

Advice and Recommendations
from the Eminent Panel
on Queensland's

PATH TO TREATY

February 2020

EMINENT PANEL LETTER TO DEPUTY PREMIER

3 February 2020

The Honourable Jackie Trad MP
Deputy Premier
Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships
GPO Box 611
BRISBANE QLD 4001

Dear Deputy Premier

On 14 July 2019 you announced on behalf of the Queensland Government that the State was initiating a Path to Treaty to help reframe the relationship between First Nations Peoples and the Government. To undertake the initial work involved in a Path to Treaty, you established two bodies namely:

- a Working Group to hold public consultations and provide a Report on these consultations and develop recommendations and;
- a Panel to oversight the Working Group and provide advice to the Government on what a Treaty might mean for Queensland including timing, process and next steps.

We are pleased to provide the Report of the Working Group. This Report provides a detailed summary of the consultations conducted throughout Queensland as well as background information and analysis. The balance of this letter provides the advice of the Panel on the Path to Treaty inclusive of the recommendations endorsed by both the Panel and Working Group.

Overview

The principal recommendation is that the Government should proceed on a Path to Treaty, with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland. Support for a Path to Treaty strongly emerged during the consultation with arguments advanced including:

- dealing with the ‘unfinished business’ of the basis and consequences of the colonisation of Queensland and its devastating ongoing impact on First Nations;
- providing empowerment for First Nations Peoples to have the ability to deal with the social and economic disadvantage that top down government programs have not, and will never be able to, address;
- being a process that advances reconciliation and justice between First Nations Peoples and all other Queenslanders and;
- marking the maturity of Queensland to honestly deal with its history and provide the foundation for a path forward.

The Panel has been conscious that the Queensland Path to Treaty should be informed by the national leadership contained in the Uluru Statement from the Heart. The constitutional dialogues conducted with First Nations Peoples leading to the Uluru Statement, reflected many of the same themes which flowed from the consultations conducted by the Working Group, particularly the centrality of truth telling. This is not surprising as the mutual understanding required to reach agreements cannot occur if non-Indigenous Queenslanders do not understand the history of First Nations before and after colonisation and why a treaty process is so important.

It will be critical as the Path to Treaty unfolds over time, that the national process underway around the emergence of a Voice to Parliament be a guiding light. That said, the Panel believes the Queensland Path to Treaty can progress in parallel and can embody the Uluru themes of Voice, Treaty and Truth.

To implement the Path to Treaty, the Panel recommends the creation, by legislation, of institutional arrangements to take the process forward that recognises there must be appropriate independence from the Executive Government. These arrangements will need the independence from government because the government will be a party in treaty negotiations, and the inherent conflict this creates means the architecture to support a treaty process cannot rest within government.

Further, there will be an extensive process of building understanding in the wider community and the capacity within First Nations before actual negotiations can begin.

The key recommended institutional structure proposed is the First Nations Treaty Institute. This Institute will have the responsibility to take the Path to Treaty forward and do the demanding groundwork to support the emergence of representative structures for First Nations, with the capability to engage in the treaty process. Its first priority will be to lead the process of truth telling and healing.

The second recommended institutional initiative goes to the security and adequacy of the funding needed for the Path to Treaty. The process will be long and the ultimate outcome would see the relationship between First Nations and the Queensland Government guided by the treaty commitments. As is the case in Canada and New Zealand, the independent structures that operate need funding which is sustainable. Hence, it is proposed that a Treaty Future Fund be established in which annual budget contributions are made to build the corpus of the Fund to a level which can, over time, support the process and the institutional outcomes which emerge. This Fund would be managed by the Queensland Investment Corporation with input on ethical investment options from the First Nations Treaty Institute.

It is important that the momentum towards treaty be continued. Therefore, it is recommended that the Government place before the Parliament a Path to Treaty Bill in the first half of 2020 which establishes these institutional arrangements. Further the Government should prepare a Statement of Commitment to treaty which sets out its intention to proceed on a rights based model consistent with the Queensland *Human Rights Act 2019* (Qld) and the United Nations Declaration on the Rights of Indigenous Peoples.

First Nations Treaty Institute

The carriage of the Path to Treaty should be led by an independent statutory entity proposed to be called the First Nations Treaty Institute. The Institute would be a facilitating and enabling structure to advance the necessary work to make Queensland treaty ready. It wouldn't be a party to a treaty or be involved in the negotiations but would support First Nations and the wider community.

