

Path to Treaty Bill 2023

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Committee Secretary
Community Support and Services Committee
Parliament House
Cnr Alice and George Street
Brisbane Qld 4000

By email to: cssc@parliament.qld.gov.au

Dear Committee

Path to Treaty Bill 2023

Thank you for the opportunity to make a submission in relation to this Bill.

The Queensland Human Rights Commission has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote an understanding and discussion of human rights in Queensland, and to provide information and educative services about human rights.

The Commission writes in support of the intent of the Bill, which promotes the human rights of Aboriginal and Torres Strait Islander Queenslanders¹, including through:

- Creating a First Nations Treaty Institute (Treaty Institute) to support and prepare Aboriginal people and Torres Strait Islander peoples to participate in treaty negotiations with the Queensland government;
- Establishing a formal inquiry (the Inquiry) to conduct truth-telling and healing conversations in Queensland, to record and share Queensland Aboriginal and Torres Strait Islander history, tradition and culture, and the impacts and effects of colonisation; and
- Removing outdated and discriminatory provisions of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*.

Truth and treaty are necessary steps to achieve equal recognition and formal equality before the law for Aboriginal peoples and Torres Strait Islander peoples as required by

¹ Not limited to but including *Human Rights Act 2019* s 28 Cultural rights of Aboriginal peoples and Torres Strait Islander peoples, s 15 Recognition and equality before the law, and s 21 Freedom of expression.

STATEWIDE

tollfree
1300 130 670
info@qhrc.qld.gov.au
qhrc.qld.gov.au
fax 07 3193 9979

Brisbane

Level 20
53 Albert Street
Brisbane Q 4000
PO Box 15565
City East Q 4002

Cairns

Ground Floor
10 Grove Street
PO Box 4699
Cairns Q 4870

Townsville

Ground Floor
187-209 Stanley Street
PO Box 1566
Townsville Q 4810

Rockhampton

Level 1
209 Bolsover Street
PO Box 1390
Rockhampton Q 4700

section 15 of the *Human Rights Act 2019*. They are also significant for the cultural rights of Aboriginal peoples and Torres Strait Islander peoples which are given specific acknowledgement and protection by the preamble and section 28 of the *Human Rights Act 2019*.

The human rights, including the cultural rights, of Aboriginal peoples and Torres Strait Islander peoples must also inform the processes towards achieving truth and treaty. The cultural rights in the *Human Rights Act 2019* are drawn from the International Covenant on Civil and Political Rights, article 27, and the United Nations Declaration on the Rights of Indigenous Peoples, articles 8, 25, 29 and 31. The Commission commends the government for reflecting these provisions in the principles in Clause 6 of the Bill:

- 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 both the Human Rights Act 2019 and the principles of the United Nations Declaration on the Rights of Indigenous Peoples
- the importance of self-determination
- the importance of communities being able to give free, prior and informed consent
- respect and promotion of Aboriginal law, Aboriginal tradition, Torres Strait Islander law and Ailan Kastom
- equality and non-discrimination.

Embedding these human rights principles is critical to achieve a process of treaty making and truth telling that respects and promotes human rights.

The Commission acknowledges the considerable work undertaken by the Interim Truth and Treaty Body, the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, and other entities to develop this legislation in a relatively short timeframe.

The Commission's general observation is that the Inquiry's compulsive powers provided for in the Bill are insufficient. While the leadership may determine that the strategic direction for the Inquiry favours community engagement and voluntary participation, the Inquiry powers should not be curbed at the outset. As a necessary part of the truth telling process, the Inquiry will need to be given the powers and mechanisms necessary to promote participation and accountability.

While supporting many aspects of the Bill, the Commission recommends some changes to ensure that the legislative framework empowers the Treaty Institute and the Inquiry to meet their objectives.

