

Path to Treaty Bill 2023

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Path to Treaty Bill 2023

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Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the *Community Support and Services Committee* for the opportunity to comment on the Path to Treaty Bill 2023 (the Bill).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all classifications of workers that make up the nursing and midwifery workforce including registered nurses (RN), midwives, nurse practitioners (NP) enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 70,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The vast majority of nurses and midwives in Queensland are members of the QNMU. As the Queensland state branch of the Australian Nursing and Midwifery Federation, the QNMU is the peak professional body for nurses and midwives in Queensland.

Through our submissions and other initiatives, the QNMU expresses our commitment to working in partnership with Aboriginal and Torres Strait Islander peoples to achieve health equity and ensure the voices of Aboriginal and Torres Strait Islander nurses and midwives are heard. The QNMU supports the Uluru Statement from the Heart and the call for a First Nations Voice enshrined in our Constitution. The QNMU acknowledges the lands on which we work and meet always was, and always will be, Aboriginal and Torres Strait Islander land.

Recommendations

The QNMU recommends that:

- There be an addition to the Preamble of a paragraph acknowledging that the Path to Treaty be conducted using a rights based approach.
- The responsibility for the appointment of the Institute Council be, as previously recommended, the responsibility of First Nations representative mechanisms and structures.
- The Institute be established as an independent authority and not a statutory body with this process undertaken in association with First Nations representatives, designed to enshrine processes addressing accountability to both Government and First Nations Peoples.
- Further consideration be given to the management of the Treaty Institute Council and in particular the alignment of provisions in the Bill with the *Legislative Standards Act 1992*.

- Further consideration be given to the funding levels and responsibility for management of the funding for both the Institute and the Inquiry.
- Consideration be given to both a greater openness to the flexibility in the length and scope of the Truth-telling and Healing Inquiry.

The QNMU strongly supports the identified purpose of the Bill, through the establishment of a First Nations Treaty Institute (the Institute):

- to develop a framework to support parties entering treaty negotiations.
- to support the participation of Aboriginal and Torres Strait Islander peoples in the treaty negotiations.

and the initiation of a Truth-telling and Healing Inquiry namely:

- to establish and progress the Truth-Telling and Healing Inquiry (the Inquiry).

The extensive consultative process undertaken to achieve this Bill is also of importance, in particular the role of, and 2020 report by, the Eminent Panel co-chaired by Dr Jackie Huggins AM and Professor the Hon Michael Lavarch AO, and the associated work by the Treaty Advancement Committee (TAC). The recommendations proposed by both these groups provided directions to support the aspiration declared in the Bill's Explanatory Notes:

The Path to Treaty is a shared journey between the Queensland Government, Aboriginal and Torres Strait Islander peoples and non-Indigenous Queenslanders – a key reform with the ultimate goal of negotiating a treaty or treaties that will reframe and strengthen the relationship between Queensland's First Nations and the wider community.

And while the Queensland Government in its 2020 response to the Eminent Panel's advice indicated that all recommendations were accepted, in full or in-principle, as were those from the TAC, the QNMU is concerned that the final position of the Bill around these recommendations may constrain the achievement of this goal. It is noted that the initial recommendation regarding the timing of the Bill to be finalised in 2020, was withdrawn in recognition of constraints around COVID-19.

The key issues discussed below include:

1. Overview approach – including the Preamble to the Bill
2. Role and funding of the Institute
3. Management of the Institute
4. The Independence of the Institute
5. The scope of the Truth-telling and Healing Inquiry

The Path to Treaty Process – a shared journey

This process is summarised in the graphic below from the TAC report (October 2021).



This language of shared journey suggests a **working with** partnership, without strong power imbalances. This represents an opportunity to move forward together, addressing past traumas and building a stronger relationship between First Nations peoples and the wider community. This also is an opportunity, an investment in building a better Queensland and capturing all the benefits of the diversity from greater partnerships.

While clearly there are negotiating issues in how this can be set up it is important that this is based around a strengths-based approach reflected in the reference by the Eminent Panel for the need to have a rights-based framework.

The initial advice from the Eminent Panel provides an insightful presentation of advice on how to progress. They clearly understand the scope of the Institute including the task of building community understanding that will underpin any successful negotiation process.

