Parliamentary Committees

Planning Bill 2015
Planning and Environment Court Bill 2015
Planning (Consequential) and Other Legislation Amendment Bill 2015

Planning and Development (Planning for Prosperity) Bill 2015
Planning and Development (Planning Court) Bill 2015
Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015

Report No. 23, 55th Parliament
Infrastructure, Planning and Natural Resources Committee
April 2016

Infrastructure, Planning and Natural Resources Committee

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Deputy Chair	Mr Michael Hart MP, Member for Burleigh
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Acknowledgements

The committee thanks those who briefed the committee, provided submissions and participated in its inquiry. In particular, the committee acknowledges the assistance provided by the Department of Infrastructure, Local Government and Planning.

Contents

Chair's foreword

This report presents a summary of the Infrastructure, Planning and Natural Resources Committee's examination of the following bills:

- Planning Bill 2015
- Planning and Environment Court Bill 2015
- Planning (Consequential) and Other Legislation Amendment Bill 2015

- Planning and Development (Planning for Prosperity) Bill 2015
- Planning and Development (Planning Court) Bill 2015
- Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015.

The committee's task was to consider the policy outcomes to be achieved by each suite of bills, as well as the application of fundamental legislative principles, including whether each bill has sufficient regard to rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank those organisations and individuals who lodged written submissions on the bills.

I would also like to thank all those individuals, organisations and departmental officials who gave evidence at a public hearings or who briefed the committee. I would like to thank the committee's secretariat and the Technical Scrutiny of Legislation Secretariat.

I commend the report to the House.

Jim Pearce MP
Chair

April 2016

Acronyms

bill	Planning Bill 2015
BCC	Brisbane City Council
CCC	Queensland Crime and Corruption Commission
Coastal Act	*Coastal Protection and Management Act 1995 (Qld)*
Consequential Amendments bill	Planning (Consequential) and Other Legislation Amendment Bill 2015
department	Queensland Department of Infrastructure, Local Government and Planning
EDO	Environmental Defenders Office Qld
ESD	ecologically sustainable development
FLP	fundamental legislative principles
HIA	Housing Industry Association
ISQ	Independent Schools Queensland
JR Act	*Judicial Review Act 1991*
LGAQ	Local Government Association of Queensland
LGIP	local government infrastructure plan
P&E Court	Planning and Environment Court
P&E Court bill	Planning and Environment Court Bill 2015
PCA	Property Council of Australia
PIA	Planning Institute of Australia
private member's bill	Planning and Development (Planning for Prosperity) Bill 2015
QCEC	Queensland Catholic Education Commission
QELA	Queensland Environmental Law Association
QHA	*Queensland Heritage Act 1992 (Qld)*
QPP	Queensland Planning Provisions
SARA	State Assessment and Referral Agency
SDAP	State Development Assessment Provisions
SLC	Scrutiny of Legislation Committee
SPA	*Sustainable Planning Act 2009 (Qld)*
SPP	State Planning Policy
SPRP	State Planning Regulatory Provisions
UDIA	Urban Development Institute of Australia

Recommendations

Recommendation 11 **44**

The committee recommends that infrastructure charging for both state and non-state schools should be consistent and equitable and therefore both state and non-state school providers be exempt from paying infrastructure charges where the development is undertaken through Ministerial designation.

Points for clarification

Point for clarification 1 **21**

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the rationale for the proposed changes relating to assessment benchmarks.

Point for clarification 2 **66**

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the necessity for transitional provisions in the bill to be retrospective for up to 5 years.

Point for clarification 3 **71**

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the rationale for matters such as those in clauses 220 and 263 of the bill being appropriate to be prescribed by regulation.

1 Introduction

1.1 Role of the committee

The Infrastructure, Planning and Natural Resources Committee (the committee) was established by the Legislative Assembly on 27 March 2015 and consists of three government and three non-government members.

The committee's areas of portfolio responsibility are:

- Infrastructure, Local Government, Planning and Trade, and Investment
- State Development, Natural Resources and Mines
- Housing and Public Works.[1]

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering the policy to be given effect by each bill and the application of the fundamental legislative principles (FLPs) to each bill.

1.2 The referral

On 4 June 2015 three private member's bills, the Planning and Development (Planning for Prosperity) Bill 2015, the Planning and Development (Planning Court) Bill 2015, and the Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015, were referred to the committee for examination and report. The committee's inquiries were suspended by the Parliament on 17 July 2015 to enable concurrent consideration with the Government planning bills to be introduced later in 2015.

On 12 November 2015, the Planning Bill 2015, the Planning and Environment Court Bill 2015 and the Planning (Consequential) and Other Legislation Amendment Bill 2015 were referred to the committee for examination and report. On the same day, the Parliament reopened the committee's inquiry into the private member's bills.[2]

In accordance with Standing Order 136(1), the committee is required to consider all of the six planning bills and report by 21 March 2016.

1.3 The committee's inquiry process

1.3.1 Private Member's bills

On 11 June 2015, the committee called for submissions on the private member's bills with a closing date of 13 July 2015. The committee received 47 submissions (see Appendix A). On 25 June 2015, the committee held a public briefing on the bills. The committee was due to report by 13 October 2015 but the inquiry was suspended by Parliament on 17 July 2015. After the inquiry was reopened on 12 November 2015, with the introduction of the Government's planning bills, the committee wrote to stakeholders and advised that submissions received on the private member's bills would be considered by the committee as part of its inquiry. The committee also invited additional submissions on the Government's planning bills from submitters.

1 Schedule 6 of the *Standing Rules and Orders of the Legislative Assembly*, effective from 31 August 2004 (amended 16 February 2016).

2 Queensland Parliament, Record of Proceedings, 12 November 2015, p 2906.

1.3.2 Government planning bills

On 16 November 2015, the committee called for written submissions by placing notification of the inquiry on its website, notifying its email subscribers and sending letters to a range of stakeholders. The closing date for submissions was 18 January 2016. The committee received 127 submissions (see Appendix B).

On 30 November 2015, the committee held a public briefing with the Department of Infrastructure, Local Government and Planning (the department) and Mr Tim Nicholls MP, the Member for Clayfield (see Appendix C). The committee conducted regional public hearings in Cairns on 27 January 2016 (see Appendix D), Townsville on 28 January 2016 (see Appendix E) and Mackay on 29 January 2016 (see Appendix F). On 26 February 2016, the committee held a public hearing in Brisbane (see Appendix G).

Copies of the submissions and transcripts of the public briefing and public hearings are available from the committee's webpage.[3]

1.4 Policy objectives of the planning bills

The objective of the Planning Bill 2015 is to deliver better planning for Queensland by:

- enabling better strategic planning and high quality development outcomes
- ensuring effective public participation and engagement in the planning framework
- creating an open, transparent and accountable planning system that delivers investment and community confidence
- creating legislation that has a practical structure and clearly expresses how land use planning and development assessment will be done in Queensland
- supporting local governments to adapt to and adopt the changes.[4]

The policy objectives of the Planning and Environment Court Bill 2015 are to:

- provide a separate piece of legislation to govern the constitution, composition, jurisdiction and powers of the Planning and Environment Court
- provide legislative framework for new Court Rules and procedures.[5]

The policy objective of the Planning (Consequential) and Other Legislation Amendment Bill 2015 is to:

- make consequential amendments required for the proposed enactment of the Planning Bill 2015 and the Planning and Environment Court Bill 2015 and repeal of the *Sustainable Planning Act 2009*.[6]

The objective of the Planning and Development (Planning for Prosperity) Bill 2015 is to 'deliver Australia's best land use planning and development assessment system' by providing for:

- simplified plan making arrangements
- simplified categories of development and decision rules
- a navigable and easy to use Act[7]

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3 See www.parliament.qld.gov.au/ipnrc.
4 Planning Bill 2015, explanatory notes, p 1.
5 Planning and Environment Court Bill 2015, explanatory notes, p 2.
6 Planning (Consequential) and Other Legislation Amendment Bill 2015, explanatory notes, p 1.

The policy objectives of the Planning and Development (Planning Court) Bill 2015 are to:

- provide a separate piece of legislation to govern the constitution, composition, jurisdiction and powers of the Planning and Environment Court
- provide the legislative foundation for new Court Rules and procedures to ensure the Court's efficient operation.[8]

The policy objectives of the Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015 are to:

- make consequential amendments required for the proposed enactment of the Planning Bill 2015 and the Planning and Environment Court Bill 2015
- repeal the *Sustainable Planning Act 2009*.[9]

1.5 Government consultation on the planning bills

Legislative review of the current land use planning arrangements in Queensland has been underway for a number of years.[10] In the course of review, there has been considerable engagement with stakeholders including local government, peak bodies, industry, professional and legal representatives, community and environmental groups and the public to identify key reforms around plan making, development assessment, dispute resolution and other areas of the planning system. Government engagement has ranged from individual meetings to formal consultation processes.[11]

The State Government released exposure drafts of the bills so that stakeholders could have input prior to introduction of the legislation.[12]

The Council of the City of Gold Coast described the development of the proposed planning framework over the last few years as 'an iterative and progressive process'.[13]

The committee were made aware of the level of fatigue in the industry regarding the development of the legislation and for the need to finalise this process. The Planning Institute of Australia (PIA) advised:

> …this reform process has been underway for more than three years and many of our members have expressed the feeling of being somewhat fatigued. We hope this committee process and the concurrent consideration of these two bills will provide an early outcome, supported by the detail and tools necessary for the new act to achieve its purpose and create a culture of achievement among the sector.[14]

However, not all sections of the community felt they were included in this consultation process.[15] The committee heard from community groups who were included only at the conclusion of the consultation process, for example, Park It Community Group:

> They were consulted but only after we had actually approached the department. There was one day that was put on by the planning and infrastructure department that we attended, but basically that

7 Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 1.
8 Planning and Development (Planning Court) Bill 2015, explanatory notes, p 1.
9 Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015, explanatory notes, p 1.
10 Planning Bill 2015, explanatory notes, p 1.
11 Planning Bill 2015, explanatory notes, p 11. See also, Public hearing transcript, 26 February 2016, pp 35-37.
12 Department of Infrastructure, Local Government and Planning, Draft Planning Bills 2015 consultation report, November 2015, p 2.
13 Council of the City of Gold Coast, submission 96, p 1.
14 Public hearing transcript, Brisbane, 26 February 2016, p 17.
15 Public hearing transcript, Cairns, 27 January 2016, p 4.

> was just an information-giving day. We did put in fairly lengthy submissions, as you are no doubt aware, to the planning department subsequently when they put out the draft plan. Once again, it was, 'This is the fait accompli.' The people who were most heavily involved in the drafting of both bits of legislation … were the developers, the local government and the building industry. I attended one of those meetings while the LNP was still there with the EDO, and we were one of the very, very few community organisations, and that was one day and that was very much at the end of the process. So the community did not feel heavily involved in the designing of those bills.[16]

Committee comment

The committee acknowledges the extensive consultation over a number of years on the planning framework. We note that exposure drafts of the bills were released for consultation prior to their introduction in the House. The committee commends such industry stakeholder engagement. However, the committee is disappointed with the reported lack of targeted and sector appropriate consultation with representative community groups. While these groups may not be the administrators or the planning and development professionals who use the planning framework, it is communities across the state who are most impacted by the end result. The committee is also deeply concerned by the reported lack of consultation with appropriate Native Title Owners or Native Title representative bodies in north Queensland. The committee urges the department to continue to actively engaging with all stakeholders to seek to address or minimise community and industry concerns.

We recognise that the department would be familiar with all, if not most, of the comments raised in the submissions. Nevertheless, given that the committee received 127 submissions on the Government's planning bills, many of which were very detailed, there is still a level of uncertainty or concern regarding the proposed new planning framework. We are aware that some issues may be resolved with the finalisation of the planning regulations and other supporting documents or are outside the scope of the current bills. Again the committee urges the department to continue to actively engaging with all stakeholders to seek to address or minimise concerns.

1.6 Should the bills be passed?

Standing Order 132(1)(a) requires the committee to determine whether to recommend the planning bills be passed.

Recommendation 1

The majority of the committee recommends the Planning Bill 2015 be passed.

Recommendation 2

The majority of the committee recommends the Planning and Environment Court Bill 2015 be passed.

Recommendation 3

The majority of the committee recommends the Planning (Consequential) and Other Legislation Amendment Bill 2015 be passed.

[16] Public hearing transcript, Brisbane, 26 February 2016, p 6.

Recommendation 4

The majority of the committee recommends the Planning and Development (Planning for Prosperity) Bill 2015 not be passed.

Recommendation 5

The majority of the committee recommends the Planning and Development (Planning Court) Bill 2015 not be passed.

Recommendation 6

The majority of the committee recommends the Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015 not be passed.

2 Examination of the Planning bills

2.1 Background

On 12 June 2013, the former LNP government announced its intention to reform Queensland's planning and development assessment system, and prepared new planning legislation to replace the *Sustainable Planning Act 2009* (Qld) (the 'SPA').[17] In November 2014, the following bills were introduced to the Queensland Parliament:

- Planning and Development Bill 2014
- Planning and Environment Court Bill 2014
- Planning and Development (Consequential) and Other Legislation Amendment Bill 2014.

The Planning and Development Bill intended to repeal the SPA and, according to the then Deputy Premier and Minister for State Development, Mr Jeff Seeney MP, the bill would:

> establish a new planning act that will simplify plan making arrangements, streamline the development assessment system and restructure planning legislation to remove superfluous procedures, detail and redundant provisions'.[18]

One purpose of the reforms, according to the then Deputy Premier, was the promotion of 'prosperity', the achievement of which 'entails the balancing of community wellbeing, economic growth and environmental protection'.[19]

The suite of bills lapsed at the end of the 54th Parliament in January 2015.

On 4 June 2015, the Shadow Minister for Infrastructure, Planning, Small Business, Employment and Trade, Mr Tim Nicholls MP, introduced three private member's bills to the Queensland Parliament:

- Planning and Development (Planning for Prosperity) Bill 2015 (the private member's bill)
- Planning and Development (Planning Court) Bill 2015
- Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015.

According to the Shadow Minister, the private member's bill largely mirrored the Planning and Development Bill introduced in 2014 and sought to 'maintain momentum' with regards to planning reforms in Queensland to ensure the development of 'Australia's most efficient planning system'.[20]

On 12 November 2015, the Deputy Premier and Minister for Infrastructure, Local Government and Planning, Hon Jackie Trad MP, introduced the Government's planning bills to the Parliament:

- Planning Bill 2015 (the bill)
- Planning and Environment Court Bill 2015 (P&E Court bill)
- Planning (Consequential) and Other Legislation Amendment Bill 2015 (Consequential Amendments bill).

In her introductory speech to the bill, the Minister reiterated the government's commitment to continue with the planning reform process, and stated:

[17] Planning and Development (Planning Court) Bill 2015, explanatory notes, p 1.
[18] Queensland Parliament, Record of Proceedings, 25 November 2014, p 3890.
[19] Queensland Parliament, Record of Proceedings, 25 November 2014, p 3891.
[20] Queensland Parliament, Record of Proceedings, 4 June 2015, pp 1130-1.

> We said we would keep those elements of the former government's reform that made sense but ensure that we get the balance right between community, environment and development.[21]

A number of submissions compared the suites of bills in regard to environmental factors. The Environmental Defenders Office Qld (EDO) told the committee:

> EDO Qld and the Queensland Conservation Council prepared this brief scorecard that analysed the Sustainable Planning Act prior to changes made by the Newman government, the Sustainable Planning Act after changes were made by the Newman government and the two sets of bills – the LNP bills and the government bills – and how they performed against those key criteria. What this analysis exercise proved to us is that the LNP bills are by far the worst performing in terms of these key elements in our planning frameworks. The government bills are definitely an improvement but not as good as even the Sustainable Planning Act prior to the changes by the Newman government.[22]

Committee comment

The committee notes that the current Government's planning bills are the culmination of a process of reform. Most submitters and witnesses stated that they were addressing their comments solely to the Government's bills in their representations to the committee. For this reason, the focus of the committee's report and comments is on the Government's suite of planning bills.

2.2 A new planning framework

The bills seek to replace the current planning legislation by creating a new 'framework' legislation.[23] This broadly entails that rather than providing specific measureable outcomes to be achieved according to detailed criteria and guidance, the bill's function is to establish the required foundational elements of the system. The level of prescription or direction is placed in a regulation, instrument or scheme which will allow for these to change as required.[24] The expected result of this new approach is that rights, roles and responsibilities are embedded in the highest order instrument – the legislation – where it is subject to parliamentary scrutiny, and fundamental machinery is embedded in the regulation, with process matters then placed in instruments.[25] The committee was informed that:

> At over 700 pages, the current planning legislation (SPA) is complicated and hard to navigate. Information is difficult to find, and processes and obligations are hard to clarify or follow. SPA also contains information that is more instructive material than legislative requirement; its structure has also led to duplication and replication and is not aligned to more contemporary drafting practices.
>
> Ongoing issues are experienced because of the "decision rules set in SPA that establish a highly prescriptive and structured way that assessment managers are to make decisions. This arrangement is complicated and forces plan makers into designing very detailed schemes so that the decision-making process can be satisfied…"[26]

In support for its decision to introduce new legislation and repeal SPA, the department advised:

> The cumulative effect of addressing these factors combined with a range of other issues that have been continually raised, led to a need to holistically recraft the legislation. These other issues include complex currency period/related application arrangements; that multiple approvals/conditions for premises may overlap/conflict; non-minor changes require the entire application to go through a full process again; criteria for determining a change application is complex and uncertain; cancellation arrangements are inflexible; there are inconsistencies in obligations and powers; local government

21 Queensland Parliament, Record of Proceedings, 12 November 2015, p 2882.
22 Public hearing transcript, Brisbane, 26 Feb 2016 p 1-2.
23 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 2.
24 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 4.
25 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 4.
26 Public hearing transcript, Brisbane, 26 February 2016, pp 13-14.

> community infrastructure designation arrangements are not useful; practical challenges in using Temporary Local Planning Instruments; the confusion and unworkability of the purposive provisions; the need for a way to exempt inappropriately categorised development in certain circumstances; formalising alternative assessment arrangements; and inflexibilities within current processes. With all the detailed process elements contained in the legislation, changes can take many months to be realised.
>
> If all of the elements were to be tacked by a SPA amendment, any amending Act would be long and complicated even with many foundational elements of SPA remaining the same. Creating a new Act presented other opportunities to improve other parts of the legislation where there is repetition, duplication or confusion - like consolidating appeal rights in a single schedule in tabular form; consolidating definitions and restructuring provisions in a more intuitive way.
>
> The proposed new Planning Act still contains a significant portion of the key elements of the current planning framework and much of the new arrangements will be familiar to users.[27]

The committee received evidence both supporting the new planning framework and questioning the need to repeal the current legislation. A number of stakeholders recognised the increasing complexity of the SPA and the *Integrated Planning Act 1997* (Qld) that predated it and the need to reform the legislative planning framework in Queensland.[28]

> From the perspective of the housing industry, which is responsible for the vast majority of planning approvals across the state, the planning system is a living example of the aphorism that the road to hell is paved with good intentions. Despite its laudable objectives, at a day-to-day operational level the planning system is a nightmare for those whose livelihood and whose building outcomes rely on it.[29]

According to the Urban Development Industry of Australia (UDIA), 'the biggest issue with the current planning system is its complexity. That is why this process was started, to get to the bill we are looking at'.[30] The UDIA told the committee:

> It has just grown like Topsy since 1998 … We do need this legislation to go through because we need to do everything we can to reduce that complexity and make the system perform better. That is what is in everyone's interests.[31]

Logan City Council expressed that it did not support the proposed reforms, consistent with earlier submissions to previous planning bills, as the bill appears to 'do nothing to enable better strategic planning and higher quality development outcomes'.[32] In a submission responding to the government's announcement to commence planning reforms in 2013, the Council had stated:

> [The Logan City] Council believes that a structured review of the existing legislation would deliver greater benefits to all parties as there are many opportunities available to improve these processes by amendments to the SPA.[33]

The Local Government Association of Queensland (LGAQ) shared a similar view: 'our initial position was not to support a complete remake of legislation again but to look to the current legislation to see where it could be improved'.[34] LGAQ highlighted its concern about the impact of further legislative planning reforms on local government and communities:

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27 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 2-3.
28 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 2.
29 Public hearing transcript, Brisbane, 26 February 2016, p 9.
30 Public hearing transcript, Brisbane, 26 February 2016, pp 13-14.
31 Public hearing transcript, Brisbane, 26 February 2016, pp 13-14.
32 Logan City Council, submission 13, p 1.
33 Logan City council, submission 13, p 1.
34 Public hearing transcript, Brisbane, 26 February 1016, p 32.

> The committee must also recognise this will be Queensland's third planning Act in 20 years which also includes many interim reviews and reforms that have occurred on a regular basis during that time. Currently, many councils have either recently completed or are still finalising planning schemes in accordance with the SPA and will now be required to transition to a new framework without a period of regulatory stability or an impartial State-wide review of completed schemes. The genuine concern of 'change fatigue' is not just a concern of councils, but the communities they represent, with any transition inevitably being expensive, time consuming and resource intensive.[35]

Brisbane Residents United did not support the changes to the legislation as they argued that the move towards less prescription around approved developments would lead to greater emphasis on relaxation of planning rules:

> I think the planning bills, like other recent planning changes, are going about fixing that problem the wrong way. We can have good planning and a vibrant construction sector. The approval delays are not due to legislation that is too prescriptive; the delays are due to their lack of prescription and the seemingly boundless scope of planning relaxations and rezonings that are available to the persistently applying developer. This is where it gets bogged down. This is where the community feels baffled and betrayed. The solution is for town planning to provide certainty. Isn't that what business wants? Define the building limits and stick to them. Submit a development application that abides by those rules and it can be quickly approved, but stick to the principles of amenity, building footprints, airflow and people-friendly streetscapes et cetera.[36]

However, the committee also heard from the Property Council of Australia (PCA) who argued the need for flexibility in the planning framework:

> Our planners in Queensland are qualified professionals and they rightly should have the discretion to make a decision based on all the information at hand, including public feedback on that outcome… how far and how locked down do the rules actually have to be? We need to have some degree of flexibility in there to enable Queensland to be the smart state, to allow us to prosper, to allow us to have innovation and to deliver great outcomes for communities and to provide that certainty, as well as the flexibility to be innovative.[37]

Similarly, the Housing Industry Association (HIA) argued the need to ensure balance in how much detail is prescribed in the Act:

> In terms of more prescription, there is always a balance between prescription and innovation. People in the development industry are constantly innovating in design and materials and those sorts of things. It is about getting that balance right. If you make it too prescriptive you will end up with streets and suburbs looking like penal colonies, with cookie-cutter development that is only designed to fit the code rather than what the market wants.[38]

The committee heard that ultimately planning is to ensure that our built environments are spaces which serve and provide for society at large. Brisbane Residents United told the committee:

> What makes a city liveable also makes it competitive. What makes a state liveable also makes it competitive. Significant world cities recognise greening and good planning as key to attracting and retaining talent and sustaining the economy... We need to provide a planning framework that delivers through adequate regulation and certainty.[39]

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35 Local Government Association of Queensland, submission 89, p 4.

36 Public hearing transcript, Brisbane, 26 February 2016, p 4.

37 Public hearing transcript, Brisbane, 26 February 2016 p 12.

38 Public hearing transcript, Brisbane, 26 February 2016, p 13.

39 Public hearing transcript, 26 February 2016, p 4.

2.3 Transitional arrangements

A number of submissions sought more guidance and clarity in the bill with regards to transitional arrangements, with some submissions expressing concern over the associated costs of transitioning to new planning arrangements. For example, Townsville City Council stated:

> We … have concerns around the transitional arrangements. We acknowledge that the department has provided for a 12-month transitional period which is greatly supported and appreciated, but it is also a financial cost that is going to be borne by every council across Queensland in changing information technology systems, business processes, websites and forms—all the infrastructure that supports the development assessment system that is going to have a real and immediate financial impact on every local government.[40]

Similarly, the LGAQ sought financial and expert assistance for local governments to enable them to transition to the new framework.[41]

The department was aware of the impact of introducing new planning legislation, including the cost, on local government and advised that funding was available to facilitate the transition:

> On more operational matters, considerable funding has been committed for the transition process. In relation to timing, it is intended that the Bill will commence no less than 12 months from assent to provide time for local governments to examine and update their schemes; adapt their development assessment systems to reflect the new arrangements once the Bill is passed and the related instruments particularly the development assessment rules are settled; and enable delivery of an extensive education and training program about the planning framework.[42]

Committee comment

The committee is satisfied that the Government has considered the impact of introducing new planning legislation on local government, including cost and timing implications, and is pleased that funding will be provided and that local governments will have 12 months to implement the required changes.