Summary of recommendations

The Commission recommends:

1. The Treaty Institute is prescribed as a public entity for the purposes of the *Human Rights Act 2019*, so that it is subject to the obligations of public entities as provided for under that Act. (clause 12)
2. Clarification of whether the single Code of Conduct for the Queensland Public Service is to apply to the Treaty Institute, having regard to whether a bespoke, co-designed code of conduct would better achieve the goals of independence, cultural rights and self-determination for the Treaty Institute. (clause 12)

3. That persons who have been convicted of indictable offences (aside from spent convictions) are not automatically disqualified from holding Council or senior executive officer roles on the Treaty Institute, but rather that criminal histories are required to be considered as one aspect of weighing up suitability for the role. (clause 55)
4. Reconsideration of the 3 year timeframe for formal truth-telling, even with the possibility of extension, having regard to Queensland's geographical size, two distinct cultural groups, cultural safety of participants, and the need to afford time for First Nations groups to prepare and consider how they wish to participate in truth telling. (clause 64)
5. Strengthening the Bill to support and give priority to providing culturally appropriate professional services to address experiences of stress and psychological trauma associated with the Inquiry process, and independent advocacy to facilitate broad and meaningful participation. (clause 72)
6. Increase powers of the Inquiry to compel information and attendance from any person, or at a minimum to include local governments, the Queensland Police Service, missionaries and other faith-based service providers, and other organisations that act or have acted on behalf of the State, to ensure the effectiveness and cultural safety of the truth telling and healing process. (clauses 75, 80, 81, 85)
7. Narrow clause 83(a)(ii) of the Bill which allows a person to refuse to comply with a notice to produce issued by the Inquiry because the document or thing contains personal information. For example, a more balanced ground for refusal could be where disclosure would reasonably be expected to cause the individual harm, or the individual has refused consent for the information to be disclosed. Alternatively, the Commission recommends that if the document or thing contains personal information, then the document or thing must be provided to the Inquiry with the personal information redacted, or else a summary of the information must be provided in a way that does not disclose personal information. (clause 83(a)(ii)).
8. There be a review 12 months after the commencement of the Inquiry in relation to the mechanisms and powers of the Inquiry. (clause 94)

Accountability and independence of the Treaty Institute

The legislative framework for the Treaty Institute proposed by the Bill seeks to balance the Institute's independence and self-determination, against mechanisms to ensure its accountability, transparency and credibility.

Clause 12 of the Bill lists the accountability mechanisms to which the Treaty Institute is subject, including the *Financial Accountability Act 2009*, the *Crime and Corruption Act 2001*, and the right to information and information privacy legislation. The *Human Rights Act 2019* is not listed, although the Explanatory Notes to the Bill indicate that it is intended that the Treaty Institute be subject to the *Human Rights Act 2019*.²

² Explanatory Notes, Path to Treaty Bill 2023 (Qld) 16.

Under the *Human Rights Act 2019*, public entities have obligations to act and make decisions in a way that is compatible with human rights; and give proper consideration to human rights when making a decision.³ A person may complain about an alleged contravention of this obligation to the Commission for dispute resolution, and may raise this as an additional ground for relief if legally challenging the public entity's act or decision for other reasons.⁴

Public entities are defined under section 9 of the *Human Rights Act 2019*. It is the Commission's view that the Treaty Institute would meet the definition of a functional public entity under section 9(1)(f) of the Act as 'an entity established under an Act when the entity is performing functions of a public nature'.

However, to avoid uncertainty as to which functions of the Treaty Institute the *Human Rights Act 2019* applies, the Commission recommends that the Treaty Institute be prescribed a public entity for the purposes of the *Human Rights Act 2019*.