The Panel's recommendations were designed to address identified constraints in achieving the stated policy objectives arising from the knowledge and lived experiences of the Eminent Panel and those with whom they consulted through their process. Key recommendations which are discussed further in the submission include:

1. 1.2 That the Path to Treaty be conducted using a rights based approach consistent with both the *Human Rights Act 2019* (Qld) and the United Nations Declaration on the Rights of Indigenous Peoples;

2. 1.3.1 the establishment of the First Nations Treaty Institute as an independent body to lead the Path to Treaty process;
3. 1.3.5 the adequate resourcing of these actions through the establishment of a First Nations Treaty Future Fund;
4. 2.3 That the governance of the Institute be the responsibility of an Institute Council comprising:
 - i. 2.3.1 of members initially appointed by the Governor in Council and then subsequently;
 - ii. 2.3.2 of members directly appointed by First Nations representative mechanisms and structures; and
 - iii. 2.3.3 A Chief Executive Officer appointed by the Institute Council.
5. 2.6 That funding for the First Nations Treaty Institute be drawn from the First Nations Treaty Future Fund; and
6. 7.2.7 That the administration of the Fund be placed with First Nations Treaty Institute with investment of the Funds to be undertaken by the Queensland Investment Corporation informed by ethical considerations provided by the First Nations Treaty Institute.

Finally in progressing the Path to Treaty it is important to recognise the significant implications of failure to achieve the objectives.

In summary while this Bill is presented as a step in walking together with First Nations peoples, some of the approaches which differ from the initial recommendations from the Eminent Panel may impact on the outcomes and this significant opportunity may be lost. Thus, these comments made by the QNMU in this submission are focussed on contributing to achieving the desired and positive outcomes.

Overview

Rights based approach

The Eminent Panel recommended:

the Path to Treaty Act can acknowledge the important background to the Treaty process and some salient historical facts, as well, the process would be rights based and consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

with the suggestion that this could be placed early in the Bill, for example in the Preamble, to establish the approach taken. In the Bill the Preamble makes no mention of a rights based approach, with Human Rights mentioned in the Principles for administering Act (s6):

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.

This approach does show a subtle step back from the intent of the recommendation. It is useful to reflect on what a rights based approach would look like and whether its formal inclusion would impact on further drafting decisions? The European Network of National Human Rights Institutions (ENNHRI, 2023) defines a human rights-based approach as having five principles, clearly very relevant to a Path to Treaty partnership process:

- Participation,
- Accountability,
- Non-discrimination and equality,
- Empowerment, and
- Legality.

Role and Funding

A main purpose of the Bill is to establish the Institute.

The Bill does provide some scope of what this role might involve but clearly the role of the Institute, while not explicitly spelt out, is extensive and will also play a critical role in moving Queensland forward. Thus, the Institute will need a range of specialist skills covering legal expertise and also communication and engagement – and in particular there will be a need to progressively identify the path forward, as this is new and very complex territory. Perhaps in recognition of this move into the uncertain in the Bill the Powers of the Institute (s17) are:

“to do anything necessary or convenient to be done in performing its function”.

Funding levels

This role will clearly require both reasonable staffing and extensive operating costs given the need for across Queensland engagement. Brief detail on the funding arrangements for the Institute are provided in the Explanatory Notes including:

- A \$300 million Path to Treaty Fund (the Fund) has been established on the advice of the Eminent Panel.
- A minimum annual allocation of \$10 million from the Fund will be provided to the Institute to support its functions.
- The performance and operation of the Fund will be reviewed by Queensland Treasury before the end of 2025 to allow consideration of returns and future use of the Fund for treaty related actions.

Is a \$10 million allocation to establish and operate this Institute adequate to address an extremely complex social and legal issue for which it holds responsibility, and to capture the future benefits of reconciliation?

It is useful to look at how other states are addressing this issue. The Victorian Government has been progressing its own Path to Treaty approach. In 2018 legislation was enacted requiring the Victorian Government to work with the First Peoples' Assembly (originally established as the Aboriginal Representative Body) to establish a Treaty Authority (see Casten et al., 2022; Victorian Public Service Commission, 2019). In establishing and progressing engagement with the Assembly processes were clearly undertaken to ensure accountability, with these summarised in a suite of accountability initiatives outlined in the Department of Premier and Cabinet Annual Report 2021-22 (Victorian Government, 2022a).

Recently the Self-Determination fund was finalised (First Peoples' Assembly of Victoria, 2022) with this fund having two key roles – (i) treaty preparation and (ii) empowering First Peoples. This fund, managed through the First Nations Assembly, will operate as a public charitable trust administered for the benefit of First Peoples now and into the future. Further, under the funding agreement (Victorian Government, 2022b) commitments have been made. An initial \$65 million partial funding commitment has been made to support equal standing by First Peoples' in Treaty negotiations, with a future commitment of not less than an additional \$65 million to be negotiated.