2.4 Ecological sustainability

In the bill, 'ecological sustainability' is identified as a core purpose of the proposed Act.[43]

The large number of submitters who commented on the purpose of the bill, were supportive of ecological sustainable principles of the bill.[44] Some submitters sought a more expansive purpose or additional descriptive content.[45]

Many submitters preferred for the use of the term 'ecologically sustainable development' (ESD) rather than 'ecological sustainability'.[46] For example, the Queensland Environmental Law Association (QELA) supported the inclusion of a reference to ecological sustainability, but proposed that the reference should be to 'ecologically sustainable development' as proposed in the draft bill.[47]

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40 Public hearing transcript, Townsville, 28 January 2016, p 6.

41 Local Government Association of Queensland, submission 89, p 7.

42 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 51.

43 Public briefing transcript, Brisbane, 30 November 2015, pp 2, 15.

44 See for example: Sunshine Coast Council, submission 14, Appendix 1, p 1; Cassowary Coast Council, submission 15; Kurilpa Futures Campaign Group, submission 48, p 1; Seqwater, submission 55, attachment 1, p 2.

45 See for example: M Knox, submission 10, p 3; Queensland Heritage Council, submission 17, p 4; Noosa Parks Association Inc, submission 19, p 2.

46 See for example: J Clarke, submission 51, p 2; Environmental Defenders Office Qld, submission 111, p 3.

47 Queensland Environmental Law Association, submission 65, p 1.

In response, the department advised that the term 'ecological sustainability' was chosen to address the conflict between the narrow definition of 'development' in the bill, and the common broader meaning of 'ecologically sustainable development'.[48] The department also noted:

> Facilitating "ecological sustainability'' is expressed as the outcome to be achieved by the Act's land use planning and development assessment system. The more detailed description has been adopted in response to broad stakeholder input…While not calling up any of the other explanations of ESD in other Acts, the purpose as described in the Planning Bill expresses the key outcomes sought that are relevant in the context of Queensland's planning system.[49]

2.5 Aboriginal and Torres Strait Islander knowledge, culture and tradition

The committee was informed that the inclusion of section 5 'Advancing purpose of Act' and subsection 2(d) … valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition ...was 'the first time in the history of planning in Australia that Aboriginal and Torres Strait Islander people, their knowledge, culture and tradition have been explicitly acknowledged, valued and protected in any piece of planning legislation'.[50] Dr Sharon Harwood of James Cook University told the committee:

> This inclusion makes me very proud to be a planner in the state of Queensland and very proud that Queensland is the first state in Australia to do so.[51]

Similarly, Mr White, Consultant Anthropologist, Biocultural Connexions, noted:

> It is fantastic that the new Planning Bill is going to show value and promote Aboriginal tradition in advancing its goals. We think that is really great.[52]

However, concerns were raised regarding the authority of the provision to affect planning decisions more broadly.

> We do not know how things work inside government, but as a result of those consultations this new provision advancing the purpose of the act was inserted. So the difference between the previous one and this new one is that there was consultation and this one provision was stuck in. I was saying that it is like a sore thumb. It has not been integrated.[53]

Dr Harwood recommended that the provisions in clause 5 needed to be 'operationalised' within the bill for more effective Indigenous planning. The committee also heard evidence that the bill gave recognition to historical and traditional elements of Aboriginal and Torres Strait Islander culture and knowledge but there was a need to also acknowledge and accommodate contemporary Aboriginal and Torres Strait Islander planning requirements:

> …there are planning laws for people, lifestyle and sustainability, to protect Aboriginal culture and knowledge. … the intent needs to be expressed throughout the legislation and the statutory instrument. Currently the legislation does not cater for or consider Aboriginal cultural heritage. In the definition of an owner—someone who charges rent—to protect the significant cultural heritage; it is historical recognition only. This is why we need to fix the bill.[54]

The committee heard that there is a requirement to 'create a parallel process of Indigenous planning within and beside the mainstream approach to planning, use and management',[55] as Indigenous

[48] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 5-6.
[49] Public hearing transcript, Cairns, 27 January 2016, p 1.
[50] Public hearing transcript, Cairns, 27 January 2016, p 1.
[51] Public hearing transcript, Cairns, 27 January 2016, p 1.
[52] Public hearing transcript, Cairns, 27 January 2016, p 2.
[53] Mr White, Public hearing transcript, Cairns, 27 January 2016, p 6.
[54] Public hearing transcript, Cairns, 27 January 2016, p 3.
[55] Dr S Harwood, submission 78, p 2.

people 'have had their own world views driven by a different set of cultural values and norms'.[56] It was argued that Indigenous planning could be achieved by establishing processes to enable Indigenous communities to self-define goals to be included in 'a Local Area Plan which could be incorporated into the Local Government Planning Scheme where it applies to Aboriginal/Torres Strait Islander Land Trust land'.[57] Mr White said that the current planning scheme does not facilitate different forms of Indigenous land use:

> I want to get one thing clear. If you look at a planning scheme that is produced under the current Sustainable Planning Act, it is not capable of including Indigenous land use agreements or native title because the current planning system—the law, the legislation—does not recognise or allow you to have Indigenous land use agreements. When we were talking with Yarrabah shire council they could not see those ILUAs. They said that they are private contracts. They are not something that the planning system picks up. We are saying here is a chance for the new planning bill to do it.[58]

Dr Harwood informed the committee:

> My suggestion is that new provisions be inserted into the bill that would enable community based planning to occur at a land trust level. The bill needs to reflect the fact that this local-level planning needs to be driven by the relevant Aboriginal and/or Torres Strait Islander community, but would ultimately need the assistance of the local shire council to have that embodied within the local planning scheme. I am suggesting a collaborative approach be undertaken.[59]

Committee comment

The committee is concerned that the Planning Bills do not adequately address the specific issues for planning in Aboriginal and/or Torres Strait Islander communities. The committee urges the department to continue to actively engaging with Aboriginal and/or Torres Strait Islander communities and representative bodies to investigate, address or minimise community concerns.

2.6 Heritage protection

2.6.1 Amendment of the Queensland Heritage Act 1992

The Consequential Amendments Bill proposes to remove sections 68 to 70 of the *Queensland Heritage Act 1992* (QHA) due to redundancy as they relate to assessments by the chief executive administering the QHA prior to the establishment of the State Assessment and Referral Agency (SARA) in July 2013.

However, both the National Trust Queensland and the Queensland Heritage Council advocated for the retention of sections 68 to 70 on the basis that the bills in their current form will reduce protection for Queensland's significant heritage places.

The Queensland Heritage Council contended:

> Heritage protection in Queensland remains weakened with the Planning Bill and the Consequential Amendments Bill that accompanies it because they provide no statutory role for the Council to give its view about development applications that propose total or substantial destruction of a Queensland heritage place.[60]

The National Trust Queensland stated:

> The object of the Queensland Heritage Act 1992 is to provide for the conservation of Queensland's cultural heritage. However, under these proposed Acts, the decision making powers in relation to

[56] Dr S Harwood, submission 78, p 2.
[57] Dr S Harwood, submission 78, p 3.
[58] Public hearing transcript, Cairns, 27 January 2016, p 5.
[59] Public hearing transcript, Cairns, 27 January 2016, p 2.
[60] Queensland Heritage Council, submission 17, p 1.

> the conservation of Queensland's cultural heritage continue to shift away from the QHA and the Department that administers it. While the QHA will continue to facilitate the entering of significant places in the Queensland Heritage Register (QHR), decisions about the protection, conservation and management of heritage places are resting with the State Assessment and Referral Agency (SARA) under the provisions of the proposed Acts.[61]

The National Trust's concerns are that an assessment officer in SARA, 'with no particular experience in heritage conservation and adaptive reuse, can consider but then disregard the recommendations of the experienced officers of the Department of Environment and Heritage Protection (EHP), and also [act] without the advice of the Queensland Heritage Council (QHC), … [to] approve the demolition or substantial demolition of a heritage place'.[62] At a public hearing the Queensland Heritage Council argued:

> …we would like to see sections 68 and 70 not removed from the act…The one-sentence reason for that is that we think it is not appropriate that a single unelected official in the planning department can make a decision the effect of which is to extinguish a heritage listing. That is what we are worried about. We are not saying that the Heritage Council should have sovereignty; we are saying that the Heritage Council should have the ability—guaranteed ability—to give a view on a matter where a heritage place could be extinguished.[63]

The National Trust further stated that the Acts lack transparency as they do not provide for 'the preparation and publication of detailed reasons behind any decision to approve the demolition or substantial demolition of a heritage place'.[64] The Queensland Heritage Council contended that the test that should be applied when the destruction of a Queensland heritage place is proposed should be set out in the Heritage Act even though it may be applied through the SDAP. It further submitted that a decision may be made by SARA to approve the destruction of a Queensland heritage place without regard being had for the view of the Heritage Council on whether a prudent and feasible alternative exists.[65] The National Trust raised its concerns that a weakening of heritage protection could also damage Queensland's reputation in this area:

> We are quite concerned about these planning bills. The separation between the listing process and the development assessment process seems to be shifting further and further apart. This does not seem to be happening in other states, and we are concerned that that might lead to Queensland's reputation of not protecting its heritage places well enough. For quite some time we have been battling the reputation Queensland built in the 1970s and 1980s about its heritage protection, and I would hate to see that going backwards again in that way.[66]

In response to the submitters' concerns, the department advised:

> The intent of the proposed Planning Regulation is that SARA is the prescribed referral agency for all referrals relating to State interests, including State heritage places. SARA consults with the Department of Environment and Heritage Protection as the technical agency. It is proposed that non-legislative arrangements will be made to give the Queensland Heritage Council a formal role in providing advice to SARA for applications where a proposal may 'destroy or substantially reduce' the cultural heritage significance of a State heritage place. Further, to provide greater guidance and ensure adequate protection is provided for State heritage places, the SDAP *Module 9: Queensland heritage* is also being reviewed.[67]

The department further advised:

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61 National Trust Queensland, submission 21, p 1.

62 National Trust Queensland, submission 21, p 1.

63 Public hearing transcript, Brisbane, 26 February 2016, p 23.

64 National Trust Queensland, submission 21, p 2.

65 Queensland Heritage Council, submission 17, pp 3-4.

66 Public hearing transcript, Brisbane, 26 February 2016, p 2.

67 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 27, and see also, pp 57-58.

It is worth understanding that the impression that has been given by some – that the decision-making process in SARA is a planner sitting at a desk going. 'I don't care about that and I'm not going to give it effect' – is fundamentally wrong. When the State Assessment and Referral Agency was established, we created what were called state development assessment provisions. They had never hitherto existed. Those state development assessment provisions provide a comprehensive description of all the state's requirements when it comes to making an application for a development that the state has an interest in. They had not existed prior to SARA's creation. Where did those requirements come from? They came from the agencies, so everything that is in those requirements – and it is an extensive set of requirements in relation to the protection of heritage – came from the Department of Environment and Heritage Protection.

Every application that comes in that has any aspect of heritage is referred immediately to the Department of Environment and Heritage Protection. The Department of Environment and Heritage Protection is solely then responsible for determining whether that development triggers the need for the 'no prudent and feasible alternative test' and then at its discretion calls on the Heritage Council to make a judgment and to inform its advice to SARA. SARA does not ignore that advice. In fact, in the vast majority of instances SARA has given absolute effect to the advice of all agencies that come through.

However, the whole point of SARA is that there are many times in number, but proportionally small, where a range of different views from the state are irreconcilable or a state agency is not giving effect to the very code provisions that it said it wanted applied. In the exact same way that a local government gives one decision to an applicant – you do not get a decision from the traffic engineer, you do not get a decision from the heritage architect and you do not get a decision from the landscape architect or the planner; you get one decision – you do the same with the state. That is what the whole point of the State Assessment and Referral Agency was. While I appreciate the passion that the Heritage Council has for its job and the passion that the National Trust has for protecting heritage, there is absolutely nothing preventing them now from being appropriately engaged in the process.

Mindful, however, of its concerns, we have looked at ways of strengthening that. As was mentioned, there is a specific provision now inserted into advancing the purpose of the act in relation to heritage protection. If people had taken the time to look at the recently released regulation, they would have seen that the words that the chief executive 'may have regard to the state development provisions' have been changed and will be, on finalisation, a regulation changed to 'must assess against'. That requires the State Assessment and Referral Agency to give effect to those provisions.

…

In addition … the intent is for the Heritage Council to be given explicit reference in the state development assessment provisions as being the party that assists in the determination …[68]

Committee comment

The committee acknowledges submitters' concerns regarding heritage protection. We recognise that there is still uncertainty regarding the new planning system given that the planning instruments have not yet been finalised. We note, however, the department's advice that the 'no prudent and feasible alternative test' has been retained in the State Development Assessment Provisions (SDAP) which must be considered by SARA when assessing development applications relating to heritage places, and that the Queensland Heritage Council will be given a formal role in providing advice to SARA for applications where there is a significant risk that the effect of approving the development would impact on a cultural heritage place.

The committee acknowledges that the department has attempted to address submitters' concerns regarding heritage protection and that the Heritage Council is to be given explicit reference in the state development assessment provisions as being the party that assists in the determination.

[68] Public hearing transcript, Brisbane, 26 February 2016, p 38.

Nevertheless, we are of the view that the role of the Queensland Heritage Council with respect to decisions about the demolition or substantial demolition of a heritage place should be in an Act.

Recommendation 7

The committee recommends section 68 and section 70 of the *Queensland Heritage Act 1992* be retained so that the role of the Queensland Heritage Council with respect to decisions about the demolition or substantial demolition of a State heritage place be in primary legislation.

2.7 Development assessment

Chapter 3 of the bill establishes the categories of development and assessment and the committee received a significant amount of evidence in regard to these matters.[69]

2.7.1 Categories of development

The bill proposes to reduce the number of categories of development from five to three: prohibited development, assessable development and accepted development.[70]

While some submitters were in favour of the change, others expressed concern about it. The PCA, for example, was pleased that the categories of development were being simplified.[71]

Conversely, the LGAQ, for example, opposed the proposed change on the basis that the costs will outweigh the benefits:

> The LGAQ maintains that no rationale or evidence has been provided to conclusively demonstrate the benefits to the community and most importantly, that the benefits will outweigh the costs to local governments (and industry) given the necessity to amend planning schemes and change established business systems and processes. Local governments maintain that the existing levels of assessment are not fundamentally broken and that the proposed changes (including removal of compliance assessment and self-assessment without workable replacements) will not provide the perceived outcomes sought-after, but merely divert limited resources and priorities from other proactive processes and structural initiatives already underway.
>
> The LGAQ acknowledges compliance assessment is not widely used (as originally intended) and has often been limited to secondary approval processes. Notwithstanding, councils do utilise compliance assessment for a number of matters such as:
>
> - simple operational works requiring compliance with standard drawings (especially concerning streetscape treatments, landscaping, stormwater management plans, traffic access crossovers and traffic plans);
> - survey plan endorsement; and

[70] The new category of 'accepted development' 'combines the SPA categories of exempt and self-assessable development complying with any self-assessable requirements': Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 21. See also, SPA, ss 235-239. Compliance assessment is discontinued under the bill because it has not been widely used by local government: Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 21. Particular development will be accepted development 'only if it complies with any requirements prescribed in the Regulation or the local planning instrument': Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 21.

[71] Property Council of Australia, submission 85, p 9.

- planning matters where further development approvals are required but the parameters of such approvals have already been considered (i.e. through a preliminary approval).

> The removal of compliance assessment (and self-assessment) will require councils to review and redraft their planning schemes and transition existing compliance assessment (and self-assessment) to the 'higher level' of code assessment. This escalation in levels of assessment appears counter-intuitive and will merely confuse the scope and operation of the code assessment category.[72]

Toowoomba Regional Council reiterated the LGAQ's position regarding the lack of demonstrated benefit for significant time, effort and cost in changing the categories of development.[73]

Examples of other matters raised by stakeholders in relation to categories of development included:

- Toowoomba Regional Council expressed concern that the proposed default position if a categorising instrument does not categorise a particular type of development is that the development will be accepted development. The Council's position was that it would be preferable for it to be assessable development.[74]
- The PIA was concerned that members of the public may misconstrue the meaning of accepted development and the PIA therefore suggested that the original categories of development be retained apart from development requiring compliance assessment.[75]

The department advised that '[o]nly new planning schemes made under the Planning Act will be required to use the new categories of development'.[76] It further stated that '[t]he overall intent and outcomes for development are not changed by the reduction in categories under the Bill'.[77]

2.7.2 Categories of assessment

Clause 45 of the bill, which proposes to establish the two categories of assessment for assessable development (code assessment and impact assessment), 'is intended to establish a risk-based approach to categorising assessable development'.[78] The department advised:

> Due to feedback received on the draft Bill, the Bill retains the existing categories of code and impact assessment for assessable development, and requires that all applications for impact assessable development are publicly notified. This intent is the same as the SPA.
>
> Public notification is not required for code assessable development, as this category is intended for development that can be assessed wholly against pre-determined criteria. The opportunity for community input is at the plan making stage, when the codes for the development are being proposed and made available for public consultation.
>
> The delinking of public notification from some impact assessable development is not proposed in the Bill as community feedback strongly opposed this option.[79]

The EDO submitted that it was concerned that code assessable development need not be assessed against the purpose of the bill.[80] In a similar vein, Brisbane City Council (BCC) stated:

> … Advancing the purpose of the Planning Act includes matters such as supplying infrastructure in a coordinated, efficient and orderly way; this is considered a valid and necessary consideration by the assessment manager in code assessment.[81]

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72 Local Government Association of Queensland, submission 89, p 7.
73 Toowoomba Regional Council, submission 11, p 3.
74 Toowoomba Regional Council, submission 11, p 3. See clause 44(6)(a).
75 Planning Institute of Australia, submission 67, p 4.
76 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 21.
77 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 20.
78 Planning Bill 2015, explanatory notes, p 50.
79 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 21-22.
80 Environmental Defenders Office, submission 111, p 11.

In response to concerns that an assessment manager does not have to carry out code assessment in a way that advances the purpose of the proposed Act, the department advised:

> Clause 45(4) provides that an assessment manager is not required to advance the purpose of the Act when assessing code assessable development. This intent has not changed from the SPA, section 4(2) which states that advancing the Act's purpose does not apply to code assessment or compliance assessment. This is because code assessment, as a bounded assessment, must only be against prescribed assessment benchmarks, and the purpose of the Act should be reflected in the assessment benchmarks when developed by the assessment manager. These assessment benchmarks [are] also subject to State scrutiny through planning review and approval processes, where the requirements of the Planning Act (such as the purposive provisions and State policy (such as the State Planning Policy) are considered.[82]

Some submitters had concerns about code and impact assessment under the bill. Kurilpa Futures Campaign Group raised concerns that the new categories of development decreased both the level of public notification and transparency:

> In terms of transparency, it seems to me that it is not too late to change the assessment categories to improve the ability of people to be informed about development in their area and to comment on them. At the moment under the existing and proposed legislation we have the situation where for development that is code assessable, which is in line with what the plan says, neighbours do not get informed and communities do not get informed and they are not able to make objections. I think that is unwelcome to many local groups and many local individuals. That can be changed. I suggest in brief that we go back to the classic three planning categories: exempt, which is for tiny things that people do in their own houses; prohibited, which is for things such as radioactive waste in shopping centres; and the rest are development assessable, so people will know about them and can object. I submit that is not an unreasonable category. It is very simple and straightforward and allows more routine processing.[83]

The UDIA was concerned about changes the bill proposes to make to code assessment.

> … code assessment is designed to deal with development that is considered appropriate for a locality and enable quicker assessment than impact assessment. Code assessable developments are considered by the industry to involve significantly less financial and planning risk and complexity than impact assessable applications. As currently drafted, the Planning Bill places this type of assessment under threat.
>
> Currently, the term "code" is not defined and assessment benchmarks are not exclusively tied to codes. As a result, it is possible for assessment benchmarks for a code assessable development to identify an entire planning scheme or broad and contestable policy statements. This broadening of what is considered as 'bounds' or parameters for a code assessment creates significant complexity and risk for development projects and will make it difficult for developers to attract financing projects in Queensland.
>
> …
>
> The Institute is strongly opposed to changing code assessment in the way suggested in the explanatory notes whereby it can morph into a category of assessment that is the equivalent of impact assessment in everything but the requirement for public notification. Such a policy change has never been part of the consultation on the 2014 Planning and Development Bill nor was it raised during discussions about the draft 2015 Planning Bill. The current approach to code assessment must be carried forward in the Planning Bill 2015.[84]

BCC contended:

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81 Brisbane City Council, submission 117, attachment, p 2.

82 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 21-22.

83 Public hearing transcript, Brisbane, 26 February 2016, p 2.

84 Urban Development Institute of Australia, submission 81, p 7.

> Applying this bounded assessment approach, combined with the proposal that assessment is in favour of a development approval, results in a very dramatic shift in the operating assumptions of how a planning scheme is to be drafted. This is in clear conflict with community expectations and Council does not support this approach.
>
> Planning is an outcome-focussed activity and no justification has been provided as to why the focus has changed to not be in favour of the outcome.
>
> The proposed changes to allow wide ranging assessment benchmarks across the planning scheme, as part of code assessment are not supported. This is a fundamental change that has the potential to undermine the general trend towards streamlining code assessment.[85]

The EDO recommended that the bill 'provide prescriptive guidance as to circumstances when a development should be code versus impact assessable'.[86] The organisation asserted that code assessable development categorisation 'is increasingly being provided by local governments, which is leading to less public consultation on development applications'.[87]

Park It Community Group were also concerned about the increased use of code assessment development applications, as these did not allow for community notification or objection:

> If this bill goes through, over 90 per cent of development will end up being code assessable. I can tell you what you are going to end up with. People are already talking about class actions against their local councils and against developers on assessments, and that is what code assessment has brought us to.[88]

Toowoomba City Council submitted that the proposed categories of assessment 'will reduce the scope of Council's decision making discretion, given the presumption in favour of approval'.[89] The Council considered that it 'may cause concern for Council where certain development proposals are appropriate having regard to the planning controls, but the development application is poorly compiled or hasn't provided adequate information'.[90]

With respect to impact assessment being carried out against, or having regard to, any other relevant matter, the department advised:

> Impact assessment is not a bounded assessment, like code assessment, and is intended to apply when assessment against a broader range of matters is appropriate, and where public notification and public input via submissions is desired. While assessment benchmarks and other matters that the assessment manager must assess against or have regard to will be prescribed for particular development, there may be circumstances when 'other relevant matters' would be an important consideration. It is intended that such matters be limited to matters of public interest, and they must be of relevance to the development. Assessment against or having regard to 'other relevant matters' is not obligatory and may not be a consideration for many applications.[91]

BCC did not support the proposed test for assessment against or having regard to 'any other relevant matter'. The Council supported the 'sufficient grounds' test having regard to matters of public interest or planning grounds.[92]

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85 Brisbane City Council, submission 117, attachment, p 2.

86 Environmental Defenders Office, submission 111, p 11.

87 Environmental Defenders Office, submission 111, p 11.

88 Public hearing transcript, Brisbane, 26 February 2016, p 7.

89 Toowoomba Regional Council, submission 11, p 3. The presumption in favour of appeal is discussed below in 2.7.6 of this report.

90 Toowoomba Regional Council, submission 11, p 3.

91 Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 22.

92 Brisbane City Council, submission 117, attachment, p 15.

Merit v impact

A difference between the private member's bills and the bill is the terminology used for the categories of assessment. Under the private member's bill, the terms 'standard' and 'merit' are used. Under the bill, the terms 'code' and 'impact' are used.

Submitters were divided on which terms should be part of the planning legislation. The PIA, BCC, Seqwater and the EDO were among those who supported use of the terms code and impact.[93] The EDO submitted:

> The changes to the development assessment framework in the planning bill are not substantial enough to warrant changing the terms; changing the terms is unnecessarily confusing for all stakeholders and further reduces the accessibility of the planning system to lay people already familiar with the current terms.[94]

Mackay City Council stated:

> Through our various submissions we did originally have a view that that terminology should not change, but through the reform process we have changed our view on that. We believe that a change does not matter either way and if it is going to assist in the culture then there is some reason to say that those names should change.[95]

Other submitters argued for a change in terminology. QELA, for example, considered that the categories of assessable development should be called standard and merit assessment rather than code and impact assessment because an assessment benchmark 'might be a different part of a planning scheme than a code, such as a strategic outcome' and therefore the name code assessment would be an inappropriate description.[96] Townsville City Council stated:

> At the moment, impact assessment denotes it is a negative commencement or starting point, whereas merit starts to change the perception about the benefits of the development.[97]

However, the committee also heard that:

> Whether something is called 'impact assessment' or 'merit assessment' personally I think is of monumental insignificance. But there is some merit, if you will excuse the pun, in sticking with current language rather than reinventing language. I think, on balance, it does not make that much difference, but there is some argument for sticking with 'impact assessment'.[98]

Committee comment

The committee recognises that there are good arguments for each pair of terms labelling the categories of development. Nevertheless, to minimise the changes for stakeholders, we are of the view that the planning legislation should retain the terms 'code' and 'impact' rather than move to 'standard' and 'merit'.