Clause 12(2)(e) of the Bill clarifies that the Treaty Institute is a public sector entity under the *Public Sector Ethics Act 1994*. Under that Act, the chief executive officer of the public sector entity must ensure that a code of conduct is prepared for the entity, which is then approved by the responsible Minister.⁵

It is not clear whether the single Code of Conduct for the Queensland Public Service⁶ is intended apply to the Treaty Institute or whether a bespoke, co-designed code of conduct will be developed. Some provisions of the single Code of Conduct could be difficult to reconcile with the independence, purpose and functions of the Treaty Institute, including:

3.1 Commit to our roles in public service

Our role is to undertake our duties, and to give effect to the policies of the elected government, regardless of its political complexion.

We will:

- a. accept that the elected government has the right to determine policy and priorities
- b. be responsive to the government of the day and implement decisions and policies professionally and impartially

...

4.1 Ensure diligence in public administration

...

We will:

...

- d. comply with all reasonable and lawful instructions, whether or not we personally agree with a given policy direction.

³ *Human Rights Act 2019* (Qld) s 58(1).

⁴ *Human Rights Act 2019* (Qld) ss 64, 59.

⁵ *Public Sector Ethics Act 1994* (Qld) ss 15 and 17.

⁶ State of Queensland (Public Service Commission), *Code of Conduct for the Queensland Public Service* (1 January 2011).

There may be times where the Treaty Institute is not aligned with the policy position of the government on a range of issues, and therefore adherence to these aspects of the single Code of Conduct could hamper its independence from government.

The Commission recommends careful consideration as to whether the single Code of Conduct should be adopted by the Treaty Institute or whether the development of a separate code, which could additionally take into account the cultural rights of Aboriginal peoples and Torres Strait Islander peoples and the importance of self-determination, is more appropriate.

Appointment of members

Under clause 55 of the Bill, people who have been convicted of indictable offences (aside from spent convictions⁷) are disqualified from becoming or continuing as members of the Treaty Institute Council or a senior executive officer, or where they have refused to disclose criminal history. Apart from the Treaty Institute secretary, these are identified positions.

Automatic disqualification may be arbitrary and not compatible with rights to recognition and equality before the law, taking part in private life, and to privacy.⁸ The Commission considers that criminal history checks may disproportionately disadvantage Aboriginal and Torres Strait Islander applicants who are recognised as strong community leaders but have been involved in the criminal justice system in the past. These applicants may have unique perspectives and value to bring to the role from a lived-experience perspective.

The Commission understands the justification that the integrity and propriety of the Treaty Institute is vital and may take precedence over the protection of individual human rights.⁹ However, automatic disqualification of a person from sitting on the Treaty Institute Council because of their criminal history, without consideration of any other circumstances, is not necessary to achieve that purpose, and could be achieved in a way that is less restrictive of human rights.

Rather than an automatic disqualification, a less restrictive option would be to individually consider applicants' criminal history information in context, as one aspect of weighing up suitability for the role.

Term of Inquiry

The Inquiry is established for a term of 3 years, although the Minister has discretion to extend this period on notice from the Inquiry or on the Minister's own initiative.¹⁰

The term of Inquiry reflects Treaty Advancement Committee Report Recommendation 14. The Committee gave the following explanation:

The Committee believes that with sufficient engagement and support from the Queensland Government to access existing work and research to support the chronicling of colonisation of Queensland, along with adequate financial backing to conduct its inquiry, a three-year timeframe is appropriate. This is a common length of term for Inquiries of this nature that

⁷ 'Spent convictions' are defined in the Bill as meaning convictions for which the rehabilitation period under the *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) has expired and has not been revived. Broadly speaking this is 10 years for convictions dealt with as an adult, and otherwise 5 years.

⁸ *Human Rights Act 2019* (Qld) ss 15, 23 and 25.

⁹ Explanatory Notes, Path to Treaty Bill 2023 (Qld) 9-10.

¹⁰ Path to Treaty Bill 2023 (Qld) clause 64.

seeks to ensure a balance between being comprehensive while guarding against losing momentum and focus. This also takes into account that additional truth telling and healing led by the Institute will continue as a function beyond the three-year time frame of the formal Inquiry.

