sup> The UNDRIP reaffirms and illuminates international human rights law as it relates to Indigenous peoples. While not in force with the standing of a treaty, its principles are considered as customary international law and its formal endorsement by a majority of Member States of the UN lends it significant normative weight.<sup>2</sup> The UNDRIP:

- (a) recognises the human rights of collective groups;

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<sup>1</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Ten Years of the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples: Good Practices and Lessons Learned - 2007-2017*, UN Doc A/HRC/36/56 (7 August 2017) para 3.

<sup>2</sup> *Ibid* para 9.

- (b) seeks to repair past injustice through recognition of rights intended to balance unequal and exploitative relationships;<sup>3</sup> and
- (c) is the product of participation by Indigenous peoples alongside States,<sup>4</sup> and is thus founded on Indigenous peoples' self-determination and participation. It is these two 'values that inhere within the Declaration' and which 'create[s] a framework for Indigenous dialogue' and advocacy with and within States'.<sup>5</sup>

The right of Indigenous peoples to self-determination lies at the core of the UNDRIP, which recognises that '[b]y virtue of that right [Indigenous people] freely determine their political status and freely pursue their economic, social and cultural development'.<sup>6</sup> The UNDRIP further recognises that, 'in exercising their right to self-determination, [Indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions'.<sup>7</sup> Pre-UNDRIP international human rights law also recognises the right to self-determination,<sup>8</sup> however the UNDRIP builds upon this understanding by extending the right to Indigenous peoples as a unique sub-national group.<sup>9</sup> As Sámi Indigenous rights expert Mattias Åhrén notes, this 'development cannot be described as anything less than a paradigm shift in international law'.<sup>10</sup>

Indigenous peoples' participation also underpins the UNDRIP. Perhaps nowhere is this more clearly expressed than in the art 19 recognition of the right to free, prior and informed consent:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.<sup>11</sup>

Thus, the UNDRIP adopts a set of standards by which States' dealing with Indigenous peoples may be judged. It is the irreducible anterior condition of equal relations between the State and First Peoples. Without adherence to the rights recognised in the UNDRIP, any pathway to treaty and truth risks imposing top-down benevolent reforms on First Nations people and failing to properly engage First Nations people to secure their free, prior, and informed consent and achieve their self-determination.

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<sup>3</sup> Andrew Erueti, *The UN Declaration of the Rights of Indigenous Peoples: A New Interpretive Approach* (Oxford University Press, 2022) 2.

<sup>4</sup> Ibid 3.

<sup>5</sup> Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1) *The International Journal of Human Rights* 174, 176.

<sup>6</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3 ('UNDRIP').

<sup>7</sup> Ibid art 4.

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1(1). Both of these Conventions create binding international law obligations for Australia.

<sup>9</sup> Erueti (n 3) 3.

<sup>10</sup> Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016) 119.

<sup>11</sup> UNDRIP (n 6) art 19.

## Part 4: Administering Principles of the Path to Treaty Bill

Clause 6 of the Path to Treaty Bill sets out the principles for the administration of the Act, that is, both the treaty process and the Truth-Telling and Healing Inquiry. It provides:

### 6 Principles for administering Act

- (1) The main principle for administering this Act is to ensure that, in partnership and good faith, the rights and history of Aboriginal peoples and Torres Strait Islander peoples are acknowledged and respected in accordance with —
  - (a) the *Human Rights Act 2019*; and
  - (b) the principles of the United Nations Declaration on the Rights of Indigenous Peoples.
- (2) Without limiting subsection (1), the following principles also apply for the administration of this Act—
  - (a) the importance of self-determination for Aboriginal peoples and Torres Strait Islander peoples;
  - (b) the importance of Aboriginal peoples and Torres Strait Islander peoples being able to give free, prior and informed consent as part of treaty negotiations and the making of a treaty;
  - (c) the importance of respecting and protecting Aboriginal tradition, Torres Strait Islander law and Ailan Kastom;
  - (d) the importance of equality and non-discrimination.

We raise two matters in relation to this clause.