2.7.3 Assessment benchmarks

The matters against which development must be assessed under both code and impact assessment have been consolidated into the term 'assessment benchmarks'.[99]

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93 Planning Institute of Australia, submission 67, p 4; Seqwater, submission 55, p 3; Brisbane City Council, submission 117, p 1; Environmental Defenders Office, submission 111, p 11.

94 Environmental Defenders Office, submission 111, p 11.

95 Public hearing transcript, Mackay, 29 January 2016, p 7.

96 Queensland Environmental Law Association, submission 65, p 4.

97 Public hearing transcript, Townsville, 28 January 2016, p 7. See also, for example, Large Format Retail Association, submission 9, p 5.

98 Housing Industry Association, public hearing transcript, Brisbane, 26 February 2016 p 13.

99 Planning Bill 2015, explanatory notes, p 52.

> The Bill does not seek to define or constrain what a benchmark can be. It is deliberately intended that this be left to individual planning instruments. …
>
> An assessment benchmark may take the form of a "traditional" code, with a code purpose, "performance outcomes" and "acceptable solutions". Alternatively for simple works or other development of a technical nature, an assessment benchmark may take the form of a simple list of standards to be met. There is also nothing preventing the assessment benchmarks for a particular development consisting of several codes together with overarching statements of intent for the development, or areas in which the development is to be located. It would even be possible for the relevant parts of an entire planning scheme to be identified for assessing particular development in particular contexts [100]

Some submitters were concerned about assessment benchmarks.

The Sunshine Coast Council, for example, listed the following amongst its key concerns:

> The potential ambiguity relating to both the structure of assessment benchmarks and the hierarchy of assessment benchmarks and how this ambiguity may affect the drafting of planning schemes. In relation to this, it is recommended that immediate consideration be given to a 'model' structure for a local government planning scheme under the new legislation, in order to improve the level of understanding of the new legislation more generally. Such a structure should be developed in consultation with local government stakeholders.[101]

Park It Community Group submitted that assessment benchmarks 'will end up being even more of a problem [than the current 'performance based solutions'] unless very strict guidelines and transparency is put in place to understand what the benchmarks are against the local and state instruments'.[102]

Spring Hill Community Group was of the view that the use and application of assessment benchmarks would, amongst other things, 'appear at the surface to reduce the opportunity for local input'.[103]

BCC was not supportive of the concept of assessment benchmarks. It contended that no case had been established as to how they would improve the development assessment process. It sought to reinstate section 313 of the SPA.[104]

QELA was concerned that 'the broadly defined nature of an assessment benchmark could lead to code assessment being an uncertain process, potentially involving assessment against strategic policy statements in a planning scheme'.[105]

The Large Format Retail Association was concerned that the assessment benchmarks for code assessment may lead to 'elimination of scope for performance based outcomes and emergence of additional impact based assessment (either inadvertently or deliberately)'.[106]

Committee comment

The committee acknowledges submitter concerns about assessment benchmarks. The committee therefore seeks clarification from the Minister on the rationale for the proposed changes relating to assessment benchmarks, with a view to assuaging submitter concerns.

[100] Planning Bill 2015, explanatory notes, p 52.
[101] Sunshine Coast Council, submission 14, p 3.
[102] Park It Community Group, submission 59, p 14.
[103] Spring Hill Community Group, submission 112, p 5.
[104] Brisbane City Council, submission 117, attachment, p 14.
[105] Queensland Environmental Law Association, submission 65, p 2.
[106] Large Format Retail Association, submission 9, p 6.

Point for clarification 1

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the rationale for the proposed changes relating to assessment benchmarks.

2.7.4 Exemption certificates

Exemption certificates were included in clause 41 of the private member's bill and subsequently in clause 46 of the bill at the request of the local government sector.[107]

> An exemption certificate is a new feature, intended to exempt development from the development assessment process in particular limited circumstances, where the categorisation of the development is the result of an error, or solely due to circumstances that no longer apply, or the effects of the development would be minor or inconsequential in light of the reasons why it was categorised in the first place.[108]

The bill does not make provision for a person to apply for an exemption certificate but there is nothing stopping a person asking an assessment manager for an exemption certificate. The assessment manager may give an exemption certificate without a request.[109]

The impacts of a decision to give an exemption certificate are not appealable.[110] However:

> … broad powers are available under the Bill for the Planning and Environment Court to review decisions using its declarations and orders powers. Consequently a person may bring a proceeding before the Court to test aspects of the lawfulness of a decision to give an exemption certificate, such as whether the decision was beyond power because the circumstances under which the exemption certificate was given did not conform with the limitations in the Bill.[111]

There was a diversity of views amongst submitters regarding exemption certificates. While some supported their inclusion in the legislation, others did not.

EDO told the committee:

> Another discretion we recommend should be removed is for exemption certificates. So this is exempting an applicant from needing a development approval at all. Currently the provision around exemption certificates is quite vague and uncertain for such a strong power. The decision as to whether to require public notification to be repeated where an application has changed also has a broad discretion with little guidance.[112]

Logan City Council considered exemption certificates to be a 'good initiative'.[113]

QELA also supported exemption certificates.[114]

BCC was of the view that they will be beneficial for exempting minor or inconsequential development from having to apply for a development approval. It noted in particular:

[107] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 25.
[108] Planning Bill 2015, explanatory notes, p 55.
[109] Planning Bill 2015, explanatory notes, p 55.
[110] Planning Bill 2015, explanatory notes, p 55.
[111] Planning Bill 2015, explanatory notes, p 55.
[112] Public hearing transcript, Brisbane, 26 February 2016, p 2.
[113] Public hearing transcript, Brisbane, 26 February 2016, p 30.
[114] Queensland Environmental Law Association, submission 65, appendix, p 4.

> … Council sites subject to community leases would greatly benefit from this process and would reduce their costs for a minor expansion or upgrade to a community facility, as well as removing low impact development applications from the development assessment system.[115]

BCC did, however, recommend removing the requirement to provide the owner with a copy of an exemption certificate because it is 'unnecessary and adds additional workload to local government'.[116]

Aurizon welcomed the introduction of the exemption certificate process. It regarded exemption certificates as providing 'a quick and inexpensive procedure for the assessment of minor, low-risk alternatives to the acceptable solutions defined in applicable planning instruments'.[117]

The PCA also supported the introduction of exemption certificates. It described them as 'a welcome addition to the assessment framework and as a means of fast tracking development, particularly where it has been categorised incorrectly'.[118]

Noosa Parks Association Inc was concerned that the local government or chief executive has power to give an exemption certificate to developers in instances in which the effects of the development would be minor. This, it considered may 'lead to potential for corrupt practice'.[119]

The Spring Hill Community Group submitted that proposed new section 46 provides an 'extreme level of discretion' and may lead to unacceptable outcomes. It recommended that the clause be omitted.[120] The EDO recommended that if the discretion to give an exemption certificate remains in the bill, 'there should be a requirement on the decision maker to provide and publish reasons as to why an exemption certificate was considered to be appropriate'.[121]

Mt Isa City Council was concerned about 'the pressure its Planning Officers may receive from outside forces, including Developers, to circumvent the planning process by issuing an Exemption Certificate for a particular development'.[122] In addition, the Council considered that the process may 'mask a larger issue of inconsistencies with planning instruments'.[123]

Toowoomba Regional Council submitted:

> While there are specific circumstances in which an exemption certificate may be given, there is potential for the power to be abused.
>
> The use of the terms "*minor or inconsequential"; "no longer apply"* and "error" in Subsection (3)(b)(i)-(iii) respectively, could lead to argument as to when these triggers are applicable. They should be clearly defined, or there is the potential for legal challenges (in the nature of declaratory proceedings on administrative law grounds) brought by commercial competitors against a decision of Council to grant an exemption certificate. To reduce the potential for such challenges it is desirable that the circumstances surrounding the giving of an exemption certificate be subject to the requirement that "*if the entity is reasonably satisfied that …".*
>
> There should be the ability for an exemption certificate to be given subject to conditions. This may be critical as to whether Council would agree to grant an exemption certificate.

[115] Brisbane City Council, submission 117, attachment, p 15.
[116] Brisbane City Council, submission 117, attachment, p 16.
[117] Aurizon, submission 47, p 2.
[118] Property Council of Australia, submission 85, p 9.
[119] Noosa National Parks Association Inc, submission 19, p 3. (Note that the Association was in favour of exemption certificates in some instances, see p 2).
[120] Spring Hill Community Group, submission 112, p 7. See also, for example, Public briefing transcript, Brisbane, 26 February 2016, p 2: the Environmental Defenders Office Qld similarly argued that the discretion to give exemption certificates should be removed; submission 111, p 11.
[121] Environmental Defenders Office, submission 111, p 11.
[122] Mount Isa City Council, submission 80, p 1.
[123] Mount Isa City Council, submission 80, p 1.

> While it is possible for Council to grant an exemption to state that assessable development is not assessable, it may also be useful for Council to have the power in circumstances to determine that development which may require impact notification assessment may be assessed as code. Criteria around this would also need to be included in the Act.
>
> There should also be the ability for a local government to withdraw an exemption certificate.[124]

The department advised that there is no provision for withdrawing an exemption certificate, 'given that the certificate may only be given in very limited and particular circumstances'.[125]

Seqwater was of the view that State interests, such as water quality and bulk water supply infrastructure must be protected and clause 46 of the bill does not do this.[126]

Committee comment

The committee considers that the giving of exemption certificates must be a transparent process. We note that the Consultation Draft (version 2) of the Planning Regulation requires a local government to keep each exemption certificate given by or to the local government under section 46 of the proposed Act available for inspection and purchase.[127] We are of the view that there is merit in making details about exemption certificates available to the public. We recommend that the Minister require local government and the chief executive to publishing details about exemption certificates they give.

Recommendation 8

The committee recommends the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment require local governments and the chief executive to publish details about exemption certificates they give.

2.7.5 Chosen assessment managers

The assessment manager is the person responsible for either or both of the following:

- administering a properly made development application
- assessing and deciding part or all of a properly made development application.[128]

The chosen assessment manager is the assessment manager under section 48(3).[129]

Clause 48(3) provides that if:

- a regulation prescribes a local government or the chief executive (each the entity) to be the assessment manager for a development application in relation to the development that requires code assessment, and
- the entity keeps a list of person who are appropriately qualified to be an assessment manager in relation to that development, and
- someone makes a development application in relation to only that development to a person on the entity's list, and

[124] Toowoomba Regional Council, submission 11, pp 3-4.
[125] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 26.
[126] Seqwater, submission 55, p 2.
[127] Consultation Draft of the Planning Regulation 2016 – version 2, Schedule 32, cl 1.
[128] Planning Bill 2015, cl 48.
[129] Planning Bill 2015, schedule 2.

- the person accepts the application,

the person is the assessment manager for the application.[130]

Local governments are not required to keep a list of chosen assessment managers.[131]

The opportunity for an applicant to select an assessment manager 'is a new tool for the planning framework and is intended to enable low risk applications to be assessed efficiently and effectively'.[132] It was introduced at the request of local government.[133]

Regarding the reason for the inclusion of chosen assessment managers in the bill, the department stated:

> What we have found over time is that many councils are looking at ways of dealing with the more straightforward and, one could call them, simple applications as expeditiously as possible. We have heard already in today's session talk about things like the RiskSMART processes or T5 or whatever any council chooses to call it. Those processes that are intended to deal with those applications which fit very well or very closely with what the scheme had envisaged are the sorts of things that would comply fully. Councils have headed down this path of their own volition. We see this as a way of some of those councils taking it as far as they choose but, as I said, it will be their option to do so and we have made it available at their request.[134]

Stakeholders presented a range of views about chosen assessment managers.

Logan City Council and the LGAQ, for example, had reservations about chosen assessment managers including who would be responsible if a chosen assessment manager's decision is appealed.[135] The LGAQ stated:

> The fundamental issue is who is responsible for the decision and the consequences that flow from that decision in terms of appeals and related costs. Is the council, notwithstanding the fact that is has nothing to do with that decision, going to be held responsible or will the alternative development manager be responsible? … I can assure you that local governments will not be disposed towards accepting the consequences of lost appeals against a decision made by someone else that they had no authority over in terms of making that decision.[136]

The Crime and Corruption Commission (CCC) was concerned that assessment managers have 'a large scope for unmanaged conflicts of interest' because the role has a substantial discretionary element. Further, given that a chosen assessment manager is external to local government, 'it is possible that their discretionary decision making is not subject to equivalent levels of scrutiny'.[137] However, the LGAQ strongly refuted any inference made in the CCC submission:

> It is easy to identify complaints and to infer from that that there are systemic problems. We have researched this issue and cannot find in the matters that have been referred to the CCC by way of complaint any that have actually resulted in actions being taken against individuals on planning matters.[138]

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[130] 'Appropriately qualified' is defined in schedule 1 of the *Acts Interpretation Act 1954* for a function or power as having the 'qualifications, experience or standing appropriate to perform the function or exercise the power'. The arrangements only apply to code assessment 'because the assessment benchmarks and decision rules for code assessment are clear and transparent': Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 19.

[131] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 20.

[132] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 19.

[133] Public hearing transcript, Brisbane, 26 February 2016, p 36.

[134] Public hearing transcript, Brisbane, 26 February 2016, p 36.

[135] Public hearing transcript, Brisbane, 26 February 2016, pp 33-34.

[136] Public hearing transcript, Brisbane, 26 February 2016, pp 33-34.

[137] Crime and Corruption Commission, submission 72, p 4.

[138] Public hearing transcript, Brisbane, 26 February 2016 p 34.

The EDO asserted that applicants should not be able to choose assessment managers.[139] It should be the 'luck of the draw' as to who will assess an application. This, it contended, would ensure development assessment is objective and decided only on its merits.[140]

The EDO told the committee:

> Assessment managers should not be able to be chosen by the applicant. At the moment this is possible in all frameworks. There is no provision to safeguard against conflicts of interest which is quite shocking. Even required fees to be paid are able to be negotiated with this chosen assessment manager. Further, there must be a tighter requirement as to who can be an assessment manager—specifications as to what qualifications are required for the people making the decisions around development.[141]

The PIA considered that there is insufficient information about chosen assessment managers in the bill and explanatory notes to fully explain how the initiative will work.[142]

Toowoomba Regional Council supported the inclusion of chosen assessment managers in the bill 'only on the basis that the ability to appoint such assessment managers is completely at Council's discretion (ie: the State may not enforce this upon Council).'[143] The Council is uncertain how compliance issues will be addressed given that Council would not have the opportunity to impose conditions on the approval.[144]

Unitywater supported the chosen assessment manager concept and submitted that it 'is immediately adaptable to the connections approval system and will provide benefits to developers, land development consultants, construction contractors and Unitywater'.[145] It recommended that the Consequential Amendments Bill be amended to 'include provisions to give a head of power to Distributor-Retailer Authorities to accredit appropriately qualified persons to assess and approve/refuse connections applications'.[146]

QELA supported the introduction of chosen assessment managers but had concerns about 'the lack of machinery provisions in the Planning Bill about chosen assessment managers'.[147] It submitted that there were anomalies between the explanatory notes, the bill and the Planning and Environment Court bills. For example, QELA noted that the explanatory notes at page 62 state that the bill also addresses situations when the ongoing responsibilities of a chosen assessment manager will revert back to the prescribed assessment manger, but that the provisions do not appear in the Planning Bill.[148]

The PCA was pleased with the introduction of chosen assessment managers in clause 48 but recommended that the provisions be amended to provide for:

- resolution of conflicts of interest
- the handover of all documents to the prescribed assessment manager, not just a copy of the application and decision notice

[139] Public hearing transcript, Brisbane, 26 February 2016, p 2.
[140] Environmental Defenders Office, submission 111, p 12.
[141] Public hearing transcript, Brisbane, 26 February 2016, p 2.
[142] Planning Institute Australia, submission 67, pp 4-5.
[143] Toowoomba Regional Council, submission 11, p 4.
[144] Toowoomba Regional Council, submission 11, p 4.
[145] Unitywater, submission 53, p 1.
[146] Unitywater, submission 53, p 1.
[147] Queensland Environmental Law Association, submission 65, appendix, p 4.
[148] Queensland Environmental Law Association, submission 65, appendix, pp 5-6.

- what happens in extenuating circumstances if the chosen assessment manager is no longer able to undertake the assessment.[149]

With respect to certain issues that may arise through the use of chosen assessment managers, the department advised:

> There are no provisions for dealing with a conflict of interest for a chosen assessment manager in the Bill – this would rely on service level agreements and administrative arrangements negotiated between the prescribed assessment manager and the chosen assessment manager. …
>
> The Bill deals with circumstances where a chosen assessment manager ceases to exist or is removed from the prescribed manger's list, ensuring that applicants and holders of development approvals given by chosen assessment managers are not disadvantaged by this event.
>
> Also, the Bill requires the chosen assessment manager to give the prescribed assessment manager details of the applications and decisions it makes, and the access rules under the proposed Planning Regulation will require the prescribed assessment manager to keep this information publicly available.[150]

Committee comment

The committee acknowledges that the introduction of chosen assessment managers may benefit some stakeholders but we are concerned about certain issues raised by submitters in relation to chosen assessment managers. We recommend that these issues, particularly those regarding transparency of decision making and the liability for decision-making, be addressed.

Recommendation 9

The committee recommends the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment address the issues raised by submitters regarding chosen assessment managers, particularly those regarding transparency of decision-making and the liability for decision-making, and considers any necessary amendments to the Planning Bill 2015.

2.7.6 Deciding development applications requiring code assessment

There was a diversity of views on clause 60(2)(b) of the bill which would enables an assessment manager to approve a code assessable development application even if the development does not comply with some or all of the assessment benchmarks.

The EDO recommended clause 60(2)(b) be omitted. The organisation was of the view that the 'significant discretion' provided in clause 60 is not adequately limited by the examples and 'could easily be abused to allow bad development without any safeguards'.[151]

The UDIA recommended expanding the list of examples in the subdivision.[152]

The PIA suggested including the example in the explanatory notes in the bill.[153]

Seqwater considered that matters of State interest should be given the greatest weight during the development assessment process and a development application should only be approved to the extent that the application complies with benchmarks relating to matters of State interest.[154]

[149] Property Council of Australia, submission 85, p 9.
[150] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 20.
[151] Environmental Defenders Office, submission 111, p 16.
[152] Urban Development Institute of Australia (Queensland), submission 81, p 4.
[153] Property Institute of Australia, submission 67, p 5.

Presumption in favour of approval

Clause 60(2)(a) of the bill provides that an assessment manager must approve a code assessable development 'to the extent the development complies with all the assessment benchmarks for the development' – that is, there is a 'presumption in favour of approval'.[155] Some stakeholders were in favour of the presumption while others sought to have the provision amended.

The PCA supported the presumption, submitting that it:

> …is essential for the efficient operation of the planning system, and to ensure that the new framework is able to achieve its desired outcomes.[156]

The PCA was, however, concerned that some local governments may decide to raise the level of assessment of development within their planning schemes and recommended that the State Government ensure that there is a successful transition to the new planning framework.[157]

BCC did not support the presumption on the basis that:

> …*Brisbane City Plan 2014* was prepared with a presumption in favour of the planning scheme provisions and would be unable to transition directly to operate under the new code assessment rules.[158]… This change is not in line with community feedback that all applications should be assessed with consideration of residents' issues'.[159]

The Council was of the view that 'the scope of and approach to code assessment should remain unchanged from that currently applicable via s313 and s324 of the SPA'.[160]

Central Highlands Regional Council favoured a neutral position in the legislation. It asserted:

> Legislation should not favouritise outcomes, this should be the job of Local Planning instruments.
>
> Example, if Council receive a non-compliant Code assessable application Council may only refuse the development if compliance cannot be achieved by imposing development conditions. This is all well and good but in the example whereby Council receive a non-compliant Code assessable application in an area of high flood hazard and the proposal is for densities well in excess of what is envisioned in the high flood hazard area, Council's preferred option will naturally be to not support such a proposal. (Please note that the flood hazard overlay does not necessarily change it to being Impact). However in this circumstance it is expected that refusal would be appealed in the Planning and Environment Court and due to the provision of 'may only refuse the development if compliance cannot be achieved by imposing development conditions' the court may find that you can condition the development to be at a compatible density with the zoning despite the presence of high flood hazard.[161]

Committee comment

The committee recognises that there is evidence both for and against the inclusion of the 'presumption in favour of approval' in clause 60. The committee supports the inclusion of the 'presumption in favour of approval' in clause 60.

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[154] Seqwater, submission 55, p 4.

[155] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 23.

[156] Property Council of Australia, submission 85, p 11.

[157] Property Council of Australia, submission 85, p 11. See also, for example, Queensland Environmental Law Association, submission 65, p 2: QELA supported the presumption in favour of approval for code assessable development, subject to certain reservations.

[158] Brisbane City Council, submission 117, p 2.

[159] Brisbane City Council, submission 117, attachment, p 2.

[160] Brisbane City Council, submission 117, attachment, p 2. See also, for example, Environmental Defenders Office Qld, submission 111, p 16: The EDO sought amendment to section 60 so as to not provide a presumption of approval.

[161] Central Highlands Regional Council, submission 68, p 3.

2.7.7 Referral agencies / SARA

The committee heard from the PCA who commended the development of SARA:

> The planning reform agenda has delivered some great outcomes already. One of those that I want to quickly touch on is SARA. SARA, for the first time, has enabled the government to give a holistic view of development assessment. Prior to SARA, it was up to the applicant to go to individual government departments. They then received the advice back and it was up to the applicant to figure out how to resolve the conflicts that the government provided them. Through SARA, we now have a single whole-of-government response to development assessment. It sounds like common sense, but it has not happened until recently. I want to reinforce our support for that.[162]

The bill generally continues the current arrangement for SARA and referral agencies.[163] Amongst other changes, it is proposed that concurrence agencies will become referral agencies with the power to direct assessment managers through the referral agency response. Advice agencies will be able to provide advice only.[164] Also, it is intended that the proposed Planning Regulation will require that SARA assess development against the SDAP, unlike the SPA which only requires that SARA 'may have regard to SDAP'.[165]

The Queensland Heritage Council commended the requirement that SARA must assess development applications against the SDAP as compared with the current system where SARA may have regard for the SDAP.[166]

The EDO recommended that specialist departments have a concurrence agency role. The organisation had reservations about the power of SARA. It was of the view that specialist departments should have a greater role, such as being able to seek further information for a development application.[167]

The LGAQ recommended that clause 56(2) be amended to allow referral agencies to impose conditions on variation requests.[168]

2.7.8 Relationship between a preliminary approval and a development approval

Some submitters raised concerns about clause 49(4) which proposes that a preliminary approval overrides a later approval to the extent of any inconsistency except in certain circumstances.

According to the explanatory notes:

> The reason for a preliminary approval prevailing over a later development permit is to afford applicants certainty in relation to any rights or obligations attached to the preliminary approval. These rights or obligations are intended to provide a framework within which further detailed development approvals may be sought. This certainty would not be available to a proponent if a development permit, for example, approved a lower density of development than that approved under a preliminary approval to which it relates.[169]

The QELA contended that clause 49(4) 'will be problematic and is unnecessary'.[170] QELA's submission lists a number of reasons why it does not agree with the statement in the explanatory notes that the subsection affords applicants certainty in relation to any rights or obligations attached to the

[162] Public hearing transcript, Brisbane, 26 February 2016, p 11.
[163] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 26.
[164] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 26.
[165] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 26.
[166] Queensland Heritage Council, submission 17, p 3.
[167] Environmental Defenders Office Qld, submission 111, pp 14-15.
[168] Local Government Association of Queensland, submission 89, p 7.
[169] Planning Bill 2015, explanatory notes, p 65.
[170] Queensland Environmental Law Association, submission 65, appendix p 6.

preliminary approval, including that there is currently no such provision in SPA and it is unclear what current difficulty the section is seeking to address.[171]

Rockhampton Regional Council submitted that clause 49(4) 'is likely to lead to more applications to amend where this could be avoided if the later approval overrides the preliminary approval to the extent of any inconsistencies'.[172]

The PCA supported clause 49(4) in principle but it was concerned about the practical application of the provision.

> First, the provision should only apply to preliminary approvals and later development permits that are issued as a result of an application made after the new legislation commences. To apply this provision to applications made and approvals granted under prior legislation would have serious unintended consequences.
>
> Second, there needs to be a readily accessible record of the matters identified in clauses 49(4)(a) and (b) so that third parties are able to determine whether the presumption in clause 49(4) applies or has been superseded by a written agreement. One way of doing this may be for this information to be recorded on the decision notice.[173]

2.7.9 Deemed approvals

Submitters' views were mixed on the matter of deemed approvals in clause 64 of the bill. QELA, for example, supported the retention of deemed approvals, as did the PCA.[174] The EDO, on the other hand, contended that clause 64 should be amended to provide for deemed refusals rather than deemed approvals. If not, it contended that there should be an option for the referral agency or assessment manager to require more time to consider an application without the approval of the applicant.[175] BCC asserted that the deemed approval provisions should only apply where the assessment manager is either the local government or the chief executive so that, amongst other things, 'appropriate safeguards are in place to prevent deemed approvals being issued inconsistently'.[176]

With respect to deemed approvals, the department advised:

> The deemed approval provisions under the SPA are retained in the Bill. The deemed approval provisions apply to all assessment managers, including chosen assessment managers. While not frequently used, the provisions provide a mechanism to ensure statutory timeframes for decision-making are met by assessment managers. To date stakeholder feedback has been that the deemed approval provisions have led to more timely approvals and have been effective in encouraging cultural change.
>
> As applications made to chosen assessment managers are expected to be limited to low risk (code assessment) development, it is extremely unlikely that timeframes will not be adhered to.[177]

[171] Queensland Environmental Law Association, submission 65, appendix p 6. See also, Planning Bill 2015, explanatory notes, p 65.