Rationale

The Committee acknowledges that the formal Truth Telling and Healing Inquiry has an arduous task in uncovering the history of the colonisation of Queensland at a state-wide level. The term length was guided by examples of other truth telling processes. For example, the Victorian Government and the First Peoples' Assembly established their truth and justice process, the Yoorrook Justice Commission, in May 2021 and it is due to provide its final report by the end of June 2024, a period of just over three years. It was noted that a survey of best international practice conducted by the Northern Territory Treaty Commissioner also indicated that a defined timeframe for a truth telling process in the order of three years appeared to be optimal.¹¹

As pointed out by the Interim Truth and Treaty Body at the Parliamentary Hearing on 13 March 2023, Queensland is unique due to its geographical size and two distinct cultural groups. For this reason, the Commission urges reconsideration of whether the 3-year timeframe for formal truth-telling, even with the option of extension, is realistic to achieve the Inquiry's goals, especially if taking evidence on country and in community. Considering the need for First Peoples to prepare for and consider how they wish to participate in the Inquiry, there is a risk that a short timeframe will compromise the quality of outcomes as well as the cultural safety for participants.

Support for stress and psychological trauma

The Explanatory Notes to the Bill acknowledge the very real risk that truth-telling may result in stress and psychological trauma for a person. Failure to properly and sufficiently address this risk will be a barrier to full participation in the process, impair the function and goals of the inquiry, and may amount to indirect discrimination of a witness on the basis of race or disability.

Clause 72(2) of the Bill requires that the Inquiry make guidelines for procedures:

- to recognise whether a person is experiencing stress or psychological trauma;
- for supporting the person experiencing stress or psychological trauma; and
- for preventing, reducing or mitigating stress or psychological trauma experienced.

The oral briefing from the Department noted that they were closely looking at the experiences of the Victorian Yoorrook Justice Commission and that:

It is very important that there are resources ie you know people on the ground that can go in pre, during and be there post for the truth telling processes. To support people to get ready for that, to voluntary participate in that if they wish, support through the process and then post support in terms of any needs and issues that arise afterwards. ... It's a key part of our planning around operationalising the bill to make sure that's in place and certainly a guiding principle is that we will be approaching this from a healing and trauma-informed approach.¹²

¹¹ State of Queensland (Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships) *Treaty Advancement Committee Report*, October 2021 34.

¹² Evidence to Community Support and Services Committee, Queensland Parliament, Brisbane, 13 March 2023, 38.38 min (Jason Kidd, Acting Deputy Director-General, Disability Services and Aboriginal and Torres Strait Islander Partnerships).

The Commission highlights the need to ensure professional, culturally appropriate, mental health support is available for people giving testimony or making a submission, before, during and after a truth-telling session or hearing.

The Commission additionally recommends adequately funded independent advocacy services for individuals wishing to participate in truth telling. Advocacy is essential for some participants, especially those who are vulnerable, to have a voice in the process. The government should not seek to rely on the existing resources of First Nations non-government agencies or the many unpaid volunteers working for their communities.

While these are largely matters for operationalisation, consideration could be given to strengthening the wording of the Bill to give these matters priority. For example, the Yoorrook Justice Commission, set up under letters patent directs the Commission to ‘adopt practices and approaches to minimise harm and re-traumatisation for First Peoples’.¹³

Powers to require production and attendance

The Inquiry model proposed intends to encourage voluntary participation and sharing of histories from both Aboriginal and Torres Strait Islander peoples and non-Indigenous Queenslanders.¹⁴

For this reason, only government entities:

- are unable to tell the Inquiry to not record a document or thing given during a truth telling session (clause 75(3));
- are unable to give a document or thing subject to conditions (clause 80(6));
- can be issued with a production notice to give a document or thing, or make a written submission to the Inquiry (clause 81);
- can be issued with an attendance notice to attend a truth-telling hearing (clause 85).