First, the rights contained in the *Human Rights Act 2019* (Qld) (**HRA**), the UNDRIP, and the rights specified in cl 6(2) are *legal rights* and must be understood as such. They are not merely principles by which the conduct of the State should be guided or by which the treaty and truth process will be judged morally. Rather, they are legal obligations to which the State is bound, and which *must* dictate the conduct of the State and are a lens through which the acceptability and lawfulness of the treaty and truth process will be judged. The HRA itself imposes an obligation on public entities to act compatibly with and give proper consideration to relevant human rights in decision-making.<sup>12</sup> The State is bound by this obligation, as the Treaty Institute, the Treaty Institute Council, and the Truth-Telling and Healing Inquiry will be if the Bill is passed.<sup>13</sup>

Second, we emphasise the treaty and truth process as a ‘partnership [in] good faith’.<sup>14</sup> In order to deliver a truth and treaty process that can be described in this way, the State’s conduct must fully reflect those principles, cognisant of the history of Queensland’s colonisation and the many failed reconciliation ventures and independent inquiries on issues facing First Nations people that have been overseen by the State of Queensland and the Commonwealth. The State must therefore act in the spirit of

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<sup>12</sup> *Human Rights Act 2019* (Qld) s 58(1).

<sup>13</sup> See *ibid* s 9.

<sup>14</sup> Path to Treaty Bill 2023 (Qld) cl 6(1) (‘Path to Treaty Bill’).

partnership and in good faith in its dealings with First Nations people in, through, and beyond treaty and truth-telling.

In this vein, we lament that the Committee's inquiry into the Bill is on such a tight timeframe. The Premier introduced this Bill to the Queensland Parliament on 22 February 2023, yet the Committee required submissions—which ought to mobilise expertise in this area, including the voices of First Nations people to fulsomely engage with the Bill—just over two and a half weeks later by 17 March 2023. The Committee is due to table its final report just over a month later on 21 April 2023. Meaningful engagement and consultation with First Nations people and the broader community on such an important piece of legislation ought not be rushed, particularly if the consultation with First Nations people is to meet the definition of free, prior and informed consent.

We also lament other recent actions by the Queensland Government which challenge the extent to which the process is one of partnership and good faith. This includes the Queensland Government's intention to override the HRA to implement laws allowing children to be charged with criminal offences for breach of bail.<sup>15</sup> Given the over-policing and criminalisation of First Nations people,<sup>16</sup> we raise the inconsistency of the State seeking to adhere to the HRA in some areas and yet disregarding it in others.

#### **Recommendations:**

1. Redraft clause 6 of the Bill to make clear that the matters listed in cl 6(2) are human rights, with legal obligations attached thereto.
2. The State's conduct must fully reflect the treaty and truth as a process 'in partnership and good faith', cognisant of the history of Queensland's colonisation and the litany of failed reconciliation plans and independent inquiries that the State of Queensland and the Commonwealth has served up for First Nations people. The State must match words with actions more broadly in its conduct with First Nations people in, through, and beyond the path to treaty.

## **Part 5: The Treaty Process: Funding**

The Treaty Institute that the Bill seeks to establish has significant functions at the core of treaty-making, including supporting and empowering First Nations people in their participation in treaty-making.<sup>17</sup> Yet, the Bill does not provide any guaranteed funding arrangement for the Treaty Institute. As we have pointed out elsewhere, in the past when governments have set up bodies to assist and work with First Nations people, there were problems with sustainability due to inadequate resourcing.<sup>18</sup> Providing

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<sup>15</sup> See, Strengthening Community Safety Bill 2023 (Qld).

<sup>16</sup> See, Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 100-2; Chris Cunneen, 'Institutional Racism and (In)Justice: Australia in the 21st Century' (2019) 1(1) *Decolonization of Criminology and Justice* 29.

<sup>17</sup> Path to Treaty Bill (n 14) cl 13.

<sup>18</sup> Melissa Castan, Kate Galloway and Scott Walker, 'A New Treaty Authority Between First Peoples and the Victorian Government is a Vital Step Towards a Treaty', *The Conversation* (online, 16 June 2022) <<https://theconversation.com/a-new-treaty-authority-between-first-peoples-and-the-victorian-government-is-a-vital-step-towards-a-treaty-184739>>.

guaranteed funding independent of the political cycle and day-to-day control of the Government would also ensure the independence of the Treaty Institute that the Bill establishes.<sup>19</sup> While we note that as part of arrangements for the Queensland Budget, the Queensland Government announced \$300 million for the Path to Treaty Fund, such a political commitment is insufficient to meet the needs of independent funding to guarantee the self-determination of the Treaty Institute.<sup>20</sup>