[172] Rockhampton Regional Council, submission 45, p 2.

[173] Property Council of Australia, submission 85, p 9.

[174] Queensland Environmental Law Association, submission 65, appendix p 9; Property Council of Australia, submission 85, p 12.

[175] Environmental Defenders Office, submission 111, pp 16-17.

[176] Brisbane City Council, submission 117, p 18.

[177] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 28.

2.8 Local planning instruments

There was general support expressed for the provisions in Chapter 2 concerning simplification of the state planning instruments and removal of the State Planning Regulatory Provisions (SPRPs) and Queensland Planning Provisions (QPP), as well as consultation arrangements in the bill.[178]

The UDIS supported the 'removal of unnecessary planning instruments including SPRPs and the QPP, reducing the complexity of the planning system'.[179]

Seqwater supported the reduction of the number of State planning instruments and the retention of the State Planning Policy (SPP) and regional plans, adding that the SPP and SPP guidelines 'have proven to be effective and should be retained'.[180]

Many submissions were received on the contents of local planning instruments and the removal of the QPP. There were mixed views; some advocated for a more flexible approach, and others for a more prescriptive model.[181]

Cairns Regional Council sought greater transparency with regards to the making or amending of local planning schemes, noting that the current provisions in the bill 'do not give local government enough certainty with regard to the cost and timing of the process'.[182]

The committee notes the department's intention to address this issue:

> The Department is committed to assisting local governments in their transition to the new Planning Act. Financial and administrative assistance will be available to support those local governments who choose to amend their planning schemes for commencement of the new Planning Act.[183]

The HIA raised its concerns over the complexity, duplication and cost of the current Queensland system as a result of complex local planning instruments:

> The highest priority for us is to provide affordable access to accurate information about all the development constraints that apply to a particular parcel of land. At the moment project proponents, even for quite simple developments, have to work through zone codes, local planning codes, overlay codes—of which there might be 20 or more on a block of land—plans of development constraint, conditions in subdivision development approvals, the Queensland Development Code and the national construction code. All up, there might be upwards of 30 places that need to be visited to get the answer. The result is contradictory conditions and ultimately mistakes. The department's response to submissions notes that the current legislation and the bills require councils to provide certificates that address these constraints, but the response does not tell you that a full certificate for all these constraints from some local authorities can cost $7,000 and take six weeks. In New South Wales councils provide the same information by regulation for $133. Our submission recommends amendments to the bill to replicate these successful schemes, not just in New South Wales but in other states as well. Making that kind of information available in a one-stop shop, as they are doing in New South Wales, will take time. In the meantime we would be anxious for the government to proceed with its mandated statewide housing code to remove the need to access that information for an awful lot of that kind of development.[184]

The bill would require a local planning instrument to identify strategic outcomes while the 'regulated requirements' of the instrument are to be established through the Planning Regulation.[185] According

[178] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 9.
[179] Urban Development Institute of Australia (Queensland), submission 81, p 3.
[180] Seqwater, submission 55, attachment 1, p 3.
[181] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 10.
[182] Cairns Regional Council, submission 88, p 12.
[183] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 21.
[184] Public hearing transcript, Brisbane, 26 February 2015 p 9.
[185] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 10.

to Ipswich City Council, the lack of detail in the legislative framework model is developing a process 'with no boundaries'. Council stated that '[t]here is the potential for this process to introduce significant uncertainty, time delay and consequential financial implications into the plan making process'.[186]

In response to comments on the lack of detail in the legislative framework, the department advised:

> The Bill requires a local planning scheme to identify strategic outcomes; and the 'regulated requirements' of a local planning scheme will be established through the Planning Regulation. Therefore, any regulatory matters in the QPP that need to be carried forward will be included in the Planning Regulation. As identified in the draft Planning Regulation currently on public consultation, the mandatory elements of the current QPP are embodied in the draft Regulation and have been identified as a result of consultation.[187]

In response to comments regarding the SPP and the impact on local governments, the department advised:

> The SPP continues to provide State-led policy direction in relation to the content of schemes. The remaining components will be available to local government as guidance material.
>
> To support the new decision rules for development assessment in the Bill, local governments will be offered assistance from the State to examine their planning schemes and to transition these prior to the commencement of the Bill with the objective of ensuring that the policy effect of existing schemes is preserved under the new system.[188]

2.9 Consultation and transparency

Community and environmental groups raised concerns regarding the current levels of community consultation and transparency in the planning and approval process. Central to their argument was that greater public consultation and involvement would lead to better planning and development outcomes for communities and individuals. Brisbane Residents United told the committee:

> We see that community consultation is critical, as our cities need to represent planning for the people who live in them and their needs. This parliamentary committee is the first opportunity that the community have had to acquaint themselves with the extensive views of other people who are planning advocates. This is why we are stressing the need for community consultation in planning matters: so that people's connections to place are identified and given the significance required in order to build the healthy, creative and inclusive societies we know to be important. People need to know what is happening to the places they live in and have meaningful input in order to get the best outcomes for our society.[189]

Similarly, the PCA highlighted increased positive outcomes with greater community consultation and certainty in the planning process:

> A couple of the earlier speakers mentioned that they are keen to see transparency, certainty and community involvement in planning. The property industry is exactly the same. They are the outcomes that we want and we believe that the bills actually help in progressing that agenda. The best place … for the majority of this consultation to happen is actually in the plan-making stage rather than in the development assessment stage. Sometimes it is too late in the development assessment stage for the community to have its say, particularly where the community has already agreed the outcomes that it would like during the plan-making stage. The current system of code and impact assessable development actually furthers that certainty that the community and the property industry are keen to see. Where the community has had the chance to provide input to the plan and an outcome has been agreed, then codes are developed and then there should be certainty

[186] Ipswich City Council, submission 102, attachment, p 1.
[187] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 10-11.
[188] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 10.
[189] Public hearing transcript, Brisbane, 26 February 2016, p 3.

> that a developer can deliver on those codes without further consultation with the community. It has already agreed that that is the outcome it is after.[190]

Park It Community Group told the committee:

> I think we should start treating our residents like they are adults. That is the start of it. When you do consult with people and you are honest with them about what can and cannot be done, often they will come up with solutions that work. I truly believe that if you said to people in a particular area, 'We have to fit this particular number of people in this area. We want you to examine the area and say where you would like what type of development,' once those development zones were set people would be quite happy with that.[191]

EDO highlighted the need for longer public notification periods:

> We would ask for longer public notification periods to be provided for in the bills, particularly for high-risk developments. Public involvement in decision-making is widely accepted as leading to better decision-making, particularly on planning matters, so sufficient time has to be provided to allow the public to provide meaningful consultation.[192]

The committee was advised by Brisbane Residents United that community consultation should entail:

> … a reasonable expectation that the community's input will be taken on board ... At the moment, we largely have the community being educated or advised what will be given to their area, rather than an opportunity to put in and give the ideas about what is best for their area. This is the shift in community consultation: there should be an expectation that the plan will actually be able to shift based on the input of the community that uses the space.[193]

Public consultation in regard to making or amending State planning instruments was also raised. The committee notes that with regards to clause 10 (Making or amending State planning instruments) to apply to making or amending guidelines or rules so that public consultation provisions will apply to Minister's rules and guidelines.[194] However, the Queensland Environmental Law Association found section 11, which allows for a minor amendment to a state planning instrument to be made by regulation, to be contrary to the bill's purpose to be transparent and accountable.[195]

Cairns Regional Council sought further clarification of the public's opportunity to make submissions concerning the making or amending of a state planning instrument, and expressed the desire that local government should also have the opportunity to make a submission.[196]

Committee comment

The committee commends the aspects of the bill which facilitate greater transparency and consultation. The committee acknowledges the importance of community engagement. The committee notes that members of the community who seek engagement in regard to local planning and development matters are not usually the administrators or the planning and development professionals and do not have the time or the resources to act as a 'watchdog' for all community interests. As a result the committee urges the department to continue to improve the access and ability for community consultation and engagement to minimise community concerns.

[190] Public hearing transcript, Brisbane, 26 February 2016, pp 11-12.
[191] Public hearing transcript, Brisbane, 26 February 2016, p 5.
[192] Public hearing transcript, Brisbane, 26 February 2016, p 2
[193] Public hearing transcript, Brisbane, 26 February 2016, p 5.
[194] Department of Infrastructure, Local Government and Planning, Draft Planning Bills 2015: Consultation Report, November 2015, p 7.
[195] Queensland Environmental Law Association, submission 65, p 5.
[196] Cairns Regional Council, submission 88, p 12.

2.9.1 Public access to documents

Some submitters, including several local governments, expressed concern relating to Part 3 of Chapter 7 that outlines the bill's requirements regarding public access to documents. The concerns presented were two-fold: a) that the bill would increase the administrative burden and cost for local governments and lack the clarity about the specific requirements; b) that the bill should be amended to prescribe which documents are to be made publicly available, rather than the Planning Regulation.[197]

Townsville City Council was concerned that the wording 'whenever the place is open for business' under subsection 4 (a) (i) of section 263 would not take into consideration a notification period or the timeframes required to retrieve documents from storage facilities:

> This use of terms implies that at all times without giving notification and taking consideration to the timeframes that retrieval of documentation from respective storage facilities there is an expectation that all material for inspection or purchase will always be immediately on hand. The sheer volume of material required to be kept by local government does not allow for this to be the case.[198]

Townsville City Council also expressed concern regarding the related costs of providing this level of public access to documents:

> It is suggested that in order for this section to operate in line with current systems, there needs to be inclusion of retrieval and requirement to give notification of requesting to view. Storage and retrieval of material is a considerable cost to councils. Consideration should be made to allow council the ability to charge for the retrieval costs of stored material to allow for inspection or to make copies of.[199]

The EDO and the Cassowary Coast Regional Council submitted that the matters specified in this section of the bill but prescribed in a regulation should be included in the Act. The EDO stated that provisions relating to public access to documents under Chapter 7, Part 3 should be strengthened to ensure 'open access to planning and development information'.[200] The EDO summarised its position as follows:

> Easy and certain access to information by the community is the foundation of transparent, accountable and open governance. Development affects everyone in the community. Therefore there should be a presumption of making all documentation relevant to a development application, or new or amended instruments, easily available to the community on principle.
>
> Changes to regulations happen frequently – the purpose of regulations is that they contain technical detail that can be easily changed. Important rules around the public's ability to access all relevant, specified documents must be provided in the Act for certainty – as they are in SPA.[201]

BCC sought assurances that any amendments to local government' obligations as proposed in clause 263 'should occur in consultation with local governments and allow for sufficient time for necessary business systems to be amended'.[202]

The department advised that it believes the approach taken by the bill and other instruments such as the Planning Regulation will make it easier for stakeholders to 'navigate, find and understand rights and responsibilities under the legislation':

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[197] Townsville City Council, submission 79; Cassowary Regional Coast, submission 15; Environmental Defenders Office, submission 111; Brisbane City Council, submission 117;

[198] Townsville City Council, submission 79, p 15.

[199] Townsville City Council, submission 79, p 15.

[200] Department of Infrastructure, Local Government and Planning, Better Planning for Queensland: next steps in planning reform directions paper (May 2015), p 8.

[201] Environmental Defenders Office, submission 111, p 20.

[202] Brisbane City Council, submission 117.

> The bill carries forward matters rightly embodied in legislation - rights, roles and responsibilities under the framework. The bill now has a succinct and practical structure through the removal of descriptive detail and process details to other instruments such as the Planning Regulation or other statutory instruments…
>
> Consistent with this approach, clause 263 of the bill provides for the Planning Regulation to establish the information that is required to be made publicly available by entities with statutory responsibilities for planning and development under the bill. Given modern technology and widespread public access to the internet, much of the material will be required to be published on websites.[203]

Committee comment

The committee supports the government's approach to specifying the requirements for public access to documents in the Act but moving the descriptive detail and process to other instruments such as the Planning Regulation.

2.9.2 Publishing reasons for decisions

The bill proposes new requirements in clause 63(4) and (7) obliging local governments and the chief executive to publish a notice about the decision for particular applications on its website. The rationale for the amendments is to 'address transparency and accountability in decision-making'.[204]

Some stakeholders, such as community groups, the EDO, and the PCA, commented favourably on the proposed new requirements.[205] Local governments, however, expressed some concerns about the provisions.

Toowoomba Regional Council, for example, contended that the notification requirements are 'unduly onerous on the local government' and 'create unnecessary duplication of effort between the officer's assessment report and the notice of decision and are unreasonable in their current form'. It suggested that the requirements could be addressed by requiring council with PDOnline or a similar system publishing the notices of decision and assessment reports on their website.[206]

The LGAQ recommended that the new requirement be removed because of its likely impact on local governments.

> The new requirements are purportedly being introduced to ensure greater transparency in decision making. However, in an applicant-based planning system built on a presumption of approval, to now require complying applications (particularly code assessable) that comply with the codes to be published through an additional notice on council's website is both perverse and excessive. Based on published State Government reporting for the State's 19 high growth council, where 90 per cent of the development applications occur, this will equate to at least 17,000 development applications per year that are either approved or refused requiring additional notices.
>
> It must be noted that many local governments in Queensland do not have the information technology resources and capacity to publish such notices in any meaningful way on their websites. In addition, a broader lack of planning expertise in many councils will divert already limited resources into preparing and checking administrative tasks that add limited or no value to the planning system.
>
> It must also be noted that no detailed consultation or investigation was undertaken in drafting these additional requirements in the Bill 2015. There were not included in previous consultation drafts and appear to have lacked due consideration.

[203] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 48.

[204] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 32.

[205] Public hearing transcript, Brisbane, 26 February 2016, p 13; Environmental Defenders Office Qld, submission 111, p 14; Property Council of Australia, submission 85, p 11.

[206] Toowoomba Regional Council, submission 11, p 5.

> A similar obligation has been imposed on referral agencies in specified circumstances under Sections 56(6) and (7).[207]

BCC supported the requirement to include reasons for the decision in the decision notice and publish a decision notice on the council's website, in particular because it will promote transparency. The Council noted, however, that it 'is a significant process change that may pose a challenge for Council to implement' and thus it recommended that the timeframe be extended and further consultation be undertaken with the council.[208]

The department is of the view that:

> While the provisions impose additional requirements on the entities, they are not considered unreasonable given the community expectations that relevant assessment matters will be appropriately considered in decision making.[209]

Committee comment

The committee supports 'transparency and accountability in decision-making'. Nevertheless, we recognise that some local governments may not currently have the resources to meet the new publication requirements relating to notices about development application decisions. We recommend that the department continue to consult with local governments regarding the commencement and content of these provisions, with the objective of providing transparent and accountable decision-making.

Recommendation 10

The committee recommends the Department of Infrastructure, Local Government and Planning continue to consult with local governments regarding the commencement and content of the notification requirements in clause 63, with the objective of providing transparent and accountable decision-making.

2.10 Compensation

2.10.1 Taking or purchasing land for planning purposes

Clause 262 of the bill would enable a local government to take or purchase land for two purposes: to achieve the outcomes of the planning scheme; or to allow development the subject of a development approval to proceed.[210]

In regards to clause 262, there was strong opposition from one submitter concerning the option by a local government to be able to 'take' or purchase land under the proposed Act:

> it is unacceptable to allow the local government to take someone's land when the owner has paid for it and is given no compensation.[211]

The committee sought clarification and was informed by the department that:

> It links directly back to the Acquisition of Land Act. It is compulsory acquisition. All of the acquisition of essentially public bodies throughout the state is effected through the Acquisition of Land Act. When you see the word 'take' in SPA or in the bill, it is an authority…

[207] Local Government Association of Queensland, submission 89, p 8.
[208] Brisbane City Council, submission 117, attachment, p 1.
[209] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 32.
[210] Planning Bill 2015, explanatory notes, p 169.
[211] L Prince-Large, submission 26, p 1.

> I am speculating here … I think it uses the two words 'take' or 'purchase'. I think she assumed that 'take' meant, 'I will just take it off you,' and 'purchase' meant, 'I will buy it off you.' It is really saying that when you take it, it is a compulsory acquisition, but you can enter into a straight-out 'I will agree to buy your land and you will sell it to me'. So that 'purchase' is intended to say that there is another process that does not require compulsory acquisition; you just simply agree on terms.[212]

BCC supported the wording of the provision, as it broadened the 'scope' of the provision with regards to taking or purchasing land by the replacement of the need to satisfy the 'strategic outcomes' in a planning scheme, as it currently stands in the SPA, with the term 'outcomes'.[213]

The department noted that there is a similar 'take or purchase' provision in the current SPA (s714).[214] The provision is also similar to that proposed in the private member's bill. The department also advised that Governor-in-Council approval was necessary:

> As the clause has the potential to impact on land owners, Governor-in-Council approval is necessary for a local government to take or purchase land under this clause. If this approval is obtained, the local government is taken to be a constructing authority under the Acquisition of Land Act 1967 and may take or purchase the land under that Act.[215]

The compensation arrangements of the bill are designed to offer some protection to local government from claims where a planning change is made to reduce a material risk of serious harm to persons or property on the premises from natural events or processes, and is made as required under Minister's rules prescribed by regulation.[216]

The Minister's rules are expected to be directed at establishing the requirements of good faith, with the employment of appropriately qualified persons and the best available information for assessment, as well as a requirement that the local government assess feasible alternatives for reducing the risk, including imposing conditions on development approvals.[217]

In regards to clause 40 on compensation, which would enable the designator to repeal a designation and would establish the process for repealing a designation,[218] submissions received from local governments largely supported the natural hazard compensation exemptions for local governments in relation to adverse planning changes.[219] However, there were concerns raised that the scope given to local government to make changes to a planning scheme in response to natural hazard risks without triggering compensation to the landowner could be a significant problem. For example, the UDIA did 'not support the policy intent of the section', and called for the restoration of the compensation provisions in the SPA which:

> preclude compensation for planning scheme changes related to natural hazard risk only if the risk 'could not have been significantly reduced by conditions attached to a development approval'.[220]

The UDIA stated:

> While it is accepted that planning schemes play a role in regulating development to prevent development being undertaken on sites that are physically unsuitable, the Institute strongly believes that the current arrangements offer protection for both the community and the industry and have been the basis on which investment decisions have been made.

[212] Hansard, 26 Feb 2016 p 39.
[213] Brisbane City Council, submission 117, p 38.
[214] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 50.
[215] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 50.
[216] Department of Infrastructure, Local Government and Planning, correspondence 23 November 2015, p 2.
[217] Department of Infrastructure, Local Government and Planning, correspondence 23 November 2015, p 3.
[218] Planning Bill 2015, explanatory notes, p 45.
[219] Department of Infrastructure, Local Government and Planning, correspondence 23 November 2015, p 15.
[220] Urban Development Institute of Australia, submission 81, p 4.

> The Institute believes that the approach adopted in the Planning Bill provides increased scope for a local government to down-zone land in response a perceived hazard without triggering compensation.[221]

The UDIA expressed the difficulties in prescribing for natural hazards in legislation:

> There are some natural hazards where clearly there should be provisions in planning schemes which preclude development. There are other kinds of natural hazards where the risks are different. They are risks that can emerge over a very long period of time, and they may be low or may be high. It just depends. All of these things should be assessed on a solutions basis before you make provisions which broadly down-zone areas of land such that they cannot be developed.[222]

The Cairns branch of the UDIA further stated that the proposed compensation provisions will:

> …remove the ability for landowners to seek compensation and removing certainty and creating an environment where some lending institutions may be less supportive of investing in Queensland, which is a risk for Queensland.[223]

The PCA did not support clause 30, and in particular 30(5) because:

> …there is not enough detail regarding what is required in the Minister's rules to ensure a consistent and objective determination of the materiality of the risk and severity of the harm.[224]

While the LGAQ was supportive of the new compensation provisions in the bill, it expressed concern about the perceived lack of information on the Minister's rules:

> The LGAQ broadly supports the intent of the new provisions but reserves its position on the proposed amendment until the Minister's rules, which will be fundamentally important to the process, are drafted and released.[225]

Moreton Bay Regional Council stated the following regarding the proposed Minister's rules:

> Any requirement under those 'rules' to exhaust options for attaching conditions to a developmental approval before being exempted from the compensation provisions need to be formulated with caution. The 'rules' would have to set some practical limit on the number and type of conditions that would need to be imposed to mitigate the risk of the natural hazard to an acceptable level.[226]

BCC supported the intent of the compensation provisions, but sought the removal of reference to 'natural' events, in favour of an acknowledgement that risks can also be from sources such as contamination.[227]

The department responded to recommendations that compensation should be removed from the bill as follows:

> Queensland is the only State that includes compensation arrangements of this nature in its planning framework, carrying forward a fundamental principle that the cost of decisions for the broader public good should not be borne by the individual. Removing all compensation arrangements would be a considerable shift from longstanding arrangements and has not had broader support to date.[228]

[221] Urban Development Institute of Australia, submission 81, p 8.
[222] Public hearing transcript, Brisbane, 26 February 2016, p 10.
[223] Public hearing transcript, Cairns, 27 January 2016, p 7.
[224] Property Council of Australia, submission 85, p 7.
[225] Local Government Association of Queensland, submission 89, attachment, p 5.
[226] Moreton Bay Regional Council, submission 106, pp 3-4.
[227] Brisbane City Council, submission 117, p 2.
[228] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 15.

The department advised further that amendments were made to the current compensation arrangements after local government feedback suggested the 'SPA's compensation arrangements were hindering plan making to address natural hazards'.[229]

In response to comments regarding the Minister's rules, the department advised:

> The Minister's rules at clauses 30(4)(ii) and (4)(f) will be activated as part of clause 18 and clause 20 for making and amending planning schemes under Minister's rules.
>
> Timeframes for decisions under this part are intended to find a reasonable balance between the needs of councils and land owners within an efficient system.[230]

2.10.2 Land Surrender under the Coastal Protection and Management Act 1995

Submitters were divided over clause 145 of the *Coastal Protection and Management Act 1995* (Coastal Act). The EDO, for example, expressed support for the provision on the basis that it is 'a beneficial power to ensure that development and infrastructure is not put at risk by rising sea levels'.[231] The UDIA and the PCA, on the other hand, had concerns about the provision.

The UDIA submitted that the current arrangement in relation to land surrender should be maintained. It opposed the inclusion of clause 145 because it will enable the Minister of Environment and Heritage Protection to force the surrender of land with no right to compensation.[232]

The PCA submitted:

> Of significant concern to the property industry is the consequential amendments proposed to the *Coastal Protection and Management Act 1995* (CPMA), which would see the Department of Environment and Heritage Protection (DEHP) take responsibility for issuing land surrender conditions for coastal management purposes.
>
> …
>
> Allowing other departments to take responsibility for individual elements of the assessment process erodes SARA's primacy and leads to a duplication in Government resources.
>
> Land surrender for coastal management purposes is a consideration that necessarily must take place through the integrated development assessment process, rather than as a standalone assessment.
>
> SARA is currently delegated responsibility for administering the land surrender powers of other agencies, such as Transport and Main Roads; a power it administers through the development assessment process. Logically SARA should also retain responsibility for administering DEHP's land surrender powers.
>
> Importantly, the land surrender provisions within the CPMA breach fundamental legislative principles, as they do not provide for the right of appeal or compensation for affected landowners.
>
> …
>
> Alternatives to land surrender, such as covenants and development conditions, may provide opportunities to deliver better environmental and community outcomes on affected lands, while limiting the Government's own exposure to ownership of highly constrained land.[233]

The department advised:

> The land surrender requirement is proposed to operate solely under the Coastal Act and would be separate from, but run in parallel with, the development assessment process under the Planning Bill.

[229] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 15.
[230] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 15.
[231] Environmental Defenders Office Qld, submission 111, p 26.
[232] Urban Development Institute of Australia, submission 81, p 10.
[233] Property Council of Australia, submission 85, p 17.

This reflects the fact that land surrender is an acquisition power imposed for coastal management purposes under the Coastal Act.

Although compensation and appeal rights have never been available for land surrender, arrangements have been adjusted to include a new opportunity for the owner to make a submission about a proposed land surrender requirement.

Land surrender requirements are likely to be used in very limited circumstances where the public benefit to avoid or minimise detrimental impacts on coastal management outweighs the impact to the individual owner.