As a starting point, the governance of the Institute would be vested in a First Nations Treaty Institute Council. Initially, Council members would be appointed by government with input from existing First Nations bodies and leaders. Once representative structures emerge, then the appointment of the Council should move from government to First Nations.

The Institute would work with First Nations Peoples on matters such as:

- advice and facilitation of the development of a treaty making framework
- advice on possible representative mechanisms and structures for First Nations Peoples
- support capacity building for First Nations to engage in the treaty making process
- support the development of governance models suitable for First Nations

It is further recommended that the Institute be commissioned to conduct a process of Truth Telling. In performing this task the Institute would need appropriate powers. An alternative would be to hold a Commission of Inquiry and there are advantages to that approach and some disadvantages. The Panel believes the Institute could successfully lead on the process of Truth Telling as did the then Human Rights and Equal Opportunity Commission in the 1990's on the separation of Aboriginal and Torres Strait Islander children from their families (Stolen Generations) in the Bringing Them Home Inquiry.

It should be noted that work of the Institute on representative structures must be from the ground up and reflect the differences in First Nations across Queensland. It is possible that the representative structures could in time play a role in a Voice to the government or Parliament and hence the co-design process for a national Voice should be monitored and engagement occur as appropriate.

Truth Telling and Healing

A consistent and strongly expressed view from the Working Group's consultations was the need for Truth Telling. The need for Queenslanders to know about the history of colonisation and its impact on First Nations Peoples, together with the more recent impacts of protection and assimilation policy periods, was seen as a precursor to the non-Indigenous community understanding the aspiration for treaty. Simply put, any treaty must be based on the truth. In this respect the Queensland consultations mirrored the views which emerged from the constitutional dialogues held nationally as the foundation of the Uluru Statement.

The Panel believes that Truth Telling can be a powerful and cathartic process which will deepen understanding of the shared experience of how modern Queensland came to be. It will also be difficult and potentially traumatic for all Queenslanders involved, particularly First Nations Peoples. That is why Truth should be combined with healing.

The resources which flow from Truth Telling will be invaluable in informing academic and popular understanding of First Nations. The education systems of the State should utilise the materials in curriculum design and as an aid to teaching and learning.

Capacity Building

The Working Group's report highlighted the need for First Nations and their communities to become treaty ready to ensure that future discussions and negotiations on a possible treaty or treaties can occur on an equitable and meaningful basis.

To achieve this, programs to strengthen First Nations' participation in the treaty process, and the development of governance models to help determine who should have the authority to represent each nation, should be implemented. The complexities of the dispersal of First Nations Peoples away from their traditional Country should be considered as part of this process.

Further, it is proposed that the Institute foster partnerships with universities and other bodies to conduct research, build resources and develop knowledge for First Nations to draw upon to guide treaty discussions and ongoing governance.

The Panel also believes that the Queensland Government will need to prepare to be treaty ready and this needs to be led by the Premier and the Minister for Aboriginal and Torres Strait Islander Partnerships

Community Understanding and Engagement

The treaty journey is one that has to involve all Queenslanders, and is necessary to improving the relationship between First Nations Peoples and non-Indigenous Queenslanders. The consultations underlined the importance of both First Nations and non-Indigenous support to promote understanding of the history of First Nations peoples and why the Path to Treaty is proceeding.

It is recommended that ongoing and inclusive community engagement occurs in conjunction with the establishment of the Institute to build awareness of the history of First Nations Peoples and continue the momentum towards the Path to Treaty.

The Path to Treaty Act

The implementation of the Path to Treaty will require the enactment of legislation which is recommended to be placed before the Parliament in the first half of 2020. This legislation would establish the First Nations Treaty Institute and provide for the First Nations Treaty Future Fund. In other respects the Act would provide the architectural framework for the treaty process namely:

- the recognition of representative mechanisms and structures
- support for the development of appropriate governance arrangements for First Nations
- the future adoption of a Treaty Framework
- the future creation of a Treaty Tribunal to oversee treaty negotiations and ongoing maintenance of treaties through disputes resolution
- incorporation of principles as to how the treaty process should proceed such as self-determination, free and prior informed consent, fairness and equality, good faith negotiations, mutual benefit and sustainability and transparency and accountability.

The 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.

First Nations Treaty Future Fund

Consultation participants consistently told the Working Group that the entire Path to Treaty should be supported on a sustainable and guaranteed long-term financial basis to demonstrate the government's commitment to the process.