In considering funding levels it is also useful to consider the scope of the role of the different bodies. For example, given the geographical size of Queensland compared that of Victoria and also the far higher Indigenous population in Queensland (252,733 people compared to 66,975 in Victoria, (AIHW, 2022) the challenges facing the body progressing the Path to Treaty are likely also to be more significant.

Management of the Institute

While the Bill provides extensive detail on some aspects of the organisation and governance of the Institute there are a number of aspects raised further below.

Although it was recommended by the Eminent Panel that the Institute be Independent, this was only accepted in-principle. The Government response to the TAC recommendations states that "The operational Independence of the Institute will be formalised through its establishment as a Statutory Body". Notably, in the Bill the Minister holds the total responsibility for appointing members of the Council.

While this is common in Statutory bodies it nevertheless does have implications for the operation of this Institute. Current Statutory bodies related to Queensland Treasury include the Motor Accident Insurance Commission, SEQWater and Queensland Rail. In the Statutory Body Handbook (Queensland Treasury, 2021, p.5) the limited independence of Statutory bodies is made clear:

While it is recognised that statutory bodies may be established to allow a certain level of independence from Government, the Government is still responsible for ensuring that taxpayers' funds are expended in the most efficient, effective, economical and ethical manner.

Statutory bodies are subject to varying degrees of Ministerial control which are specified in the statutory body's enabling legislation. Ministers are responsible to Parliament for the operation of all Government Boards and agencies within their portfolios and are required to table their annual reports in Parliament.

Clearly such a relationship is contrary to the one of self-determination envisaged for the Institute, and, in aiming to achieve something very new and different the Minister could afford to be both imaginative and generous in the establishment of this ongoing relationship with Queensland First Nations' people and look to a culturally appropriate approach for the establishment and management of the Institute. However, given the significant funding from the Queensland Government it is also important that processes for accountability to both Government and First Nations Peoples have been established as a part of this. Again, there appears to have been a more detailed process through which this has been undertaken in the Victorian Path to Treaty Process discussed above.

It is vital to the success of the work of this Institute that it is able to operate independently from Queensland Government oversight. While the Institute is not a party to the treaty negotiations it does have a lead role in developing and providing a framework for Queensland's First Nations peoples in such negotiations. As with any other important negotiation between two groups of people with potentially conflicting interests, neither party's negotiation strategy should be financially coerced or managerially influenced through oversight or control by the other party's representatives. Thus while the QNMU recognises the importance of Independence for the Institute in undertaking its key role, such independence has to be balanced against associated responsibilities. Clearly the decision to make the Institute a Statutory body was designed to provide safeguards around accountability, however, there would appear to be options that could be explored that would better align with the suggested partnership with First Nations peoples.

The following sections briefly comment on several other issues around the management of the Institute.

Time on Boards – need for a capacity for change

The term of appointment to the Council after the initial inaugural period is for 3 years. While the member may be reappointed (s20) there are no conditions regarding the length of this appointment or processes for consideration of the extension.

The Council has the key role in the operation of the Institute, and thus responsibility for the achievement of the identified outcomes. While it is broadly recognised that vested interests are common aspects, for example in Board members, the importance in the role of the Institute Council must operate with the interests of the Institute role. The QNMU would argue that renewal and evaluation processes for the Council are important to ensure continued clear direction, and these should be built into the Bill (e.g., Victorian Public Service Commission, 2019).

Regional inclusion in consultation

Input from across Queensland will be critical in all aspects of the Institute's role. However, clearly achieving representative views will be both complex and also expensive.

In the appointment process of the Council the Bill specifies that the Minister will select an Aboriginal and Torres Strait Islander person, but also stresses the need for selections to reflect cultural and gender diversity.

Given the importance of achieving effective representation on the Council, including of regional perspectives, it is felt that these may be better achieved through the Council members being appointed by First Nations representative mechanisms and structures as originally recommended.

Obviously both in the appointment of members of Council and also for the extensive process needed for the Truth-telling and Healing Inquiry to achieve effective outcomes, extensive across regional considerations must be undertaken.