2.11 Infrastructure

The department undertook a review of the infrastructure planning and charging framework in 2013 and 2014 and introduced reforms to improve 'the clarity, equity and consistency of the system'.[234]

The committee heard from the PCA who noted:

> Lots of independent research was commissioned to inform the outcomes of that and facilitated negotiations took place. Chapter 4 of the legislation largely reflects the outcomes of that conversation and the agreed outcomes. It has delivered a more balanced approach to infrastructure charges through the requirement for local governments to offset or refund works that have been undertaken by the industry for trunk infrastructure delivered on behalf of local governments. That is infrastructure servicing the broader community, not one specific development.[235]

The infrastructure arrangements proposed in Chapter 4 of the Bill are the generally the same as the current arrangements in the SPA.[236] The department advised that the differences include:

- introducing an automatic indexing arrangement for charges
- limiting the timeframe for making a conversion application to within one year after the development approval starts to have effect.[237]

The committee heard that there are tensions between local governments and developers in regards to infrastructure charges:

> The point I would make is that the developer has paid an infrastructure charge to the local government. The conversation we had earlier about councils developing their plans for infrastructure is a really important one to note. When councils are developing their planning schemes, sitting alongside that should be a plan for the infrastructure that is required because of the development that will proceed in an area. The way the system should be working is that we do the land use planning in conjunction with the infrastructure planning, and the development industry makes a contribution towards the delivery of that infrastructure against the plan. That part of the system is not working but the development industry is still paying their share of the infrastructure cost to the local government, and in other cases where it might be Main Roads there is a condition in place to build infrastructure. I think the disconnect there is in that structural element and the delivery of the infrastructure plan, which is why that is so critical.[238]

Townsville Regional Council said that funding to provide infrastructure is 'harder and harder to come by'. They further commented that they felt that 'some of the current mechanisms within the

[234] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 34-35. Note: Information on the infrastructure review consultation and outcomes leading to the establishment of the current framework is available at: http://www.dilgp.qld.gov.au/infrastructure/local-government-infrastructure-planning-and-charging-framework-review.html

[235] Public briefing transcript, Brisbane, 26 February 2016, p 12.

[236] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 34.

[237] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 34.

[238] Property Council of Australia, Public hearing transcript, Brisbane, 26 February 2016, pp 15-16.

infrastructure-charging provisions are limiting council's ability to be financially sustainable into the future'.[239]

The submissions raised numerous technical and operational issues across a range of topics, some of which are outlined below.

2.11.1 Maximum adopted charges and automatic indexation

The LGAQ praised the introduction of automatic indexation of maximum adopted charges as the values had not risen since their introduction in 2011.[240]

With respect to the level of the cap, Townsville City Council advised:

> Our current estimate that is a dwelling house in Townsville costs around about $32,000 for infrastructure, whereas the cap is about $28,000.
>
> …
>
> That is not counting the fact that we are actually having to borrow on top of that again. We have to finance infrastructure upfront and there are all sorts of challenges with that.
>
> …If we are going to stick with the cap, it would be nice to at least keep the original value at a very minimum to the councils. There are a range of issues, plus the fact that we do not get a subsidy on some of those water and sewerage works any more. We are still accounting for that in our cost. That is okay for now but when we have to start building new plants that is going to further raise our cost base, so that is going to be more of an impact again. At the moment we recognise the fact that we got subsidies on those treatment plants and the like, but when we go to build the next one we are not going to get a subsidy so the cost per lot is actually more again. So those impacts will get worse over time for us.[241]

In response to a question about whether Council currently charges the maximum amount, Townsville City Council responded:

> For some developments, mainly non-residential. In our fully serviced urban areas they tend to be at the cap already. Our residential areas in the city will be reaching the cap in two or three years' time. Places like Magnetic Island or remote areas tend to be at the cap because of the cost of infrastructure in those areas.[242]

Cassowary Coast Regional Council told the committee that it currently charges beneath the cap.[243]

The department advised:

> … not many councils choose to currently charge the maximum and very few of them charge across-the-board at that maximum. Some might be at the maximum; for the non-residential uses it might be lower. Of course we have the experience—if you followed this at all—in recent years with business conditions being quite difficult of councils choosing to offer periodic reductions, or holidays as they call it, from the payment of charges. The theoretical maximum cap is not widely used, but we would acknowledge that in some instances it does not really offer councils the capacity to fully recoup the cost—not even fully. The estimate at the moment is that, even if all councils were charging all of their charges at the maximum caps, in many parts of the state they would be recovering about only 65 to 70 per cent of the cost of the infrastructure being delivered.[244]

[239] Public hearing transcript, Townsville, 28 January 2016, p 6.

[240] Local Government Association of Queensland, submission 89, p 3. See also, Public hearing transcript, Townsville, 28 January 2016, p 16: indexation is a 'good thing'

[241] Public hearing transcript, Townsville, 28 January 2016, p 16.

[242] Public hearing transcript, Townsville, 28 January 2016, p 17.

[243] Public hearing transcript, Cairns, 29 January 2016, p 18.

[244] Public briefing transcript, Brisbane, 30 November 2016, p 4.

Councils are not able to charge more than the cap but they can enter into an infrastructure agreement with the developer.[245]

> Under those agreements it is quite common for the actual value of that infrastructure being paid to be substantially more. But, as I said, that is usually only for quite large developments. Master planned estates would typically have an infrastructure agreement, and the state planning regulatory provision charges usually do not feature in that other than setting some sort of benchmark that they are aware of. They will be targeting their charge at the appropriate level of recoupment. Usually with a master planned estate that is much more possible because it is a long-term development proposal where the cost of large infrastructure is able to be tracked and properly recouped through sales.[246]

Committee comment

The committee supports the introduction of automatic indexation as this will go some way towards addressing some councils' concerns regarding the cap on infrastructure charges.

2.11.2 Offsets and refunds

Some local government stakeholder groups are concerned that offset and refund arrangements are causing uncertainty. Cairns Regional Council, for example, told the committee:

> The full cost may not be known and that does create an uncertainty. The full cost of the infrastructure may not be known at the time it is required to give offsets or refunds.[247]

The LGAQ told the committee:

> The cost of the refunds and offsets that I mentioned is estimated, as best we can, in the order of $90 million. So you see the shortfall we have with the system as it is, the revenue that is being forgone and that cost which is increasing with the offsets and refunds. There is a significant cost increase finding its way onto the community. We do note and appreciate the proposed indexation of the charges in the bills. That will in fact generate an estimated additional $26 million. So having regard to the $309 million that it does cost, as best we can assess, the $122 million forgone, this new cost that is now in the order of $90 million, there is a very demonstrable cost shift to local governments and more particularly that means the community out of the development process. That is the concern that we have.[248]

BCC wanted more protection for local governments from unreasonable claims in relation to infrastructure offsets and refunds.[249]

The LGAQ suggested the state government should undertake a comprehensive review of the 2014 infrastructure charging reforms, with a particular focus on the offset and refunds requirements, including a cost-impact analysis and establishment of an ongoing monitoring and reporting framework.[250]

Committee comment

The committee notes that the bill does not amend the current arrangements regarding offsets and refunds.

[245] Public briefing transcript, Brisbane, 30 November 2016, pp 4-5.
[246] Public briefing transcript, Brisbane, 30 November 2016, p 5.
[247] Public hearing transcript, Cairns, 27 January 2016, p 23.
[248] Public hearing transcript, Brisbane, 26 February 2016, p 30.
[249] Brisbane City Council, submission 117, attachment 1, p 3.
[250] LGAQ submission, 89, p 10; Public hearing transcript, Brisbane, 27 February 2016, p 30.

2.11.3 Conversion of particular non-trunk infrastructure

Local government submissions generally did not support the conversion process and some advocated for its removal. For example, Toowoomba Regional Council submitted:

> The conversion process is unnecessary. All development applications should follow the standard development assessment process by representations made through changes during the appeal period following the issue of a decision notice.[251]

Toowoomba Regional Council suggested that, if maintained, the proposed 'excessive' timeframe of one year to make a conversion application be reduced to 20 business days.[252]

Mackay Regional Council also expressed concern about the potential financial impact of non-trunk infrastructure to trunk infrastructure:

> Trunk conversion has the potential to impact council's trunk infrastructure planning, long-term financial forecast and financial sustainability by introducing potential offset/refund requirements for development that was not anticipated. The offset and refunds framework poses a genuine risk to financial sustainability and additional liability to council. That in itself, there is a framework, there is an offsets and refunds framework, but this is further exacerbated by the potential trunk conversions with additional risk for potential development outside the PIA. And that is not clear that that provision should not apply to development outside of the PIA area. If the trunk conversion provisions are to remain, several issues should be addressed, including the time at which an application can be made and the power for council to then amend the development approval for a conversion of non-trunk infrastructure to trunk.
>
> The bill retains the trunk conversion provisions with the addition to limiting the time frame for an application to be lodged within one year of the development approval having effect. That is clause 138(2). The conversion process is unnecessary and adds an additional process. There is a process that can be followed. It is a tried and tested process for any development applications. Why have a separate process for conversion applications? The applicant has the opportunity to pursue a negotiated decision notice and if still not satisfied appeal the council's decision.
>
> What is the rationale for providing 12 months for this element of development where appeal provisions on other elements are 20 business days? Where change is required outside the normal appeal time frames, a change application can be made rather than following a separate process.
>
> In relation to council's ability to amend a development approval, the existing provisions of SPA and the bill only allow for council to impose necessary infrastructure conditions, which is clause 141(3). This does not address the additional trunk infrastructure costs, as there is no provision to include extra payment conditions. This has the potential for additional trunk requirements to be either considered as necessary trunk then eligible for offsets and refunds, or not implemented as part of the development and becoming an additional cost to the council and the ratepayers. That was not considered. If trunk conversion provisions are to remain, council should as a minimum be able to condition for trunk infrastructure in the same way as if it were a development application.
>
> The recommendation is to remove the trunk conversion provisions altogether. If this does not occur, then it is recommended that their application is limited to development within the PIA to provide some certainty and should state that conversions must be lodged in the accepted appeal time frame of 20 business days. There is a recommendation of how it could be amended, which could be in clause 3 and could state—
>
> > Within 20 business days after making the decision, the local government may amend the development approval by imposing a necessary infrastructure condition for the trunk infrastructure and/or a condition for extra trunk infrastructure costs.[253]

[251] Toowoomba Regional Council, submission 11, p 8.
[252] Toowoomba Regional Council, submission 11, p 8.
[253] Public hearing transcript, Mackay, 29 January 2016, pp 3-4.

Mackay Regional Council provided the following example:

> If a development comes along—let's say it is outside of the priority infrastructure area—and they need an intersection to get to their development which is made necessary by the development and they build the intersection but once it is built it will also service the development next door to it, they can apply for that to become trunk infrastructure.
>
> In a situation where council was likely to approve that because the infrastructure cost would be linked to just the development if it is outside of the PIA, there now is a process where, as a result of that, cost could be applied and they can get some of that funding back through the offsets or that conversion process. If it is outside of that PIA process, that process should not exist. It should be the cost for that development. It would be an additional cost that would not be in council's long-term financial forecast. Although there might be some merit to the development, the cost then prohibits that development to continue. What is likely to happen is that council would rather refuse that application because it knows it has the risk to now account for that additional cost it did not have in its long-term financial forecast, rather than approve it on the merits and cost to the development.
>
> …
>
> Prior to the latest planning reform that conversion process was a bit more clear. First of all, the conversion process probably was not as clear inside the PIA, but at least outside of the PIA it made it clear that it is a full cost to the developer where that is just not clear now.[254]

The department advised:

> The conversion application process was introduced following review and extensive consultation with stakeholders in 2013 and 2014. While there is merit in the suggestion that all infrastructure matters should be dealt with during the application approval process (including the negotiated decision stage and appeal processes), a change to abandon the conversion application process will go against the outcome of the 2013 and 2014 review.[255]

Committee comment

The committee notes that the bill does not amend the current arrangements regarding the conversion of particular non-trunk infrastructure.

2.11.4 Infrastructure charges exception for non-state schools

The committee heard evidence from the Queensland Catholic Education Commission (QCEC) and Independent Schools Queensland (ISQ) regarding the inconsistent treatment of infrastructure charging for non-state sectors, between the provisions of the private member's bill, the bill, and the Statutory Guideline for Ministerial Designations 2015:

> It was our clear understanding from consultations and discussions to date that the Bills would address this inconsistency. The Private Members' Bill Planning and Development (Planning for Prosperity) Bill 2015, Section 108, 2 c iii does address this inconsistency and is strongly supported by our sectors.
>
> From discussions with departmental policy makers, we understand the failure to address this inconsistency in the Planning Bill 2015 may be an administrative oversight as the policy position was intended to reflect the reform agenda in the drafting of the new legislative regime. It was a Government election commitment that the treatment of infrastructure charging for both state and non-state schools would be consistent and equitable. We are disappointed that the current wording in the draft Bill does not reflect this commitment.
>
> We strongly urge that the provisions of the draft Bill be amended to reflect what we understood to be the intended position, that is, that the infrastructure charging exempts all essential infrastructure

[254] Public hearing transcript, Mackay, 29 January 2016, p 7.

[255] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, pp 41.

including non-state school providers, where the development is undertaken through Ministerial designation.[256]

Committee comment

The committee supports QCEC and ISQ's proposal and recommends that infrastructure charging for both state and non-state schools should be consistent and equitable.

Recommendation 11

The committee recommends that infrastructure charging for both state and non-state schools should be consistent and equitable and therefore both state and non-state school providers be exempt from paying infrastructure charges where the development is undertaken through Ministerial designation.

2.11.5 Local Government Infrastructure Plans

The bill carries forward the ability in the SPA for local governments to have the minister approve an implementation program and a cut-off date (no later than mid-2018) for preparation of their local government infrastructure plan (LGIP).[257] The department advised that many councils are well progressed with their LGIPs but that even the larger councils may not have been able to complete their LGIPs prior to the original 2016 cut-off date.[258]

Cassowary Coast Regional Council told the committee that it was having 'resourcing issues' with preparation of its infrastructure plan.[259]

> It is quite a resource intensive exercise. Council at the moment is doing a lot of the preliminary work to be able to then put the local government infrastructure plan together and has some consultants working on some of the underlying assumptions that will inform it.[260]

Committee comment

The committee notes that the bill does not amend the current arrangements regarding the cut-off date for preparation of an LGIP.

2.12 The Planning and Environment Court

The purpose of the Planning and Environment Court Bill 2015 (P&E Court Bill) is to provide a separate piece of legislation 'to govern the constitution, composition, jurisdiction and powers of the Planning and Environment Court (P&E Court).'[261] The bill provides for the 'legislative foundation for new Court Rules and procedures to ensure the Court's efficient operation.'[262]

The explanatory notes provide the following reasons for establishing a separate piece of legislation for the P&E Court Bill:

> The Planning and Environment Court is presently established under provisions of the SPA (Chapter 7, part 1, division 1). These provisions are located in SPA primarily due to the historical establishment of the court in local government and planning legislation over time.

[256] Queensland Catholic Education Commission and Independent Schools Queensland, submission75, p.3.
[257] Public briefing transcript, Brisbane, 30 November 2016, p 3.
[258] Public briefing transcript, Brisbane, 30 November 2016, p 4.
[259] Public hearing transcript, Cairns, 27 January 2016, p 17.
[260] Public hearing transcript, Cairns, 27 January 2016, p 17.
[261] Explanatory notes, Planning and Environment Court Bill 2015, p 2.
[262] Explanatory notes, Planning and Environment Court Bill 2015, p 2.

> In more recent years, the Court's jurisdiction has expanded significantly, with it now having jurisdiction conferred on it by approximately 28 different acts in addition to SPA. They cover topics such as planning and development, environmental protection, coastal protection and management, heritage, fisheries, marine parks, transport infrastructure and vegetation management.
>
> Given the wide jurisdiction of the Planning and Environment Court, it is considered appropriate for the provisions establishing the jurisdiction and powers of the court to be transferred out of the State's planning legislation, and into its own specialised, stand-alone Bill. Having a separate Bill for the Planning and Environment Court will enhance the role and visibility of the Court as a specialised court to hear planning and environment disputes.[263]

2.12.1 Role of the P&E Court Bill in planning matters

The explanatory notes advise that the provisions of the P&E Court Bill complement the bill and together both bills would govern the development assessment dispute resolution system in Queensland through the following mechanisms:

- the Planning and Environment Court, which hears various matters, including complex, high risk matters generally started by applicants and submitters.
- Alternative Dispute Resolution Registrars who, as officers of the Planning and Environment Court, conduct mediations, without prejudice conferences, case manage conferences and have the power to hear and decide certain proceedings if directed by the court.
- the Development Tribunals (SPA's Building and Development Dispute Resolution Committees), which hear certain low risk, technical disputes generally started by applicants (established under the bill).[264]

2.12.2 Court costs provisions

Clause 59 under Part 6 (Costs) of the P&E Court Bill proposes that each party to a P&E Court proceeding must bear the party's own costs for the proceeding, subject to clauses 60 and 61. This provision would change the current costs rules for the P&E Court to reinstate the position that each party pays its own costs for proceedings, except in specific circumstances. In 2012, SPA was amended to allow for a broad discretion to award costs.

A number of private individuals and industry and community groups supported the amendments that would provide for each party to bear their own costs in P&E Court proceedings as it would ensure that 'community groups are not hindered from participating in development appeals or enforcement actions for fear of receiving a costs order against them.'[265] Submitters stated that the restoration of

[263] Explanatory notes, Planning and Environment Court Bill 2015, p 2.

[264] Explanatory notes, Planning and Environment Court Bill 2015, p 3.

[265] See for example: M Knox, submission 10; J Clarke, submission 51; C Matthews, submission 52; J Leitch, submission 54; P Hanson, submission 61; R and J Christie, submission 63; S Howard, submission 66; Birds Queensland, submission 69; Development Watch, submission 71; Environmental Defenders Office – North Queensland, submission 76; West End Community Association, submission 83; Gecko, submission 92; C & T Rodwell, submission 93; Teneriffe Progress Association, submission 100; B Morgan, submission 105; Brisbane Residents United, submission 110; Spring Hill Community Group, submission 112; Brisbane Region Environment Council, submission 114; Queensland Greens, submission 115; Sunshine Coast Environment Council, submission 116; J and B Douglass, submission 118; Helensvale Action Group, submission 119; Labor Environment Action Network, submission 121; Mark Stuart-Jones, submission 122; Planning Institute of Australia, submission 67.

the general 'own costs' rule under section 59 would allow for increased community participation on planning and development matters in the community.[266]

Council submissions also indicated support for the Court costs provisions with BCC stating that they would clarify the operation of how costs are awarded and the P&E Court's discretion to make an order for costs. Noosa Council stated that the current costs provisions 'do not serve the public interest of enabling the community, submitters, local governments and developers to dispute planning decisions due to the risk and uncertainty of the Court awarding costs against them'.[267]

Some submissions, however, were not supportive of the Court costs provisions under Part 6 and sought to retain the current general discretion to award costs, either completely or to the extent proceedings do not relate to impact assessable development.[268] Mr Tim Nicholls MP indicated that this issue was one of the most significant points of difference between the private member's bill and the P&E Court Bill:

> I do think the costs issue is something that is a matter of significant concern. In almost every other court of competent jurisdiction there is the ability for the court to be able to order costs. It is not whether they do or not, but it is whether and to the degree of influence it has on someone commencing an action and whether it is justified or not. I go back particularly to those issues around commercial disputes where it can be a real bugbear and really delay development around the place.[269]

The PCA expressed concern that the proposed Court costs provisions would result in an uneven playing field:

> The Property Council supports the ability of third parties to appeal a development application where legitimate planning issues have been raised. It is, however, imperative that the unfettered discretion of the Court to award costs in these appeal proceedings is retained.
>
> The Property Council is disappointed that the Planning and Environment Court Bill 2015 removes the discretion of the Court to determine the most appropriate allocation of costs for appeal proceedings on a case-by-case basis.
>
> Removing the discretion of the Court to award costs and re-introducing pre-determined criteria for how costs are - or are not - awarded risks the making of unmeritorious appeals, where a party can bring forward an appeal with no risk of incurring costs themselves, but may be able to inflict significant time and cost delays on another party. The Court's discretion to order that a party pay another party's costs must be reinstated to ensure fairness and a level playing field for those utilising the Court system.[270]

Similarly, the committee heard from UDIA who argued that:

> The Planning and Environment Court has a discretion. It is a discretion that it exercises according to judicial principles. That is what the current bill seeks to take away from the Planning and Environment Court—a discretion. Whenever you take a discretion away from a court you have to be very careful what you are doing because you will end up with unintended consequences and you will potentially end up with injustice.[271]

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[266] Environmental Defenders Office, submission 111; Park It Community Group, submission 59; D M Glynn, submission 60.

[267] Brisbane City Council, submission 117; Sunshine Coast Council, submission 14; Noosa Council, submission 104.

[268] HopgoodGanim Lawyers, submission 57; Urban Development Institute of Australia, submission 81; Property Council of Australia, submission 85.

[269] Mr Tim Nicholls MP, Public briefing transcript, Brisbane, 30 November 2015, p 16.

[270] Property Council of Australia, submission 85, p 16.

[271] Public hearing transcript, Brisbane, 26 February 2016, p 11.

However, the department advised that the costs provisions in the P&E Court Bill would address concerns from resident and community groups about the fear of costs being awarded against them while also providing specific circumstances where the Court would continue to have discretion to make and order for costs under sections 60 and 61:

> The return to the position that each party pays its own costs addresses concerns raised previously about the fear of costs orders acting as a deterrent to resident and community groups exercising their rights in Court proceedings about planning and development.
>
> Circumstances where the Court will continue to have discretion to make an order for costs include where the Court considers a party has brought a frivolous or vexatious proceeding, or where the Court considers a party started or conducted a proceeding for an improper purpose (for example, an appeal to delay or obstruct a commercial competitor).[272]

While supportive of the Court costs provisions in the P&E Court Bill, Kurilpa Futures Campaign Group and WWF - Australia recommended that the bill make additional amendments to further limit the scope for costs to be awarded against an appellant:

> While the Government's proposed legislation is to be praised for limiting this threat to "frivolous and vexatious" cases, objectors should never have to face crippling costs amounting to personal bankruptcy, at the whim of non-expert judges.
>
> …
>
> Unless this threat is removed entirely, it is certain to continue to deter well-justified community objectors from challenging well resourced developer applicants and their costly consultants.[273]

WWF – Australia recommended that section 59 of the P&E Court Bill be amended to include a provision explicitly stipulating that parties involved in P&E Court litigation pay their own costs.[274]

The QELA was also supportive of the P&E Bill but expressed concern that the example provided under section 60 may discourage commercial competitors from taking Court action where relevant town planning grounds exist.[275]

In response to recommendations to further limit the scope for costs to be awarded and QELA's concern regarding section 60, the department advised that sections 60 and 61 would provide the right balance:

> Providing for circumstances where costs may be awarded assists in balancing the ability for people to exercise their legal rights without fear of costs orders, against the risk of vexatious litigants or those looking to gain commercial advantage using the system inappropriately and causing unnecessary expense to others.[276]

HopgoodGanim Lawyers recommended that the Court costs provisions of the P&E Court Bill be amended to confine the awarding of costs to impact assessable development applications and that no change should be made to the costs rules with respect to code assessable development appeals, which do not involve submitters, and declaratory proceedings.[277] The UDIA opposed the orders for costs outlined in section 60 of the P&E Court Bill as UDIA believes that the 'existing SPA arrangements represent a sensible middle ground between the provisions contained within the PECB [P&E Court Bill] and the other extreme option of "costs follow the event"'.[278] However, UDIA's greatest concern was similar to HopgoodGanim Lawyers view regarding an amendment to the Bill

[272] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 54.
[273] Kurilpa Futures Campaign Group, submission 48, pp 5, 9.
[274] WWF – Australia, submission 87, p 5.
[275] Queensland Environmental Law Association, submission 65, p 2.
[276] Department of Infrastructure, Local Government and Planning, correspondence 5 February 2016, p 54.
[277] HopgoodGanim Lawyers, submission 57, p 8.
[278] Urban Development Institute of Australia, submission 81, p 10.

that would provide for the awarding of costs to be confined to impact assessable development applications with the Court to have a general discretion to reward costs for code assessable development appeals and declaratory proceedings:

> It is recommended that the Government amend the PECB so as to confine proposed changes to the costs rules to impact assessable development and allow the Court to have general discretion to award costs in respect of code assessable development appeals and declaratory proceedings. Excluding code assessable development appeals (which do not involve submitters) and declaratory proceedings would not, in our view, constitute a departure from the Government's election commitment.
>
> Excluding appeals relating to development that is code assessable or are declaratory proceedings is appropriate because the proceedings cannot determine merit issues. Applicable regulations may make a development code assessable or this may arise because the local government, duly elected, has adopted a local planning instrument that makes development code assessable. Recognising that there may be circumstances where the use by a citizen of declaratory proceedings to clarify rights is an appropriate course, and balancing this against the rights of another citizen to apply for assessable development and have the development application processed according to law within the appropriate lawful timeframe, there is clear scope for the Court to be able to apply general discretion in deciding who should pay the costs of such proceedings. This is particularly so in the context where declaratory proceedings may be used to advantage by commercial competitors, and also in light of evidence that such proceedings are starting to take the form of merit hearings with extensive expert evidence being called by applicants in order to establish the factual basis for the declaration, resulting in respondents incurring considerable costs in having to match the expert evidence of the applicant for the declaration.[279]

Committee comment

The majority of the committee supports the Court costs provision of the P&E Court Bill which directs that each party pays its own costs for proceedings, except in specific circumstances, which are provided for in sections 60 and 61.