The Panel recommends that a First Nations Treaty Future Fund be established to fund the operational costs of the Institute and the programs it will deliver for a minimum of 10 years with an annual allocation for capital investment sufficient for the Fund to become self-sustaining over time. This mirrors the approach undertaken to fund the New South Wales Aboriginal Land Council in the 1980s and 1990s.

The administration of the fund should be placed within the Institute with investment of funds to be undertaken by the Queensland Investment Corporation informed by ethical considerations provided by the Institute.

Finally, the Panel acknowledges the hard work and dedication of the members of the Working Group who had principal carriage of the consultations and the production of the Working Group Report. Further the Panel thanks the departmental officers who provided logistical support to the Working Group and Panel. Most importantly the Panel recognises those Queenslanders who have engaged in the Path to Treaty to date and acknowledges the goodwill and wisdom of the First Nations Peoples.



Dr Jackie Huggins AM
Co-Chair, Eminent Panel



Professor the Hon Michael Lavarch AO
Co-Chair, Eminent Panel

RECOMMENDATIONS

The Treaty Working Group made eight recommendations which appear below:

1. Path to Treaty - Overview

- 1.1 That the Queensland Government proceed on a Path to Treaty with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland.
- 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.
- 1.3 That, in order to progress the Path to Treaty the Queensland Government make a Treaty Statement of Commitment to express the Government's intention to further lasting reconciliation with First Nations through the actions detailed in the recommendations below involving:
 - 1.3.1 the establishment of the First Nations Treaty Institute as an independent body to lead the Path to Treaty process;
 - 1.3.2 the facilitation of a process of truth telling and healing;
 - 1.3.3 the building of capacity for First Nations to actively participate in the treaty process;
 - 1.3.4 deepening the understanding and engagement of the wider Queensland community in the Path to Treaty;
 - 1.3.5 the adequate resourcing of these actions through the establishment of a First Nations Treaty Future Fund and;
 - 1.3.6 the placing before Parliament in the first half of 2020 a Bill to further the Path to Treaty, establish the First Nations Treaty Institute and the First Nations Treaty Future Fund.

2. The First Nations Treaty Institute

- 2.1 That principal carriage of the actions required to progress the Path to Treaty be the responsibility of a statutory entity established by an Act of the Queensland Parliament called the First Nations Treaty Institute (Institute).
- 2.2 That the functions of the First Nations Treaty Institute include:
 - 2.2.1 advising and facilitating the development of a treaty making framework;
 - 2.2.2 advising on possible representative mechanisms and structures for First Nations Peoples;
 - 2.2.3 leading a process of truth telling and healing;
 - 2.2.4 providing support to build the capacity of First Nations to engage in the treaty making process;
 - 2.2.5 supporting the development of governance models suitable for First Nations and;
 - 2.2.6 engagement with the Queensland community on the Path to Treaty.
- 2.3 That the governance of the Institute be the responsibility of an Institute Council comprising:
 - 2.3.1 of members initially appointed by the Governor in Council and then subsequently
 - 2.3.2 of members directly appointed by First Nations representative mechanisms and structures and;
 - 2.3.3 A Chief Executive Officer appointed by the Institute Council.
- 2.4 That the Institute recommend to the Queensland Government the representative mechanisms and structures for First Nations provided the recommendation:
 - 2.4.1 has been informed through extensive consultation with First Nations Peoples and;
 - 2.4.2 represents an agreed position of First Nations.
- 2.5 That the First Nations Treaty Institute operate independently of the Queensland Government with reporting to be to the Queensland Parliament.
- 2.6 That funding for the First Nations Treaty Institute be drawn from the First Nations Treaty Future Fund.

3. Truth Telling and Healing

- 3.1 That the Queensland Government facilitate and resource a comprehensive process of Truth Telling to chronicle the history of First Nations Peoples prior to British colonisation of Queensland, the history and impact of colonisation on First Nations Peoples and the more recent history of Queensland in relation to First Nations Peoples.
- 3.2 That, as its first priority, the First Nations Treaty Institute be commissioned and empowered (e.g. the ability to compel the production of documents and witnesses) to conduct the process of Truth Telling and to support participants and witnesses involved in the process.
- 3.3 That healing and reconciliation be supported through the process with relevant service providers auspiced to provide support to First Nations People to recover from their lived experience and impacts of intergenerational trauma.
- 3.4 That the resources, materials and testimony gained from the process be used:
 - 3.4.1 To inform popular and academic understanding of First Nations and the history of colonisation and;
 - 3.4.2 As source material for the development of mandatory educational curricula.