As a comparison, in its treaty process Victoria has established a Treaty Authority to place First Peoples on an equal footing for treaty negotiations and to place First Peoples' culture and practices at the heart of the treaty process. The Treaty Authority was established by agreement between the First Peoples' Assembly of Victoria and the State of Victoria and given legal authority through the *Treaty Authority and Other Treaty Elements Act 2022* (Vic) (**Victorian Treaty Authority Act**). A key element of the Victorian Treaty Authority Act is that it provides guaranteed ongoing government funding of its work, which is managed and controlled by the Treaty Authority.<sup>21</sup> The amount of funding to which the Treaty Authority is entitled to from consolidated revenue is specified in dollar amounts in the Victorian Treaty Authority Act.<sup>22</sup>

#### **Recommendation:**

3. Amend the Bill to provide guaranteed government funding of the Treaty Institute to enable it to carry out its work. Funding could be specified in dollar amounts in the Bill but in any event must be guaranteed independently of executive discretion.
4. Provide for management of the earmarked funds by the Treaty Institute, with the oversight of the Treaty Institute Council.

## **Part 6: The Truth-telling and Healing Inquiry: Timing & Funding**

Clause 64(1) of the Bill requires that the Minister, within three months of the commencement of the legislation, 'establish a board of inquiry to be called the Truth-telling and Healing Inquiry'. The Inquiry is to be established for a term of not more than three years, subject to extension in the Minister's discretion.<sup>23</sup> The Inquiry's mandate is a significant one, covering a wide range of issues.<sup>24</sup> We invite the Committee to consider whether the timeframe is sufficient.

By way of illustration: Victoria currently has a truth-telling inquiry underway as part of its process towards treaty and justice for First Peoples. The Yoorrook Justice Commission was established as a Royal Commission under Letters Patent issued by the Governor of Victoria on 12 May 2021.<sup>25</sup> The terms of

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<sup>19</sup> Path to Treaty Bill (n 14) cl 11.

<sup>20</sup> Explanatory Memorandum, Path to Treaty Bill 2023 (Qld) 2.

<sup>21</sup> *Treaty Authority and Other Treaty Elements Act 2022* (Vic) ss 16-17.

<sup>22</sup> *Ibid* s 16(2).

<sup>23</sup> Path to Treaty Bill (n 14) cl 64(2)-(3).

<sup>24</sup> *Ibid* cl 66.

<sup>25</sup> Governor of Victoria, *Letters Patent* (Patents Book No 47 page 73, 13 May 2021) ('Yoorrook Letters Patent').



the Letters Patent require the Yoorrook Justice Commission to have provided an interim report by 30 June 2022 and to provide a final report by 30 June 2024.<sup>26</sup> In its interim report, the Yoorrook Justice Commission requested a two year extension of its timeline in order to fully complete its mandate, highlighting the 'breadth, depth and complexity of issues First Peoples wish Yoorrook to inquire into' and the work required to set up culturally-informed and culturally safe processes.<sup>27</sup> The Victorian Government has not yet advised the Governor to amend the letters patent to extend Yoorrook's timeline. Nevertheless, we highlight this experience to demonstrate that three years may be too short a timeframe within which the Inquiry can meaningfully carry out its work.

Please see also our recommendations at Section 4.1 above. We note that, as with the establishment of the Treaty Institute, the Path to Treaty Bill does not provide guaranteed funding for the work of the Inquiry to fully perform its functions. To guarantee the independence and work of the Truth-telling and Healing Inquiry, and so that its work can be adequately performed to enliven the self-determination of First Nations people, the Bill ought to specify the funding arrangements for the Inquiry from general revenue, to be managed by the Inquiry.

**Recommendations:**

5. Amend the Bill to provide a five-year timeline for the work of the Truth-telling and Healing Inquiry, given domestic experience of similar bodies.
6. Amend the Bill to provide guaranteed government funding of the Truth-telling Inquiry to enable it to carry out its work. This funding could be specified in dollar amounts in the Bill. Those funds should be managed by the Inquiry for its resourcing.

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<sup>26</sup> Yoorrook Letters Patent (n 25) cl 7.

<sup>27</sup> *Yoorrook Justice Commission* (Interim Report, June 2022) 73 (Recommendation 1).