The majority of the committee is satisfied with the department's advice that the proposed costs provisions in the P&E Court Bill would provide the right balance between people exercising their legal rights without the fear of costs being awarded against them while also providing protection against frivolous and vexatious proceedings. For this reason, the committee does not support amendments as proposed by the Kurilpa Futures Campaign Group and WWF - Australia to further limit the P&E Court's ability to award costs under specific circumstances in sections 60 and 61 of the P&E Court Bill.

The majority of the committee also supports the department's view that the Court costs provisions will address fears of individuals, as well as resident and community groups, of having costs awarded against them and that this will support community participation in planning and development matters. The committee, however, also supports the ability of the P&E Court to award costs in specific circumstances as outlined in section 60 of the P&E Court Bill, particularly where the Court considers the proceeding to be frivolous or vexatious.

2.12.3 Criminal jurisdiction of the Planning and Environment Court

The LGAQ and QELA recommended that the P&E Court be given criminal jurisdiction. The LGAQ advised that this would lead to cost savings for local government and streamline existing processes:[280]

[279] Urban Development Institute of Australia, submission 81, p 11.

[280] Queensland Environmental Law Association, submission 65, p 3; Local Government Association of Queensland, submission 89, p 13.

> The LGAQ identifies that giving the Planning and Environment Court criminal jurisdiction would be beneficial to local governments, particularly having judges with specialist knowledge of planning-related matters and the cost savings of not having to prosecute a criminal matter in the Magistrates Court as well as a civil matter in the Planning and Environment Court.[281]

The PIA also supported the ability of the P&E Court 'to hear and determine court processes about compliance issues where a financial penalty is sought,' which are currently heard in the Magistrates Court:

> Magistrates deal with a very wide and broad matter of offences and proceedings. I would suggest that a specialist jurisdiction where the judges are used to the terminology, where they understand the impacts of these offences well and so forth is a good idea.[282]

While the department advised that the conferral of criminal jurisdiction had not been part of the planning reforms to date and that enforcement options are dealt with in Chapter 5 of the bill (including the ability to seek enforcement orders in the Magistrates Court or P&E Court), the department also indicated that the matter had been noted for future consideration:

> That [Planning and Environment Court criminal jurisdiction] has been an issue that has been mooted and one that we have had under active consideration and are now, again, actively considering. I think there is a divergence of opinion, particularly in the areas where that would be administered—in the court, in JAG. As a department slightly removed from that jurisdictional area, I think we have to be sensitive to those differences of opinion, but it is certainly something that has a fair bit of support among the legal fraternity and it is certainly something that we would like to pursue. It is probably nothing that we have the time to pursue in the context of these bills, but certainly I think there would be benefits in pursuing that.[283]

Committee comment

The committee is satisfied with the department's advice that the conferral of criminal jurisdiction on the Planning and Environment Court is under active consideration.

3 Compliance with the Legislative Standards Act 1992

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that FLP are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of parliament.

The committee examined the application of FLPs to the bill, the Consequential Amendment bill, the P&C Court bill, and the private member's bills.

The Technical Scrutiny of Legislation Secretariat provided the committee with a detailed analysis of all the FLP issues in regard to the six bills (see Appendix H).

[281] Local Government Association of Queensland, submission 89, p 13.
[282] Public hearing transcript, Brisbane, 26 February 2016, p 22.
[283] Public hearing transcript, Brisbane, 26 February 2016, p 37.

The committee seeks clarification on the following points with respect to FLP issues. The matters are discussed in Appendix H.

- **Point for clarification 2**

  The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the necessity for transitional provisions in the bill to be retrospective for up to 5 years.

- **Point for clarification 3**

  The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the rationale for matters such as those in clauses 220 and 263 of the bill being appropriate to be prescribed by regulation.

Appendices

3.2 Appendix A – List of submitters – Private Member's Bills

Sub #	Name
001	Noosa Parks Association Inc.
002	Ipswich City Council
003	Noosa Council
004	Isaac Regional Council
005	Local Government Association of Queensland
006	Urban Development Institute of Australia – Queensland
007	Gladstone Ports Corporation
008	Noosa Shire Residents & Ratepayers
009	Moreton Bay Regional Council
010	Genevieve Gall
011	Brisbane Region Environment Council
012	Environmental Defenders Office Queensland
013	Dr Sharon Harwood – College of Marine and Environmental Sciences
014	Wildlife Queensland Gold Coast and Hinterland Branch
015	Nerang Community Association Inc
016	Property Council of Australia
017	Logan City Council
018	Gecko - Gold Coast and Hinterland Environment Council Assn. Inc.
019	Debbie Overell & Eric Black
020	QELA
021	Sheila & Steve Davis
022	Mark Gould
023	Leslie Shirreffs
024	Master Builders
025	Office of the Information Commissioner Queensland
026	Toowoomba Regional Council
027	Gympie Regional Council
028	The Royal National Agricultural and Industrial Association of Queensland
029	Cassowary Coast Regional Council
030	City of Gold Coast
031	HIA
032	Bundaberg Regional Council
033	Planning Institute Australia
034	Queensland Ports Association
035	Wildlife Preservation Society of Queensland

Sub #	Name
036	APA Group
037	Whitsunday Regional Council
038	Springfield Land Corporation
039	Cairns Regional Council
040	Queensland Greens - Noosa and Hinterland Branch
041	Brian Fenney
042	Southern Downs Regional Council
043	Mackay Regional Council
044	Tom Taranto
045	Form submissions
046	Redland City Council
047	Douglas Shire Council

3.3 Appendix B – List of submitters – Government Bills

Sub #	Name
001	Katherine Davis
002	Dianne Cazey
003	Marianna Lemonis
004	Lion Beer, Spirits & Wine Australia
005	Patricia Jackson
006	Patrick Jory
007	Barry O'Sullivan
008	RNA
009	Large Format Retail Association
010	Martin Knox
011	Toowoomba Regional Council
012	Angus D McKinnon
013	Logan City Council
014	Sunshine Coast Council
015	Cassowary Coast Regional Council
016	Frank Catorall
017	Queensland Heritage Council
018	Lara Harland
019	Noosa Parks Association Inc
020	Gwen Davis
021	National Trust Queensland
022	Lorraine Phillips
023	James Herlihy
024	Cecily Garske
025	Jill Kennard
026	BCERT Consulting Pty Ltd
027	David Pincus
028	Joan Pincus
029	Jennifer Parer
030	Nicole Leech
031	Kathleen Doyle
032	Margaret Davies
033	Dr Graham H Norton
034	W N Strutton
035	Verdun Park
036	Carolyn Pincus
037	Paul Pincus

Sub #	Name
038	Veronica Forrest
039	Daniel Knoblanche
040	Sophia Pincus
041	Georgina Tweedy
042	Simon Pincus
043	Filomena Morgante
044	Isaac Pincus
045	Rockhampton Regional Council
046	Great Barrier Reef Marine Park Authority
047	Aurizon
048	Kurilpa Futures Campaign Group
049	Eveline Fennelly
050	Philippa England
051	Jacqui Clarke
052	Caroline Matthews
053	Unitywater
054	Judy Leitch
055	Seqwater
056	Community Engagement Group
057	HopgoodGanim Lawyers
058	Powerlink Queensland
059	Park It Community Group
060	Di Glynn
061	Peter Hanson
062	Mackay Regional Council
063	Russell & Jenny Christie
064	Ergon Energy
065	Queensland and Environmental Law Association
066	Suzanne Howard
067	Planning Institute Australia
068	Central Highlands Regional Council
069	Birds Queensland
070	Wildlife Qld
071	Development Watch Inc
072	Crime and Corruption Commission
073	Environment Institute of Australia and New Zealand
074	Soil Science Australia
075	Qld Catholic Education Commission and Independent Schools Qld

Sub #	Name
076	Environmental Defenders Office of Northern Qld
077	Queensland Resources Council
078	Dr Sharon Harwood
079	Townsville City Council
080	Mount Isa City Council
081	Urban Development Institute of Australia
082	Oxley Creek Catchment Association Inc
083	West End Community Association Inc
084	Bruce White
085	Property Council of Australia
086	SEQ Catchments Ltd
087	WWF-Australia
088	Cairns Regional Council
089	Local Government Association of Qld
089	Local Government Association of Qld - supplementary submission
090	AgForce Qld
091	Housing Industry Association
092	Gecko
093	GVK Hancock Coal Pty Ltd
094	Christopher & Tracie Rodwell
095	Queensland Urban Utilities
096	City of Gold Coast
097	Tract Consultants Pty Ltd
098	Bundaberg Regional Council
099	Heart Foundation
100	Teneriffe Progress Association
101	Outdoor Media Association
102	Ipswich City Council
103	Bulimba Creek Catchment
104	Noosa Council
105	Bill Morgan
106	Moreton Bay Regional Council
107	Wolter Consulting Group
108	Bonafide Building Approvals
109	Redland City Council
110	Brisbane Residents United
111	Environmental Defenders Office
112	Spring Hill Community Group

Sub #	Name
113	Whitsunday Regional Council
114	Brisbane Region Environment Council
115	Queensland Greens
116	Sunshine Coast Environment Council
117	Brisbane City Council
118	Jeannette and Brian Douglass
119	Helensvale Action Group Inc
120	Master Builders Queensland
121	Labor Environment Action Network
122	Mark Stuart-Jones
123	CONFIDENTIAL
124	Stockland
125	Peter Burke
126	Wilston Grange
127	Queensland Law Society

3.4 Appendix C – List of witnesses at the public briefing held on 30 November 2015

Witnesses	
1	Mr Jesse Chadwick, Director, Planning Services, Planning Group, Department of Infrastructure, Local Government and Planning
2	Mr James Coutts, Executive Director, Planning Services, Planning Group, Department of Infrastructure, Local Government and Planning
3	Ms Hayley Rayment, Principal Policy Officer, Planning Services, Planning Group, Department of Infrastructure, Local Government and Planning
4	Mr Tim Nicholls, Member for Clayfield

3.5 Appendix D – List of witnesses at the public hearing held in Cairns on 27 January 2016

Witnesses	
1	Dr Sharon Harwood, Land Use and Social Planner, James Cook University
2	Mr Vincent Mundraby, Private capacity
3	Mr Paul (Djungan) Neal, Yarrabah Aboriginal Social Entrepreneur and Resident
4	Mr Bruce White, Consultant Anthropologist, Biocultural Connexions
5	Mr Adam Gowlett, President, Cairns Branch, Urban Development Institute of Australia
6	Ms Aletta Nugent, Manager Strategic Planning, Cassowary Coast Regional Council
7	Councillor Terry James, Deputy Mayor and Chairperson of the Planning and Economic Committee, Cairns Regional Council
8	Ms Lauren Stiles, Strategic Planner, Cairns Regional Council

3.6 Appendix E - List of witnesses at the public hearing held in Townsville on 28 January 2016

Witnesses	
1	Mr Bruce Elliot, General Manager, Biodiversity Conservation and Sustainable Use, Great Barrier Reef Marine Park Authority
2	Mrs Bronwyn Bignoux, Acting Manager City Planning, Townsville City Council
3	Mr Graeme Bolton, Director, Planning and Development, Townsville City Council

4	Mr Darron Irwin, Infrastructure Charges Planning Officer, Townsville City Council
5	Mr Colin Phillips, Executive Manager, Strategic Manager, Townsville City Council
6	Mr James Thorn-Stone, Acting Senior Strategic Planning Officer, Townsville City Council

3.7 Appendix F - List of witnesses at the public hearing held in Mackay on 29 January 2016

Witnesses	
1	Mr Jaco Ackerman, Manager, Strategic Planning, Mackay Regional Council
2	Mr Gerard Carlyon, Director, Development Services, Mackay Regional Council

3.8 Appendix G - List of witnesses at the public hearing held in Brisbane on 26 February 2016

Witnesses	
1	Dr Erin Evans, Spokesperson of the Steering Committee, Brisbane Residents United
2	Ms Elizabeth Handley, Chairman, Park It Community Group
3	Mr Philip Heywood, Spokesperson, Kurilpa Futures Campaign Group
4	Ms Revel Pointon, Law Reform Solicitor, Environmental Defenders Office (Qld) Inc.
5	Mrs Kirsty Chessher-Brown, Director of Policy, Research and Sustainability, Urban Development Industry of Australia
6	Mr Chris Mountford, Queensland Executive Director, Property Council of Australia
7	Mr David Nicholls, Director and Secretary, Urban Development Industry of Australia
8	Mr Mike Roberts, Assistant Director, Planning and Environment Queensland, Housing Industry Association
9	Mr Warwick Temby, Queensland Executive Director, Housing Industry Association
10	Ms Jen Williams, Queensland Deputy Executive Director, Property Council of Australia
11	Mr Trevor Gallienne, Member, Qld Policy and Advocacy Committee, Planning Institute of Australia
12	Mr Daniel Molloy, State Manager, Planning Institute of Australia
13	Mrs Lynette Prince-Large, Private Consultant town planner, BCERT Consulting

14	Ms Amanda Taylor, Member, Qld Policy and Advocacy Committee, Planning Institute of Australia
15	Mr Stewart Armstrong, General Manager, Heritage and Advocacy, National Trust of Australia (Queensland)
16	Professor Owen Peter Coaldrake, Chair, Queensland Heritage Council
17	Ms Fiona Gardiner, Director, Heritage, Department of Environment and Heritage Protection
18	Mr Luke Hannan, Manager, Advocacy, Planning, Development and Environment, Local Government Association of Queensland
19	Mr David Hansen, Development Assessment Branch Manager, Logan City Council
20	Mr Greg Hoffman, General Manager, Advocacy, Local Government Association of Queensland
21	Mr Terry Law, Partner, King & Company Solicitors
22	Mr Christian Parks, Planning Improvement and Implementation Coordinator, Logan City Council
23	Ms Megan Bayntun, Director, Act Review Team, Department of Infrastructure, Local Government and Planning
24	Mr Jesse Chadwick, Director, Act Review Team, Department of Infrastructure, Local Government and Planning
25	Mr James Coutts, Executive Director, Planning Services, Department of Infrastructure, Local Government and Planning
26	Ms Hayley Rayment, Principal Policy Officer, Act Review Team, Department of Infrastructure, Local Government and Planning

3.9 Appendix H – Fundamental Legislative Principles

3.10 Planning Bill 2015

3.10.1 Rights and liberties of individuals

Administrative power

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

Clause 230(1) provides that unless the Supreme Court determines that a decision or other matter under the Act is affected by jurisdictional error, the decision or matter is non-appealable.

Clause 230(2) provides that part 5 of the *Judicial Review Act 1991* (JR Act) applies to the extent that the decision is affected by jurisdictional error only. Pursuant to clause 230(3), a person may apply under part 4 of the JR Act for a 'Reasons for decision' advice.

Clause 230(4)(b) provides that a *non-appealable* decision is one that may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the JR Act or otherwise, whether by the Supreme Court, another court, a tribunal or another entity. Pursuant to clause 230(4)(c), a non-appealable decision is not subject to any declaratory, injunctive, or other order of the Supreme Court, another court, a tribunal or another entity on any ground.

The former Scrutiny of Legislation Committee (SLC) took particular care to ensure that Bills provided for a review or appeal against the exercise of administrative power and was opposed to clauses that removed rights of review, expressing its view that "ouster clauses" (ousting judicial review) *should rarely be contemplated and even more rarely implemented*.[284]

The SLC believed that the purpose of judicial review was to deal with actions of public officials who act beyond the powers that Parliament approved for them. Where ordinary rights of review were removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the SLC took particular care to assess whether sufficient regard had been afforded to individual rights, and noted that a removal of review rights may be justified by the overriding significance of the objectives of the legislation.[285] In some instances the SLC found provisions removing judicial review to be unobjectionable where it considered that an adequate alternative review mechanism was provided.[286]

The explanatory notes for this Bill advise that a person can appeal to the Supreme Court on the grounds of jurisdictional error only and may appeal to the P&C Court for certain matters pursuant to the private member's bill currently before the House. The notes advise:

> Both appeals and declaratory proceedings can be brought in the Planning and Environment Court and in the Development Tribunal.
>
> These comprehensive appeal, declarations and orders powers are, for the matters they cover, intended to provide a complete alternative to judicial review under the Judicial Review Act 1991(JRA). The Planning and Environment Court is a specialist jurisdiction with expertise in planning and development assessment matters, and can consequently deal with declaratory proceedings

[284] OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 19.

[285] OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 19.

[286] OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 19, citing Alert Digest 2004/8, p 8, paras 21-24; Alert Digest 2003/6, p 6, paras 46-48.

concerning these matters more efficiently than the Supreme Court could deal with them under the JRA, without sacrificing the quality of decision making.

Section 12 of the Judicial Review Act 1991 provides that the Supreme Court may dismiss an application for judicial review if another law makes adequate provision for a review of the matter. The Bill provides an appropriate alternative avenue of review, thereby removing confusion, and preventing applicants making costly, time consuming and unsuccessful applications under the JRA. It does not curtail the rights of persons to have administrative decisions reviewed judicially.

The Bill ousts the jurisdiction of the JRA in relation to the making of decisions. However, it provides that a person who has been denied an opportunity of making an application under the JRA for a statutory order of review, prerogative orders, or injunction can apply for a statement of reasons for the decision. In addition, any person who is aggrieved by a decision or action made under the Bill, has appeal rights to the Planning and Environment Court and/or the Development Tribunal (except in the limited case of Ministerial call-ins and directions for a development application).

The Bill expressly includes the ability to apply to the Supreme Court on the ground of jurisdictional error. Further, under the Planning and Environment Court Bill 2015, any person may bring proceedings in the Planning and Environment Court for a declaration about a matter done, to be done or should have been done under this Bill or the Planning and Environment Court Bill 2015 (except in the limited case of Ministerial directions for development applications). In certain circumstances, declaratory proceedings may also be started in the Supreme Court of Queensland.[287]

In relation to a non-appealable decision by the Minister, the explanatory notes state:

The Minister's powers of direction are generally not subject to statutory rights of review or appeal. Under the Bill, there is no right of appeal against the Minister's decision on the application. It is also not possible for declaratory proceedings to be brought in the Planning and Environment Court, except by the assessment manager in limited circumstances. However in certain circumstances, declaratory proceedings may be started in the Supreme Court of Queensland.

If there was an ability to appeal or to bring declaratory proceedings in respect of an application which has been called in, this would be inconsistent with the intent of the Bill. The State government should be the final arbiter on matters of State interest. Appeal rights are precluded because decisions of the Minister under the Bill are effectively policy decisions of executive government, made to protect or give effect to a State interest.

The Minister is directly accountable to Parliament, and must prepare a report providing an analysis of any submissions made on the application and the Minister's reasons for the decision. The Minister must table a copy of this report in the Legislative Assembly within 14 sitting days of making the decision.

The combined effect of the Ministerial powers under the Bill is to provide certainty about Ministerial directions, and finality about decisions regarding State interests. It is the only way to ensure that State interests are not prejudiced or threatened by the potential for ongoing litigation. It also ensures that accountability for decisions in relation to Ministerial powers is allocated to Parliament.[288]

Committee comment

The committee notes that pursuant to part 5 of the JR Act a person can appeal a matter on the grounds of jurisdictional error only and may also request a statement of reasons pursuant to part 4 (JR Act).

The committee also notes the advice contained in the explanatory notes that appeals and declaratory proceedings can still be brought in the P&C Court and in the Development Tribunal pursuant to the appeal process set out at clause 228.

[287] Planning Bill 2015, explanatory notes, page 7-8.

[288] Planning Bill 2015, explanatory notes, page 7.

In light of the appeal process provided the committee considers that the provisions have appropriate regard to fundamental legislative principles in this instance.

Natural justice

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

Clause 247 provides that a party to tribunal proceedings may appear:

(a) in person; or
(b) by an agent who is not a lawyer.

It may be argued that in not allowing a person legal representation before a tribunal, clause 247 will adversely affect the rights and liberties of individuals.

The former SLC commented that, as a general rule, representation by a lawyer enhances a person's right to natural justice because it gives the person the means to most efficiently present the person's case. That committee considered this principle was most applicable in proceedings where there is a binding outcome imposed by a third party umpire, most notably in court proceedings or arbitration.[289]

However, the former SLC also considered that there are factors which support arguments that the exclusion of lawyers promotes the effective and even-handed operation of a decision-maker. These factors include:

- the nature of the particular tribunal
- the cost and lengthening of proceedings associated with legal representation
- whether all (and not merely some) parties can afford legal representation
- whether matters coming before the tribunal are likely to be practical rather than technical.

The explanatory notes provide the following justification for the clause:

> The Bill prevents an agent representing a person before a Development Tribunal from being a lawyer. This has been a long standing feature of the Development Tribunal (formerly the Building and Development Dispute Resolution Committees) and is generally acknowledged by users of the system as working well. If legal representation was allowed it would likely increase the formality and length of proceedings and limit the advantage of having access to justice in an accessible, economical and efficient way for matters that are predominantly of a technical nature. There are also significant concerns that parties could be disadvantaged by their inability to afford legal representation, as well as there being increases to the costs of proceedings more generally.
>
> Parties are still afforded the opportunity to seek legal advice about the proceeding at any time prior to the decision being made. This may be relevant where fairness to a party may dictate that they be allowed to provide written submissions to the Development Tribunal; e.g. because of a physical or mental disability. In all instances, the Development Tribunal is bound to ensure a right to natural justice and that parties are given a reasonable opportunity to most efficiently present a person's case.
>
> The Planning and Environment Court Bill 2015 continues the ability for decisions of the Development Tribunal to be appealed in the Planning and Environment Court about an error or mistake in law on the part of the tribunal or jurisdictional error.[290]

[289] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 29.
[290] Planning Bill 2015, Explanatory Notes, pp 8-9.

Committee comment

The committee considers that given the nature of development tribunals and the effectiveness of the current process, clause 247 is appropriate in the circumstances. To this end, the committee also notes that parties may still obtain legal advice to assist them during proceedings.

Onus of proof

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the bill does not reverse the onus of proof in criminal proceedings without adequate justification.

Clause 226(1) provides that an executive officer of a corporation commits an offence if:

- the corporation commits an offence against an executive liability provision; and
- the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

Pursuant to clause 226(2) a court must consider the following when deciding whether things done or omitted to be done by an executive officer constitute reasonable steps pursuant to subsection (1)(b):

- whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence against the executive liability provision; and
- whether the officer was in a position to influence the corporation's conduct in relation to the offence against the executive liability provision; and
- any other relevant matter.

Clause 226(3) provides that action against an executive officer may take place, and the officer convicted of an offence against subsection (1), whether or not the corporation has been proceeded against for, or convicted of, the offence against the executive liability provision.

Pursuant to clause 226(5), an executive officer liability provision includes the following: 161 (Carrying out prohibited development); 162 (Carrying out assessable development without permit); 163 (Compliance with development approval); 164 (Unlawful use of premises); 165(7) (Refusal of development application); 167(5) (Contravention of an enforcement notice); 171 (Application in response to show cause or enforcement notice); 175(4) (Contravention of enforcement order); and 179(8) (Enforcement Orders).

The explanatory notes provide the following rationale for the inclusion of executive liability:

> The executive liability (standard) provisions are provided in the bill for the following reasons:
>
> - committing these offences would have the potential to result in significant public harm, including environmental harm or injury to persons;
> - the offences are not in relation to simple day to day operations of the business, which the director may have no involvement in;
> - there are reasonable steps a director could take in order to ensure compliance by the corporation;
> - liability of the corporation on its own may not sufficiently promote compliance; for example, if the corporation is a shelf company with no assets, and the offence results in a risk to the environment or public health and safety that has to be rectified, it may be justifiable to prosecute the director; and
> - the penalties applying to these offences are significant.[291]

[291] Planning Bill 2015, explanatory notes, p 11.

Section 4(3)(d) of the LSA provides that legislation should not reverse the onus of proof without adequate justification.[292] In this instance clauses 226(1)(a) & (b) allow for a potential breach of section 4(3)(d) of the LSA by stipulating that an executive officer of a corporation commits an offence if the corporation commits an offence against a liability provision and the executive officer did not take reasonable steps to ensure the corporation did not engage in the conduct which constitutes the offence.

Clause 226(2) does allow a court to look at an executive officer's conduct by providing for matters a court must consider when determining executive liability such as an officer's influence in the corporation's conduct and whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence in relation to the executive liability provision.