4. Capacity Building

- 4.1 That First Nation Peoples be supported to engage in the Path to Treaty with the aim that future discussions and negotiations on a possible treaty or treaties might occur with the State on an equitable basis.
- 4.2 That the First Nations Treaty Institute develop and administer programs to assist First Nations and their communities to become treaty-ready and support First Nations to develop governance models appropriate for different communities.
- 4.3 That partnerships with Universities and other bodies be fostered through the First Nations Treaty Institute to build resources and expertise available to be called upon by First Nations in strengthening their capacity for treaty discussions and on-going governance.
- 4.4 That the Premier supported by the Minister for Aboriginal and Torres Strait Islander Partnerships coordinate preparations within government for the Path to Treaty process.

5. Community Understanding and Engagement

- 5.1 That the Queensland Government undertake in conjunction with the establishment of the First Nations Treaty Institute and in advance of the Truth and Healing process, a community engagement program to promote understanding of the history of First Nations Peoples and the Path to Treaty process.

6. Implementation - The Path to Treaty Act

- 6.1 That the Queensland Government place before Parliament in the first half of 2020 a Bill to further the Path to Treaty, establish the First Nations Treaty Institute and the First Nations Treaty Future Fund.
- 6.2 The proposed legislation will include acknowledgment that:
 - 6.2.1 First Nations successfully governed their lands, seas, waters and air and associated resources for at least 65,000 years prior to British colonisation of Queensland;
 - 6.2.2 Colonisation occurred without the consent of First Nations and often against the active resistance of First Nations Peoples;
 - 6.2.3 First Nations have never ceded their sovereignty and continue to assert sovereignty;
 - 6.2.4 Colonisation occasioned devastating disruption to First Nations societies and the wholesale dispossession of First Nation Peoples of their lands, seas, waters and air;
 - 6.2.5 First Nations' responsibilities for their lands, seas, waters and air continue in accordance with traditional laws and customs;
 - 6.2.6 First Nations cultures and knowledge is an enormous resource for Queensland and;
 - 6.2.7 Queensland seeks to embark on a Path to Treaty in partnership and good faith and consistently, with the recognition of the rights of First Nations Peoples as embodied in the *Human Rights Act 2019* (Qld) and the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)
- 6.3 The proposed legislation will:
 - 6.3.1 establish the First Nations Treaty Institute;
 - 6.3.2 Establish the First Nations Future Fund

- 6.3.3 enable future representative mechanisms and structures to be recognised as participants in the settlement of a treaty framework and as parties to treaties;
- 6.3.4 support the development of appropriate governance arrangements for representative mechanisms and structures for First Nations individually and collectively as required;
- 6.3.5 provide for the Path to Treaty to proceed based on the Declaration (i.e. incorporate into the Act specifics such as self-determination and free prior and informed consent, fairness and equality, good faith negotiations, mutual benefit and sustainability, transparency and accountability);
- 6.3.6 enable the future creation of a Treaty Tribunal to oversee the treaty making process, monitor compliance, arbitrate and resolve disputes and review treaties over time;
- 6.3.7 enable the future adoption of the Treaty Framework as facilitated by the First Nations Treaty Institute and accepted by the Queensland Government and First Nations representative mechanisms and structures;
- 6.3.8 dispute resolution provisions and;
- 6.3.9 reporting and other necessary legislative requirements.

7. Implementation - Resourcing and creation of the First Nations Treaty Future Fund

- 7.1 That the Queensland Government provide a sustainable and guaranteed financial basis for the Path to Treaty process to proceed.
- 7.2 That a First Nations Treaty Future Fund (Fund) be established into which will be credited annual appropriations for a minimum of 10 years commencing with the Queensland Budget for the 2020/21 financial year sufficient to be applied to the following:
 - 7.2.1 the operational costs of the First Nations Treaty Institute;
 - 7.2.2 capacity building for First Nations;
 - 7.2.3 support for the Truth and Healing process and programs;
 - 7.2.4 support for representative mechanisms and structures;
 - 7.2.5 the costs of First Nations Peoples involvement in treaty negotiations and;
 - 7.2.6 an annual allocation for capital investment sufficient for the Fund to become self-sustaining over time.
 - 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.

8. Transparency

- 8.1 That the Report of the Treaty Working Group and the advice to Government of the Eminent Panel be published and made freely available to the public.