Government entities are defined by the Bill by reference to section 276 of the *Public Sector Act 2022*. This does not include many entities and organisations which have had significant involvement in the histories and experiences of Queensland First Nations people, including local governments, the Queensland Police Service, missionaries and other faith-based service providers, and other organisations that act or have acted on behalf of the State.

An important purpose of truth telling is healing and reconciliation, which must be a two-way conversation. Truth and healing can only be achieved by hearing from perpetrators and non-Indigenous perspectives, so that all sides are listened to. Given the purposes of the Inquiry, it may be incompatible with cultural rights of Aboriginal peoples and Torres Strait Islander peoples, the right to recognition and equality before the law, and the right to freedom of expression if a public entity refuses to engage with the Inquiry, unless it could demonstrably justify its reasons for not doing so.

While the Inquiry may primarily rely on voluntary participation in practice, the Commission recommends that there still be powers of compulsion where the Inquiry deems it appropriate to meet the functions and goal of the Inquiry. For example, the Inquiry may need to investigate the removal of children to dormitories under the control of a faith-based organisation and compel the production of information and records. At present, the application of compulsion powers only to ‘government entities’ is too narrow. Not providing

¹³ Letters patent from the Honourable Linda Dessau AC, Governor of Victoria, 12 May 2021, section 4(g) <<https://yoorrookjusticecommission.org.au/wp-content/uploads/2021/09/Letters-Patent-Yoorrook-Justice-Commission-signed-10-1.pdf>>.

¹⁴ Explanatory Notes, Path to Treaty Bill 2023 (Qld) 4.

the Inquiry with adequate powers at the outset risks the effectiveness and cultural safety of the truth telling and healing process.

Grounds to refuse compliance with production notices

Clause 83 of the Bill sets out reasons a government entity can provide for not complying with a notice to produce a document or thing. This includes:

- (ii) the document or thing is, or contains, personal information and the person is not able to give the document or thing without disclosing the personal information;

If a government entity refuses to produce the document, they can be required to attend a truth-telling hearing and explain their reasons for not providing the information.¹⁵

The definition of personal information takes its meaning from the *Information Privacy Act 2009*:

Personal information is information or an opinion, including information or an opinion forming part of a database, whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.¹⁶

In the Commission's view, refusing to produce on the basis of personal information is too broad and could unjustifiably impair the functions of the Inquiry. While protection of the right to privacy of individuals must be considered, this must be balanced against the functions of the Inquiry and the confidentiality obligations imposed on the Inquiry itself. A vast number of documents that the Inquiry will need to have produced are likely to contain personal information.

Clause 91 of the Bill makes it an offence for Inquiry members or staff to disclose or use confidential information (that is, personal information that is not publicly available) except in certain circumstances, including where that is necessary to perform the Inquiry's functions, with the consent of the individual, or the disclosure is deidentified.

The Commission recommends narrowing the grounds on which an entity or person can refuse to comply with a notice to produce to circumstances where disclosure would reasonably be expected to cause the individual harm, or the individual has refused consent for the information to be disclosed.

Alternatively, the Commission recommends that if a document or thing contains personal information, then the entity or person must give that document or thing with the personal information redacted, or must provide a summary of the information in a way that does not disclose personal information.

Legislative review

Clause 94 of the Bill requires that after 5 years the operation and efficacy of the Bill be reviewed. The Inquiry will likely already be completed by this time. There may be practical issues that arise during the course of the Inquiry in relation to its mechanisms and powers.

¹⁵ Path to Treaty Bill 2023 (Qld) clause 85.

¹⁶ Path to Treaty Bill 2023 (Qld) Schedule 1 (definition of 'personal information'); *Information Privacy Act 2009* (Qld) s 12.

The Commission suggests that the Bill should additionally provide for a legislative review confined to these practical matters after 12 months from when the Inquiry commences.

Yours sincerely



SCOTT MCDUGALL
Queensland Human Rights Commissioner