Generally, a person cannot be guilty of an offence unless the person is a party to the offence. It is also objectionable even if the law provides defences such as the executive officer taking reasonable steps to ensure compliance or was not in a position to influence the corporation's conduct.[293] The former SLC considered clauses in relation to executive liability and while it acknowledged the difficulties in determining liability in certain circumstances, as a general rule it did not approve of such provisions.[294]

The explanatory notes addresses the FLP and argues that the provisions do not in fact reverse the onus of proof for executive officers:

> The provisions proposed do not reverse the onus of proof; they do not require a director or executive officer to prove that he or she did not authorise or permit the conduct of the corporation that constituted the corporation's offence. Where corporations are involved in such offences, it is appropriate that there is effective accountability at a corporate level. Further the process of development of a particular site can involve many individuals acting in a representative or contractual capacity. It would not be appropriate to prosecute only the individual directly responsible for the offence, if that person was acting under instructions of another.
>
> As the Bill does not propose to reverse the onus of proof, the fundamental legislative principles are not infringed.[295]

Committee comment

The committee notes the provisions contained in clause 226 in relation to executive liability. The committee considers the justification provided in the explanatory notes, in particular whether the matters a court must take into account when determining executive liability are adequate in the circumstances, are adequate.

Retrospectivity

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation adversely affects rights and liberties, or imposes obligations, retrospectively.

Clause 250

Clause 250 provides the matters which a tribunal may consider. Clause 250(1) provides that the section applies to tribunal proceedings about:

(a) a development application or change application; or

[292] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 40.
[293] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 41.
[294] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 41.
[295] Planning Bill 2015, explanatory notes, p 11.

(b) an application or request (however called) under the Building Act or the Plumbing and Drainage Act.

Pursuant to clause 250(2) a tribunal must decide the proceedings based on the laws in effect when the application was properly made, but may give weight to any new laws that the tribunal considers appropriate in the circumstances.

In allowing for new laws to be considered which were not in place at the time of the application, clause 250 potentially breaches section 4(3)(g) of the LSA which provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. It may be argued that an individual has a reasonable expectation that the laws in place at the time the legal issue arose will be applied by the court, and not a newer set of laws established after the matter.

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The explanatory notes acknowledge the potential FLP and provide the following justification for the clause:

> Laws and policies can be implemented over time to reflect changing local circumstances, including public attitudes. The Bill is designed to ensure that these new laws and policies can be considered in the assessment of development applications. This is particularly important since time frames for consideration of an application may be extensive.
>
> This function is circumscribed by judicial authority, in particular to ensure instruments are not made with the express purpose of prejudicing assessment of development applications. The weight given to a particular policy instrument is proportionate to the stage of its development, and particularly community awareness.
>
> The Planning and Environment Court has kept a careful watch on matters where this function has been used, and has ensured that it is applied fairly in circumstances where its application is warranted. In particular the Court will not allow an assessment manager to give weight to any code, law or policy that appears to have been developed specifically in response to the application itself.
>
> The Bill does not provide for the retrospective application of new laws and policies. It simply allows these laws and policies to be considered and, if warranted, given appropriate weight.[296]

Committee comment

Clause 250 provides for new laws to be considered by the P&E Court in conjunction with the laws that were in place at the time the legal issue arose. The explanatory notes state that the P&E Court is aware of the issues which arise with respect to the application of new laws and has ensured a fair application of any new laws.

Clause 320

Clause 320(1) provides for a transitional regulation making power which enables a regulation to make provision for any matter necessary to allow or facilitate the transition of the repealed Act to the commencement of the bill or the Planning Court bill, or for anything that the bill does not make sufficient provision.

Pursuant to clause 320(2) a transitional regulation may have retrospective operation to a time that is no earlier than when the old Act is repealed. Pursuant to clause 320(4) a transitional regulation will stop having effect 5 years after the old Act is repealed.

[296] Planning Bill 2015, explanatory notes, p 6.

Section 4(3)(g) of the *Legislative Standards Act 1992* provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The former SLC viewed as objectionable transitional regulation-making provisions which were general in nature and allowed for provision about any subject matter, including those that should be dealt with by an Act as opposed to subordinate legislation.[297] In this instance clause 320(1) provides a broad power to use a transitional regulation for 'any matter necessary' to allow for the transition from the repealed Act to the commencement of the bill and the yet to be passed Planning Court bill.

The explanatory notes state:

> The Bill provides that this type of regulation expires five years after the old Act is repealed. This is longer than the period usually provided for under legislation with transitional arrangements. The period of five years is established to recognise that implementation of new or amended regulatory arrangements in plan-making usually take a number of years to flow through to instruments and assessments.
>
> Expiry at any lesser period would compromise the effectiveness of these transitional regulatory arrangements, and expose local councils to deciding development applications based on planning scheme provisions that do not reflect contemporary requirements; or going through expensive and lengthy processes to update their schemes to align with the new planning framework. Detriment may also accrue to the prospective developer required to comply with onerous, expensive and out-dated plan requirements.
>
> The regulation can operate retrospectively, but because the changes to planning schemes occur over a longer period, the likelihood of unmanageable or unexpected adverse impact is low. The extent of this delegation of legislative power is appropriate in the circumstances and provides the level of detail necessary to ensure the provisions of the Bill are workable.[298]

Committee comment

The committee is aware that it is not uncommon for legislation to contain a retrospective transitional for regulation provision expiring one year after the commencement of the Act. However, in this instance the provision allows for a transitional regulation to be retrospective for up to 5 years.

Notwithstanding the justification provided in the explanatory notes, the committee seeks clarification as to why it is necessary for the transitional provision to be retrospective for up to 5 years, especially given the broad nature of the power provided.

Point for clarification 2

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the necessity for transitional provisions in the bill to be retrospective for up to 5 years.

Immunity from proceedings

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers immunity from proceeding or prosecution without adequate justification.

[297] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 160.

[298] Planning Bill 2015, explanatory notes, p 10.

Clause 28 (Limitation of liability) provides that a local government does not incur liability for anything the local government does or does not do in complying with a direction of the Minister, or any action taken by the Minister, in relation to:

(a) an existing local planning instrument or designation;
(b) a proposed local planning instrument or designation; or
(c) a proposed amendment of a local planning instrument or designation.

Clause 28 provides immunity to a local government who complies with the direction of the Minister. This potentially breaches section 4(3)(h) of the LSA which provides that immunity from a proceeding or prosecution must have adequate justification.

The Office of the Queensland Parliamentary Counsel (OQPC) Notebook states "a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State.[299]

The SLC stated that one of the FLPs is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, the SLC also recognised that conferral of immunity may be appropriate in certain situations.[300]

The explanatory notes acknowledge the potential breach and provide the following justification:

The provision was included specifically to address potential common law liability, for example injury to persons or property, arising from a Ministerial action or direction.

> The likely effect of this provision, subject to any facts and circumstances of a specific circumstance, is not that any common law liability arising from such a direction or action is extinguished, but that it would instead arise against the State.[301]

Committee comment

The explanatory notes acknowledge that liability is not extinguished and would, depending on the circumstances of the matter, be defended by the State. As such, the committee regards the provision as having sufficient regard to fundamental legislative principles.

Clear and precise

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

The following errors appear to be contained in the bill and explanatory notes:

- Clause 63 jumps from 63(4) to 63(7). It would appear that 63(7) is meant to be 63(5)
- Clause 82(4)(d) refers to clause 45(2)(b) which is not a provision of the bill
- The explanatory notes at (page 9) under the heading 'Exemptions to local government liability', refer to clause 25. This should in fact be clause 28 (Limitations of liability).

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.[302] Plain English is recognised as the best approach to the use of language in legislation, with the objective to produce a law that is both easily understood and legally effective to achieve the desired policy objectives.[303]

[299] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 64.
[300] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 64; Alert Digest 1998/1, p 5.
[301] Planning Bill 2015, explanatory notes, p 5.

Committee comment

The committee draws these minor drafting errors to the attention of the department.

3.10.2 Institution of Parliament

Delegation of legislative power

Section 4(2)(b) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Clause 26(1) provides that the section applies to the following instruments made by a local government:

(a) an existing local planning instrument or designation;
(b) a proposed local planning instrument or designation;
(c) a proposed amendment of a local planning instrument or designation.

After the Minister considers all submissions made as required under the notice to be provided to the local government in question under clause 26(2), the Minister must decide pursuant to clause 26(4):

(a) to direct the local government to take the action stated in the notice;
(b) to direct the local government to take other action; or
(c) not to direct the local government to take any action.

Without limiting subsection 26(4), the Minister may direct the local government:

(a) to review a planning scheme, as required under section 25, and report the results of the review to the Minister;
(b) to review a designation, and report the results of the review to the Minister;
(c) to make, amend or repeal a planning scheme as required under the process in
    (i) sections 18 to 24;
    (ii) the Minister's notice; or
(d) to amend a designation as required under the process in the designation process rules or to repeal a designation under section 40.

Pursuant to clause 26(6), if the Minister decides to direct the local government to take action, the Minister must give the local government a notice that states:

(a) the nature of the action; and
(b) a reasonable period within which the local government must take the action.

Clause 26 provides the Minister with the power to issue directions to a local government to take action with respect to a proposed local planning instrument which raises the question as to whether this is an appropriate delegation of legislative power.

Section 4(4)(a) of the LSA provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. As noted in the OQPC FLP Notebook, this matter is concerned with the level at which delegated legislative power is used.

[302] *Legislative Standards Act 1992*, section 4(3)(k).
[303] OQPC, Fundamental Legislative Principles: The OQPC Notebook, pp 87-88.

Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

The explanatory notes provide the following justification for the clause:

> The Minister's powers of direction are designed to put into place the policy decisions of executive government, and are intended to protect or give effect to a State interest. These powers are intended to allow a more proactive and management-based approach to Ministerial involvement in matters of State interest.
>
> The Minister's powers are not intended to be used routinely or often. However, occasions may arise where a State interest (such as an important environmental value) could be severely affected by the implementation of a development approval. In these situations, exercising these reserve powers allows the Minister to redress what otherwise may affect State interests.[304]

Committee comment

The committee notes that it is intended that the Ministerial power provided by clause 26 will be used sparingly and in circumstances where a State interest may be adversely affected. Given the justification provided, the committee considers that appropriate regard has been given to FLPs in this instance.

Scrutiny of the Legislative Assembly

Section 4(2)(b) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

Several clauses in the bill allow for matters to be carried out by regulation. These include clauses 11, 16, 17, 19, 29, 35, 36, 37, 43, 44, 45, 46, 48, 53, 54, 55, 56, 58, 61, 63, 68, 69, 70, 76, 80, 83, 101, 108, 109, 111, 113, 114, 115, 116, 151, 181, 220, 225, 232, 234, 236, 241, 263, 267, 275, 283, 301, 320 and schedule 1.

The widespread use of regulations is acknowledged and addressed in the explanatory notes:

> The development assessment process provided for in subordinate legislation, rules and guidelines will be generally consistent with the current planning and development assessment framework. These processes are detailed in nature and are better attended to in other places, such as in subordinate legislation or subsidiary instruments or guidance [emphasis added], rather than the Bill. This frees the Bill of unnecessary detail, which assists its clarity and enables these processes to be more responsive; more easily adapted to changing circumstances as concerns emerge.
>
> The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment, Parliamentary scrutiny and disallowance. The Bill also requires the making or amendment of the development assessment rules to be subject to the same processes as for making or amending State planning policies under the Bill.[305]

Examples of the use of Regulations

Clause 220

Pursuant to clause 220(1), a person may claim compensation from the State if the person incurs loss because of the exercise, or purported exercise, of a power by or for an inspector, including a loss

[304] Planning Bill 2015, explanatory notes, p 6.

[305] Planning Bill 2015, explanatory notes, pp 9-10.

arising from compliance with a requirement made of the person under division 2, 3 or 4. Clause 220(2)(a) provides that the compensation may be claimed and ordered in a proceeding brought in a court with jurisdiction for the recovery of the amount of compensation claimed.

Pursuant to clause 220(5) a regulation may prescribe other matters that may, or must, be taken into account by the court when considering whether it is just to order compensation.

Clause 263

In relation to making documents publically available, clause 263(1) provides that a regulation may prescribe, for a person who has, or has had, powers or functions in relation to this Act:

(a) the documents, including a register, relating to the person's functions, that the person must or may keep publicly available;
(b) where, and in what form the documents must or may be kept;
(c) whether the documents, or a certified copy of the documents must, or may be kept;
(d) whether the documents must or may be kept available for inspection and purchase, or for inspection only;
(e) the period or periods during which the documents must or may be kept.

Potential FLP issues

Appropriate delegation of legislation

Pursuant to section 4(4)(b) of the LSA a bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly. Further, section 4(5)(c) of LSA provides that subordinate legislation should contain only matters appropriate to that level of legislation.

It may be argued that in some instances the matters to be dealt with by regulation would be better placed in the primary act. For example, clause 220 provides that a regulation will set out matters which a court may or must consider when determining compensation. Likewise, clause 263 provides that a regulation may prescribe the powers and functions to establish how information is to be made publicly available.

A bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.[306]

The OQPC Notebook states "For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation".[307] The matter involves consideration of whether the delegate may only make rules that are subordinate legislation, and thus subject to disallowance.

"The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when the power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny".[308] The SLC commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the SLC considered:

- The importance of the subject dealt with;

[306] *Legislative Standards Act 1992*, section 4(4)(b).
[307] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 154.
[308] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.

- The practicality or otherwise of including those matters entirely in subordinate legislation;
- The commercial or technical nature of the subject matter;
- Whether the provisions were mandatory rules or merely to be had regard to.[309]

The SLC considered that despite an instrument not being subordinate legislation, if there is a provision requiring tabling and providing for disallowance there is less concern raised.[310]

The SLC also determined if a document that is not subordinate legislation is intended to be incorporated into subordinate legislation, then an express provision should require the tabling of the document at the same time as the subordinate legislation.[311] Similar considerations apply when a non-legislative document is required to be approved by an instrument of subordinate legislation.[312]

Committee comment

Notwithstanding the reasons given in the explanatory notes and that regulations are subject to parliamentary scrutiny and therefore disallowance, the committee is concerned about the appropriateness of the relatively large number of clauses in the bill allowing for matters to be carried out by regulation. The committee is therefore seeking that the Minister clarify the rationale for matters such as those in clauses 220 and 263 being appropriate to be prescribed by regulation.

Point for clarification 3

The committee seeks clarification from the Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment on the rationale for matters such as those in clauses 220 and 263 of the bill being appropriate to be prescribed by regulation.

Clause 17

Clause 17(1)(a) provides that the Minister must make an instrument that contains guidelines setting out the matters that the chief executive must consider when preparing a notice about making or amending planning schemes. Pursuant to clause 17(b) the rules will set out the process for:

(i) making amendments including amendments to LGIPs, of a type stated in the rules, to planning schemes; making LGIPs, whether as part of a proposed planning scheme or as an amendment of a planning scheme;
(ii) reviewing LGIPs;
(iii) making or amending planning scheme policies;
(iv) making or amending TLPIs.

Clause 17(3) provides that the guidelines and rules start to have effect when a regulation prescribes the guidelines and rules.

Clause 68

Clause 68(1) provides that the Minister must make development assessment rules including rules about:

(a) how notification is to be carried out for development applications for which public notification is required;

[309] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.
[310] Alert Digest 2004/3, pp 5-6, paras 30-40; Alert Digest 2000/9, pp 24-25, paras 47-56.
[311] Alert Digest 2001/8, p 16, para. 7; Alert Digest 1996/5., p 9, para 3.8.
[312] Alert Digest 2003/11, p 23, paras 33-40.

(b) the consideration of properly made submissions.

Clause 68(2) provides that the development assessment rules may provide for:

(a) the period within which a development application may be taken to be properly made for section 51(5);
(b) the effect on a development application of the expiry of a time limit under, or of a contravention of, the rules (the lapsing of the application, for example);
(c) the revival of lapsed applications;
(d) how and when a referral agency may change its response before a development application or change application is decided;
(e) the standard conditions for a deemed approval;
(f) any matter in relation to part 5, divisions 2 to 4;
(g) the effect on a process under this chapter of taking action under the *Native Title Act 1993* (Cwlth), part 2, division 3.

Pursuant to clause 68(4) the development assessment rules do not have effect unless prescribed by regulation, however clause 68(5) provides that the development assessment rules are not subordinate legislation.

Clause 282

Pursuant to clause 282(1)(a)&(b) the Minister or chief executive may make guidelines about the matters to be considered by a person performing a function or exercising a power under the Bill, or for any other matter related to the administration of the Act.

Clause 282(2) provides that the Minister or chief executive must consult with the persons or entities the Minister or chief executive considers appropriate, before making a guideline. The Minister or chief executive must notify the making of a guideline by a notice published in the gazette, pursuant to clause 282(3).

Potential FLP issues

Appropriate delegation of legislation

Section 68(2) provides the matters the Minister may provide for in the development assessment rules. Further, while the rules are applied by regulation they are not sub-ordinate legislation pursuant to section 68(4). Similarly, clause 17 provides that the Minister must make a statutory instrument that contains rules and guidelines about the process for making and amending a local planning instrument. Clause 282 allows for the widespread use of guidelines including for any matter in relation to the administration of the Act.

It is arguable that sections 17, 68 & 282 are in breach of section 4(4)(b) of the LSA whereby a bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

The OQPC Notebook states "For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation". [313]The matter involves consideration of whether the delegate may only make rules that are subordinate legislation, and thus subject to disallowance.

"The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when the power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary

[313] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 154.

scrutiny".[314] The SLC commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the SLC considered:

- The importance of the subject dealt with
- The practicality or otherwise of including those matters entirely in subordinate legislation
- The commercial or technical nature of the subject matter
- Whether the provisions were mandatory rules or merely to be had regard to.[315]

The SLC considered that despite an instrument not being subordinate legislation, if there is a provision requiring tabling and providing for disallowance there is less concern raised.[316]

The SLC also determined if a document that is not subordinate legislation is intended to be incorporated into subordinate legislation, then an express provision should require the tabling of the document at the same time as the subordinate legislation.[317] Similar considerations apply when a non-legislative document is required to be approved by an instrument of subordinate legislation.[318]

The explanatory notes address the use of guidelines and provide the following justification:

> The Bill allows the Minister to make rules and guidelines which establish the process for making and amending a local planning instrument.
>
> The plan-making and amendment processes provided for in rules and guidelines will be generally consistent the current planning framework provided for in the old Act. These processes are detailed in nature and subject to changing circumstances as needs arise. As such these are better attended to in other places, such as in subsidiary instruments or guidance, enabling these processes to be more responsive. This in turn frees the Bill of unnecessary detail, which assists its clarity.
>
> The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment and Parliamentary scrutiny and disallowance. The Bill also requires the making or amendment rules and guidelines to be subject to the same processes as for making or amending State planning policies under sections 9 and 10 of the Bill.[319]

Committee comment

The committee notes that with respect to clauses 17 and 68 the guidelines will be applied by subordinate legislation which is subject to parliamentary scrutiny and disallowance measures. Clause 282 requires a Minister's guideline to be published by gazette notice with prior consultation to take place. In view of the parliamentary scrutiny and consultation which must occur, the committee considers that sufficient regard has been given to FLP with respect to these clauses.

3.11 Planning (Consequential) and Other Legislation Amendment Bill 2015

It is considered that clauses 75, 145, 159 and 470 may contain FLP issues.

[314] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.
[315] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.
[316] Alert Digest 2004/3, pp 5-6, paras 30-40; Alert Digest 2000/9, pp 24-25, paras 47-56.
[317] Alert Digest 2001/8, p 16, para. 7; Alert Digest 1996/5., p 9, para 3.8.
[318] Alert Digest 2003/11, p 23, paras 33-40.
[319] Planning Bill 2015, explanatory notes, p 9.

The bill also includes 3 offence provisions which are set out at under 5.3.2 below.

3.11.1 Rights and liberties of individuals

Clause 470

Summary of provisions

Clause 470 inserts new section 99BRBIA (Development tribunal to decide appeal about application for a connection based on particular laws) into the *South-East Queensland Water (Distribution and Retail Restructuring) Act 2009.*

This section applies to an appeal against a decision on an application for a connection, including, for example, a decision under a water approval given for the application.

Specifically, the development tribunal must decide the appeal based on the laws in effect when the application was made.

However, if the laws are subsequently amended or replaced, the tribunal may, in deciding the appeal, give the weight the tribunal considers appropriate, in the circumstances, to any new laws.

Potential FLP issues

If the tribunal, in deciding an application, gives consideration to new laws (not in force at the time of application), this may be considered to potentially affect rights and liberties and create uncertainty for applicants.

Committee comment

The committee notes that the explanatory notes do not identify this potential breach of FLP. However, the committee considers that there is some mitigation of this potential breach with the provisions stating that it is a decision for the tribunal (not the executive or a public servant for example) and only if appropriate in the circumstances. For this reason, the committee this provision is justified in the circumstances.

Clauses 75 and 159

This section considers whether clauses 75 and 159 breach section 4(3)(a) of the LSA regarding administrative power.

Summary of provisions

Clause 75 of the bill amends section 83 (General restrictions on granting building development approval) of the *Building Act 1975*. The effect of this amendment is that a building development approval cannot be given unless any security required by the local government for the application for the approval has been paid. The *Building Act 1975* does not contain any criteria or review rights in relation to requiring, or settling the amount of, security.

Clause 159, inserts new section 206 (Responsible entity for change application for deemed approval) into the Coastal Act. This section has the effect that the chief executive is given power to decide who will be the responsible entity for assessing applications to change particular historic approvals. The section does not contain criteria for deciding who the responsible entity is or allow for review of the decision.

Potential FLP issues

Legislation should make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined. The OQPC Notebook states, 'Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is

generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision'.[320]

The former SLC was opposed to clauses removing the right of review, and took particular care to ensure the principle that there should be a review or appeal against the exercise of administrative power. Where ordinary rights of review were removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the SLC took particular care in assessing whether sufficient regard had been afforded to individual rights, noting that such a removal of rights may be justified by the overriding significance of the objectives of the legislation.[321]

In relation to amended section 83, the explanatory notes stated:

> Generally, a requirement to pay security in relation to an application would be imposed by a local government under its powers under the Local Government Act 2009 or the City of Brisbane Act 2010. This amendment reflects existing section 83 of the Building Act 1975 and clarifies that the provision only applies in relation to security required to be paid by the applicant to a local government.

In relation to section 206, while it does not contain any criteria for deciding who the responsible entity will be, or allow for any review of this decision, the provision is based on similar provisions already in the Coastal Act – section 190 – *Assessment manager for particular applications* and section 193 – *Responsible entity for request to change deemed approval.*

Committee comment

The committee considers that, on balance, the potential breach in both sections may be justified in the circumstances.

Clause 145

The committee considered whether clause 145 breached section 4(3)(i) of the LSA - Compulsory acquisition of property.

Summary of provisions

Clause 145, proposed that new section 113 (inserted into the *Coastal Protection and Management Act 1995*) provides for the written notice by the chief executive to a land owner of a decision that land is to be surrendered for coastal management and that the Minister approves this requirement. The giving of this notice must occur within 30 business days after the proposed surrender notice. Section 113 also defines the term 'land surrender requirement', when it is to be given and what it must state, its effect, extension of time, and who copies of the notice must be provided to.

Potential FLP issues

Legislation should provide for the compulsory acquisition of property only with fair compensation.[322] The OQPC states, 'A legislatively authorised act of interference with a person's property must be accompanied by a right of compensation, unless there is a good reason'.[323]

The former SLC noted that it is generally acknowledged that compulsory acquisition of property must only be made with compensation.[324]

Here, the explanatory notes stated:

[320] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 15.
[321] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 19.
[322] *Legislative Standards Act 1992*, section 4(3)(i).
[323] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 73.
[324] Alert Digest 1996/7, pp 27-28, para. 7.13.

The Bill provides for an arrangement for land surrender for coastal management purposes, regarding applications for reconfiguration of a lot for land that is within the coastal management district, and is an erosion prone area or within 40 metres of the foreshore.

Land surrender arrangements have been in the Coastal Act since 2001, carrying over provisions from the *Beach Protection Act 1968*.

While these provisions were rendered nonoperational with the introduction of the coordinated State assessment and referral functions through amendments to the Sustainable Planning Act 2009 in 2012, this has been a long-standing arrangement, likely to be used in very limited circumstances where the public benefit in seeking surrender of the land to avoid or minimise detrimental impacts on coastal management outweighs the impact to the individual owner.

The arrangement has been adjusted to include an opportunity for the owner to make submissions in response to the land surrender notice. Time limits have been added to the arrangements, and it is noted that a person may seek judicial review.

Committee comment

The committee considers the potential breach is justified in the circumstances, due to the long standing nature of the arrangements, its intended limited use, assessment of public benefit, opportunity for the owner to make submissions, time limitations and the availability of judicial review.

3.12 Planning and Environment Court Bill 2015

No issues of FLP were identified in relation to the P&C Bill 2015.