Disclosure responsibilities

The Bill explicitly identifies disclosure responsibilities for members of the Treaty Institute Council where issues of material personal interest are raised. While this is likely to be a relatively standard clause around the responsibilities of those in such a position it also is important to ensure that the scope is clear and culturally appropriate.

The Bill does not define what a "material personal interest" is but does state (s30 (2)) where identified entities stand to gain (directly or indirectly) a benefit or suffer a loss. The entities identified include a wide range including all relatives of the individual. Given that much of the business of the Institute will deal with issues that, hopefully, will bring some benefit to communities, the likelihood that members engaged in this process would see some small gain, either personally or for someone they know, is very high. Thus, while the issue is essential to include, some more practical details of the scope of this is important for the practical and ethical operation of the Council.

Consistency with natural justice

The Explanatory Notes (p. 5-6) summarise several sections on the Bill that relate to natural justice. In particular the need for consistency with the *Legislative Standards Act 1992* (LSA) is noted in regard to the right to unbiassed decision making.

The section discussing ways of removing people from office also notes that in the conditions under which this can occur, “a breach of this natural justice condition is justified”.

While the intent of the approach is valued the “need” to breach the principles of natural justice seems too quick a solution to a situation where further exploration or options is required.

Independence

Many of the above comments lead to a brief discussion of the Independence of the Institute. While the Bill places all the responsibility to deliver an extraordinary level of change into the hands of the Institute, it also does this along with constraints on its actions.

The direction and decisions of the Institute will be led by the Council but the recommendations for Council membership have not been accepted and instead the Minister holds the responsibility for such membership.

And while the Institute is given a largely open role definition – basically to do anything needed – there clearly are very tight constraints on funding, and therefore what can ultimately be achieved. A \$300 million Path to Treaty Fund has been established but from the documentation it is only clear that the Institute will receive \$10 million in the first year with Treasury reviewing the operation of the Institute by the end of 2025 against undefined criteria. Clearly given the form and scope of the role of the Institute the timing and identification of change is likely to be slow and difficult to measure, thus may not match Treasury expectations.

While the QNMU clearly recognises the reason behind the need for the Institute to have operational Independence, there also is a recognition of responsibilities and accountabilities that come with such Independence which do not yet appear to have been fully explored in the development of these processes.

Truth-Telling and Healing Inquiry

The Truth-telling and Healing Inquiry is the second key objective of the Bill.

The Truth-Telling and Healing Inquiry (**the Inquiry**) will investigate and report on the impacts and effects of colonisation on Aboriginal and Torres Strait Islander people, through public truth-telling sessions, hearings and inviting people to give documents and other information to the Inquiry. (Fulcher & Collingburn, 2023)

As with the establishment of the Institute, the Bill places the leadership of this Inquiry as coming from the Minister – who is responsible for the establishment of the Inquiry, defining the Terms of Reference and the functions of the Inquiry. Further, the members of the Inquiry will be appointed by the Governor in Council on the recommendation of the Minister.

Although the funding for the Inquiry is not clearly defined in the Explanatory Notes (p5) it is indicated that allocations from the Path to Treaty Fund will be available to commence functions such as local truth-telling and healing activities. There are extensive guidelines in the Bill regarding the operation of the Inquiry. The QNMU feels it is important to also stress that given the nature of this Inquiry, and the trauma of those who may participate in sessions, great care must be taken in its conduct. The Bill does suggest that the term for the Inquiry should be no more than 3 years (with some provisions for extension). However, it is important to recognise that this type of process has a natural life cycle, there isn't a correct number of consultations or session. And the working through the process will define when that natural end has been reached. For example, many people will not feel comfortable coming forward initially until they are able to witness the process and whether it will be offered with Cultural support and Healing. It is important that all voices that want to be heard are heard.

Associated with this recognition comes that of the costs of the Truth-telling and Healing Inquiry. This is likely to be significant, involving both a broad consultative process that will be extensive in nature and must extend as far as is needed. The full inquiry will also include indirect costs associated with activities such as accessing documents and other artefacts. The processes and costs associated with their storage may be significant but needs to be managed respectfully.

The opportunity for the Government to lead this Inquiry, as a part of their stated shared journey represents a once in a lifetime opportunity to make essential changes to build stronger relationships between Queensland's First Nations and the wider community. Clearly the implications of a less than complete commitment to this Inquiry are significant and should be considered in finalising the details.

Thus, the QNMU recommends that consideration be given to both a greater openness to flexibility in the length and scope of the Inquiry and to greater clarity in the funding to support the essential core and associated activities of the Inquiry.

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