3.13 Planning and Development (Planning for Prosperity) Bill 2015

It is considered that clauses 48, 181, 184, 185, 230, 232, 233, 252 & 273 of the Planning and Development (Planning for Prosperity) Bill 2015 raise potential FLP issues and several clauses including 9, 14, 15, 16, 23, 29, 30, 38, 39, 40, 43, 48, 49, 50, 51, 57, 60, 65, 66, 67, 73, 77, 103, 105, 107, 109, 110, 111, 112, 149, 180, 187, 189, 191, 196, 217, 223, 227, 231, 239, 240, 243 & 273 raise potential FLP issues in relation to the use of regulations and guidelines throughout the Bill.

3.13.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals.

Clause 48 (Public notification requirement) provides for public notification requirements for a development application subject to merit assessment. Pursuant to clause 48(2) a categorising instrument may require an applicant to give notification of the application. Clause 48(3) provides that a local categorising instrument must not require notification of an application if a regulation states notification is not required for that type of application. Therefore, public notification is not mandatory.

The explanatory notes advise the following in relation to the operation of the public notification provisions:

> Under the Bill, the decision about whether a particular use, or development type falling outside of certain parameters, should be subject to public notification will continue to be based on factors such as the scale, type and location of the development, its potential for impact on the area in which it will be located, and the extent to which the proposed development falls within the scope of the planning intent of the area in which the development will be located. As under the repealed Act, this decision will be made predominantly by local governments in their role as assessment managers, through the preparation of their planning schemes. This approach continues to provide for local

governments to determine which development applications are to be publicly notified, in the context of their planning for local circumstances in the local government area.[325]

The public notification provisions provided for at clause 48 are subject to regulations which can state if public notification is required or not.

The former SLC considered the reasonableness and fairness of treatment of individuals as relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals. It is arguable that not allowing for the notification of development applications in all instances is not fair to those persons potentially affected by a proposed development and may adversely affect their rights and liberties (see section 4(1) of the LSA.

The explanatory notes identify the public notification provisions as a potential FLP issue:

> Unlinking public notification from the underlying category of assessment has the practical effect of encouraging a more risk based approach to allocating levels of assessment. However, it may also have the effect of potentially limiting the circumstances in which a development application must be publicly notified and potentially lessening the opportunity for the public to become aware of a proposed development. This may result in fewer submissions on development applications, and fewer development applications and approvals being subject to appeal by interested parties other than the applicant.[326]

The explanatory notes provide the following justification for the clause:

> Local governments establish in their planning schemes the levels of assessment for different uses based on a range of factors including those raised during community consultation and public notification of the draft planning scheme. Under the Bill, the local government's planning scheme will remain the primary instrument for establishing the levels of assessment for each defined use and whether public notification will be required. This is consistent with the current practice. There is no requirement in the Bill for a local government to take any approach that is different from their current arrangements, and it is not intended that there will be any immediate reduction in development that requires public notification.
>
> The Bill does not aim to limit or restrict public involvement in the planning framework and it does not limit third party appeal rights. Where a development application is required to be publicly notified, any person may make a submission on the development application. The Bill will not limit the circumstances in which a submitter may appeal a development decision, or a condition of an approval.[327]

Committee comment

The committee notes that pursuant to this bill, a regulation can provide that public notification is not required for certain applications despite a local government planning scheme.

Clause 185

Pursuant to clause 185(1) a person who is aggrieved by a decision may apply to the Supreme Court for a review of the decision on the grounds of jurisdictional error. Clause 185(2) provides that a decision of the Minister, other than a decision under chapter 7, part 4 (Urban Encroachment), is non-appealable and may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way.

In relation to the non-appealable decision of the Minister, the explanatory notes advise the following:

[325] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 5.
[326] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 5.
[327] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 5-6.

> Under the Bill, there is no right of appeal against the Minister's decision on the application. It is also not possible for declaratory proceedings to be brought in the Planning and Environment Court, except by the assessment manager in limited circumstances. However in certain circumstances, declaratory proceedings may be started in the Supreme Court of Queensland.
>
> If there was an ability to appeal or to bring declaratory proceedings in respect of an application which has been called in, this would be inconsistent with the intent of the Bill. The State government should be the final arbiter on matters of State interest. Appeal rights are precluded because decisions of the Minister under the Bill are effectively policy decisions of executive government, made to protect or give effect to a State interest.
>
> The Minister is directly accountable to Parliament, and must prepare a report providing an analysis of any submissions made on the application and the Minister's reasons for the decision. The Minister must table a copy of this report in the Legislative Assembly within 14 sitting days of making the decision.
>
> The combined effect of the Ministerial powers under the Bill is to provide certainty about Ministerial directions, and finality about decisions regarding State interests. It is the only way to ensure that State interests are not prejudiced or threatened by the potential for ongoing litigation. It also ensures that accountability for decisions in relation to Ministerial powers is allocated to Parliament.[328]

Clause 185(3) provides that the JRA, other than Part 4, does not apply to decision making under the Bill. In particular, the Supreme Court does not have jurisdiction to hear and determine applications made to it in relation to statutory orders of review (Part 3) and prerogative orders and injunctions (Part 5). However, Part 4 (Reasons for decision) of the JRA still applies and provides that pursuant to section 32 a person may request a statement of reasons in relation to a decision made. Section 32(2)(a)&(b) provides that written notice must be made to:

- the Minister responsible for the administration of the enactment, or the scheme or program, under which the decision was made; or
- in any other case—the person who made the decision.

The explanatory notes advise that a person can appeal to the Supreme Court on the grounds of jurisdictional error only and to the P&E Court for certain matters pursuant to the P&D bill currently before the House. The explanatory notes state:

> The Bill ousts the jurisdiction of the Judicial Review Act 1991 (JRA) in relation to the making of decisions. However, it provides that a person who has been denied an opportunity of making an application under the JRA for a statutory order of review, prerogative orders, or injunction can apply for a statement of reasons for the decision. In addition, any person who is aggrieved by a decision or action made under the Bill, has appeal rights to the Planning and Environment Court and/or the Development Tribunals (except in the limited case of Ministerial call-ins and directions for a development application).
>
> The Bill also expressly includes the ability to appeal to the Supreme Court on the ground of jurisdictional error. This follows the decision in the High Court in Kirk v Industrial Relations Commission of New South Wales [2010] HCA 1, such that the Supreme Court can issue relief for jurisdictional error and prevent Constitutional invalidity.
>
> Further, under the Planning and Development (Planning Court) Bill 2015, any person may bring proceedings in the Planning and Environment Court for a declaration about a matter done, to be done or should have been done under this Bill or the Planning and Development (Planning Court) Bill 2015 (except in the limited case of Ministerial directions for development applications). In certain circumstances, declaratory proceedings may also be started in the Supreme Court of Queensland. The Planning and Development (Planning Court) Bill 2015 continues to provide extensive declarations and orders powers to the Planning and Environment Court, which give the same rights

[328] Planning and Development (Planning for Prosperity) Bill 2015, explanatory Notes, p 8.

> of review of administrative decisions as are available under the JRA. These are in addition to the comprehensive appeal rights available to applicants and submitters under the Bill. In addition, the Bill contains continued jurisdiction for the Development Tribunals (formerly the Building and Development Dispute Resolution Committees), including the ability to make declarations about some matters.[329]

Pursuant to clause 185(4) a decision includes:

- conduct engaged in for the purpose of making a decision
- other conduct that relates to the making of a decision
- the making of a decision or the failure to make a decision
- a purported decision
- a deemed refusal.

The former SLC believed that the role of judicial review is to deal with those actions of public officials who act beyond the powers that Parliament intended for them. As such, "ouster clauses" (clauses which oust options for judicial review) should rarely be contemplated and even more rarely implemented.[330] The former SLC also took the view that:

> Whenever ordinary rights of review are removed, thereby preventing individuals from having access to the courts or a comparable tribunal, the committee takes particular care in assessing whether sufficient regard has been had to individual rights....Such a removal of rights may be justified by the overriding significance of the objectives of the legislation.[331]

The explanatory notes advise the following in relation to the role of the P&E Court and development tribunals as well as the P&D Court Bill.

> The Planning and Environment Court and the Development Tribunals are expert jurisdictions that can deal with the review of applications expeditiously, as they are familiar with the planning and development assessment system. In this respect, it is considered that the Bill and Planning and Development (Planning Court) Bill 2015 continues the ability to seek review of administrative decisions, particularly for the general public, by allowing such reviews to occur in an accessible expert jurisdiction. The combined effect of these provisions ensures that the ousting of the jurisdiction of the JRA does not operate to prejudice any person.[332]

Committee comment

The committee notes that the appeal process does not allow for the use of parts 3 and 5 of the JRA but that an individual may request a statement of reasons under part 4. The committee also notes that appeals and declaratory proceedings can still be brought in the P&E Court and in the Development Tribunal. We therefore consider the provisions have appropriate regard to FLPs.

Clause 201

Clause 201 provides that a party to tribunal proceedings may appear in person, or by an agent who is not a lawyer.

Potential FLP Issue

It may be argued that in not allowing a person legal representation before a tribunal, clause 201 will adversely affect the rights and liberties of individuals pursuant to section 4(1) of the LSA.

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329 Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, pp 8-9.
330 OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 19.
331 OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 19.
332 Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 9.

The former SLC commented that, as a general rule, representation by a lawyer enhances a person's right to natural justice because it gives the person the means to most efficiently present the person's case. That committee considered this principle is most applicable in proceedings where there is a binding outcome imposed by a third party umpire, most notably in court proceedings or arbitration.[333]

However, the SLC had considered that there are factors which support arguments that the exclusion of lawyers promotes the effective and even-handed operation of a decision-maker. These factors include:

- the nature of the particular tribunal
- the cost and lengthening of proceedings associated with legal representation
- whether all and not merely some parties can afford legal representation
- whether matters coming before the tribunal are likely to be practical rather than technical.

The explanatory notes provide the following justification for clause 201:

> This has been a long standing feature of the Development Tribunals (formerly the Building and Development Dispute Resolution Committees) and is generally acknowledged by users of the system as working well. If legal representation was allowed it would likely increase the formality and length of proceedings and limit the advantage of having access to justice in an accessible, economical and efficient way for matters that are predominantly technical in nature. There are also significant concerns that parties could be disadvantaged by their inability to afford legal representation, as well as there being increases to the costs of proceedings more generally.
>
> Parties are still afforded the opportunity to seek legal advice about the proceeding at any time prior to the decision. This may be relevant where fairness to a party may dictate that they be allowed to provide written submissions to the Development Tribunal; e.g. because of a physical or mental disability. In all instances, the Development Tribunal is bound to ensure a right to natural justice and that parties are given a reasonable opportunity to most efficiently present a person's case.
>
> The Planning and Development (Planning Court) Bill 2015 continues the ability for decisions of the Development Tribunals to be appealed in the Planning and Environment Court on issues based on points of law or jurisdiction.[334]

Committee comment

The committee considers that given the nature of development tribunals and the effectiveness of the current process, clause 201 is appropriate in the circumstances. To this end, the committee also notes that parties may still obtain legal advice to assist them during the proceedings.

Clause 232

Clause 232 enables a local government to regulate development for a material change of use for a 'party house'.

Pursuant to clause 232(2)(a)-(c) a party house is defined as a residential dwelling that is used, for a fee, to provide accommodation or facilities for guests if:

- all or part of the dwelling is regularly used by guests for parties (such as bucks nights, hens nights, raves, or wedding receptions)
- the accommodation or facilities are provided for a period of less than 10 days
- the owner of the dwelling does not occupy the dwelling during that period.

[333] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 29.

[334] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, pp 9-10.

Pursuant to clause 232(3)(a)-(c) a planning scheme, or temporary local planning instrument of a local government may:

- state that a material change of use for a party house is assessable development in all or part of the local government area
- include assessment benchmarks for a material change of use for a party house
- identify all or part of the local government area as a party house restriction area.

The explanatory notes provide further information as to the intention of the provision:

> The clause is intended to enable local government to regulate party houses as a specific land use in planning schemes. This is because, from a land use planning perspective, it was never envisaged that a residential dwelling would be used in such a way that the primary use of the premises is more consistent with an event venue rather than residential accommodation.
>
> The clause enables a planning scheme or TLPI to state that a material change of use for a party house is assessable development in all or part of the planning scheme area. A planning scheme or TLPI may include assessment benchmarks for assessing development for a material change of use for a party house. It is envisaged that since the party house use may be similar to other land uses for the provision of accommodation, entertainment, functions and receptions, a party house development assessment may be informed by those development assessment frameworks. However, this is a matter for local government consideration and determination.
>
> The clause also enables a local government to identify a party house restriction area. The clause clarifies that the use of a residential dwelling in the area as a party house is not, and has never been, a natural and ordinary consequence of an MCU for a residential dwelling as part of the residential dwelling development.[335]

Clause 232 is a potential breach of section 4(2)(a) of the LSA as to whether sufficient regard has been given to the rights and liberties of individuals. In this instance a person may be deemed to have unlawfully established a party house and therefore committed an offence, even though the use may have been lawful at the time the party house was established. Further, the definition may capture activities that resemble those of a party house which is acknowledged in the explanatory notes:

> In relation to the definition of party house in the repealed Act, the definition may potentially capture more activities than intended, or may be inconsistently applied across local government areas. However, the purpose of the provisions is to empower local government to regulate the use in a way that is relevant to the issues within its local area.[336]

The explanatory notes justify the provision as follows:

> In relation to the party house restriction area, the Bill provides that the use of a residential dwelling in the area is taken not to include, and to never have included, the use of the premises as a party house. The purpose of the party house restriction area is to clarify that, from a land use planning perspective, it was never intended that a residential dwelling includes, or is an equivalent land use as, a premises used as a venue function. These are two separate land uses and serve different purposes. The purpose of the party house restriction area is not to remove development rights.
>
> The effect of the party house restriction area is that the carrying out of a party house use becomes an unlawful use and therefore an offence, even though the use may have been lawful at the time it was carried out. There may be some rare instances in which a residential dwelling as part of a planning scheme definition has an existing lawful right to operate as a party house. Should such circumstances exist, these will be made unlawful if that residential dwelling falls within a party house restriction area. Local governments are better positioned to identify if any residential dwelling includes an existing lawful right to operate as a party house. Where an existing residential dwelling

[335] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, pp 146-147.
[336] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 14.

has an approval to operate other activities, for example, a restaurant, this approval would remain in place.[337]

Committee comment

The committee is satisfied that any potential breach of section 4(2)(a) of the LSA is justified in the case of clause 232.

Onus of proof

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the bill does not reverse the onus of proof in criminal proceedings without adequate justification.

Summary of provisions

Clause 181(1) provides that an executive officer of a corporation commits an offence if:

- the corporation commits an offence against an executive liability provision; and
- the officer did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

Pursuant to clause 181(2) a court must consider the following when deciding whether things done or omitted to be done by the executive officer constitute reasonable steps pursuant to subsection (1)(b):

- whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence against the executive liability provision; and
- whether the officer was in a position to influence the corporation's conduct in relation to the offence against the executive liability provision; and
- any other relevant matter.

Clause 181(3) provides that an executive officer may be proceeded against for, and convicted of, an offence against subsection (1), whether or not the corporation has been proceeded against for, or convicted of, the offence against the executive liability provision.

Pursuant to clause 181(5), an executive liability provision includes the following provisions: 159 (Carrying out prohibited development); 160 (Carrying out assessable development without permit); 161 (Compliance with development approval); 162 (Unlawful use of premises); 163(7) (Refusal of development application); 165(5) (Contravention of an enforcement notice); 169 (Application in response to show cause or enforcement notice); 173(4) (Contravention of enforcement order); 177(7) (Enforcement Orders).

The explanatory notes provide the following rationale for the inclusion of executive liability:

> The executive liability (standard) provisions are provided in the bill for the following reasons:
>
> - committing these offences would have the potential to result in significant public harm, including environmental harm or injury to persons;
> - the offences are not in relation to simple day to day operations of the business, which the director may have no involvement in;
> - there are reasonable steps a director could take in order to ensure compliance by the corporation;

[337] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 14.

- liability of the corporation on its own may not sufficiently promote compliance; for example, if the corporation is a shelf company with no assets, and the offence results in a risk to the environment or public health and safety that has to be rectified, it may be justifiable to prosecute the director; and
- the penalties applying to these offences are significant.[338]

Section 4(3)(d) of the LSA provides that legislation should not reverse the onus of proof without adequate justification.[339] In this instance clauses 181(1)(a) & (b) allow for a potential breach of section 4(3)(d) of the LSA by stipulating that an executive officer of a corporation commits an offence if the corporation commits an offence against a liability provision and further, if the executive officer did not take reasonable steps to ensure the corporation did not engage in the conduct which constitutes the offence.

Clause 181(2) does allow a court to look at an executive officer's conduct by providing for matters a court must consider when determining executive liability such as an officer's influence in the corporation's conduct and whether the officer knew, or ought reasonably to have known, of the corporation's conduct constituting the offence in relation to the executive liability provision.

Generally, a person cannot be guilty of an offence unless the person is a party to the offence. It is also objectionable even if the law provides defences such as the executive officer taking reasonable steps to ensure compliance or was not in a position to influence the corporation's conduct.[340] The former SLC considered clauses in relation to executive liability and while it acknowledged the difficulties in determining liability in certain circumstances, as a general rule it did not approve of such provisions.[341]

The explanatory notes address the FLP and argue that the provisions do not in fact reverse the onus of proof:

> The provisions proposed do not reverse the onus of proof; they do not require a director or executive officer to prove that he or she did not authorise or permit the conduct of the corporation that constituted the corporation's offence. Where corporations are involved in such offences, it is appropriate that there is effective accountability at a corporate level. Further the process of development of a particular site can involve many individuals acting in a representative or contractual capacity. It would not be appropriate to prosecute only the individual directly responsible for the offence, if that person was acting under instructions of another.

As the Bill does not propose to reverse the onus of proof, the fundamental legislative principles are not infringed.[342]

Committee comment

The committee notes the provisions contained in clause 181 in relation to executive liability. The committee considers the justification provided in the explanatory notes, in particular whether the matters a court must take into account when determining executive liability are adequate in the circumstances.

Retrospectivity

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of

[338] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 120.
[339] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 40.
[340] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 41.
[341] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 41.
[342] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 120.

individuals depends on whether, for example, the legislation adversely affects rights and liberties, or imposes obligations, retrospectively.

Clause 273(1) provides for a transitional regulation making power which enables a regulation to make provision for any matter necessary to allow or facilitate the transition of the repealed Act to the commencement of the bill or the Planning Court bill, or anything that the bill does not make sufficient provision for.

Pursuant to clause 273(2) a transitional regulation may have retrospective operation to a time that is no earlier than when the old Act is repealed. Pursuant to clause 273(4) a transitional regulation will stop having effect 5 years after the old Act is repealed.

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The former SLC viewed as objectionable those transitional regulation-making provisions which were general in nature and allowed for provision about any subject matter, including those that should be dealt with by an Act as opposed to subordinate legislation.[343] In this instance clause 273(1) provides broad powers to use a transitional regulation for 'any matter necessary' to allow for the transition from the repealed Act to the commencement of the bill and the Planning Court bill.

The explanatory notes provide the following justification for the provision:

> The Bill provides that this type of regulation expires five years after the repealed Act is repealed. This is longer than the period usually provided for under legislation with transitional arrangements. The period of five years is established to recognise that implementation of new or amended regulatory arrangements in plan-making usually take a number of years to flow through to instruments and assessments.
>
> Expiry at any lesser period would compromise the effectiveness of these transitional regulatory arrangements, and expose local councils to deciding development applications based on planning scheme provisions that do not reflect contemporary requirements; or going through expensive and lengthy processes to update their schemes to align with the new planning framework. Detriment may also accrue to the prospective developer required to comply with onerous, expensive and out-dated plan requirements.
>
> The regulation can operate retrospectively, but because the changes to planning schemes occur over a longer period, the likelihood of unmanageable or unexpected adverse impact is low. The extent of this delegation of legislative power is appropriate in the circumstances and provides the level of detail necessary to ensure the provisions of the Bill are workable.*[344]*

Committee comment

As recommendations 4-6 were not supported by the majority of the committee, the committee offers no comment in relation to this matter.

Immunity from proceedings

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers immunity from proceeding or prosecution without adequate justification.

Part 4 of the Bill deals with urban encroachment. Clause 222 provides that the purpose of Part 4 is to protect the existing uses of particular premises from the effects of encroachment by newer uses in

[343] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 160.

[344] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 13.

the vicinity of the premises. Clause 222(c) provides for the restriction of particular proceedings in connection with emissions coming from premises that are registered.

In carrying out Part 4's purpose, clause 230 prevents an affected person from taking civil proceedings for nuisance, and particular criminal proceedings in relation to a local law, against a registered premises.

Clause 230(2) provides that despite any other Act, an affected person may not undertake civil proceedings for nuisance, or criminal proceedings relating to a local law, against any person in relation to a claim if the following have been complied with for the relevant act:

- the development approval for the registered premises;
- any code of environmental compliance applying to the relevant act.

Pursuant to clause 230(3) the section does not apply if:

- a new or amended authority starts to apply for the registered premises; and
- the new or amended authority authorises greater emissions than the original authority of the same type for the premises.

The explanatory notes provide the following commentary as to the rationale behind the clause:

> The clause is intended to protect registered premises from civil proceedings for nuisance, and particular criminal proceedings in relation to an emissions-based nuisance complaint. The clause applies to a nuisance complaint for an activity undertaken at the registered premises, which is unreasonable or likely interference with an environmental value. However, the clause only applies to an existing use of premises that has a development approval for an activity that involves the emission of aerosols, fumes, light, noise, odour, particles or smoke.
>
> An affected person cannot take civil or criminal proceedings relating to a local law in relation to the claim against registered premises, where the relevant act complies with the development approval for the registered premises or any code of environmental compliance. However, the clause does not limit the right to take action for other contraventions under the Environmental Protection Act 1994 (EPA) or other Act.[345]

Pursuant to section 4(3)(h) of the LSA, legislation should not confer immunity from proceeding or prosecution without adequate justification. The OQPC Notebook states "a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State".[346]

The former SLC stated that one of the FPL is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. Notwithstanding that position, the SLC also recognised that conferral of immunity is appropriate in certain situations.[347]

In relation to clause 230, the explanatory notes provide the following justification for the provision:

> Under the urban encroachment provisions, no criminal proceedings under local laws or civil nuisance proceedings may be taken against the registered premises with respect to emission of aerosols, fumes, noise, light, odour, particles or smoke, provided the premises is operating within its licence conditions, development approval, or code of environmental compliance. The protection is provided

[345] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 145.
[346] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 64.
[347] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 64; Alert Digest 1998/1, p 5.

for a limited period, after which the registered premises is required to renew the registration if continued protection is required.

The proposed urban encroachment provisions require an owner or owner's agent of premises to inform intending lessees of new intensified development about the limitation of their rights. This requirement will apply to any agreement for the leasing or renting of new residential or commercial premises in an affected area. Where this requirement is not met, a penalty may be applied to the owner or owner's agent of premises. The application of a penalty is justified because the occupier's civil nuisance and criminal complaint rights will be affected by the provisions.

The provisions are justified as the owner will initially be made aware of the provisions through the notification on all titles within the affected area by the registered premises. Existing owners will be informed of the legislation, can read the Act and those with letting agreements will be aware of the obligation to inform new tenants. A new owner will see the notice on title, refer to the legislation and be informed of their obligation if they are intending to enter into a letting agreement.

The intent of the urban encroachment provisions of the Bill is to ensure existing lawfully operating uses (registered premises) subject to encroaching development, and the encroaching development, are able to coexist.[348]

Committee comment

The committee considers the justification provided in relation to clause 230 is adequate.

3.13.2 Institution of Parliament

Section 4(2)(b) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to the institution of Parliament. Sufficient regard to the institution of Parliament depends on whether, for example, the legislation allows the delegation of legislative power only in appropriate cases and to appropriate persons.

Summary of provisions

Clause 21 provides that the section applies if the Minister considers a local government should take an action in relation to an existing or proposed local planning instrument, or a proposed amendment of a local planning instrument for the following reasons:

(a) to ensure the instrument is consistent with the required contents; or
(b) to protect, or give effect to, a State interest.

After the Minister considers the notice provided under clause 21(2), pursuant to clause 21(3) the Minister must decide:

(a) to direct the local government to take the action mentioned in the notice;
(b) to direct the local government to take other action; or
(c) not to direct the local government to take the action.

Pursuant to clause 21(9) a local government does not incur any liability for anything the local government does, or does not do, in complying with a direction by the Minister.

Clause 21 provides the Minister with the power to issue directions to a local government to take action with respect to a proposed local planning instrument which raises the question as to whether this is an appropriate delegation of legislative power.

Section 4(4)(a) of the LSA provides that a Bill should allow the delegation of legislative power only in appropriate cases and to appropriate persons. As noted in the Office of the Queensland Parliamentary Counsel FLP Notebook, this matter is concerned with the level at which delegated legislative power is used.

[348] Planning and Development Bill (Planning for Prosperity) Bill 2015, explanatory notes, p 13.

Generally, the greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.

The explanatory notes provide the following justification for the clause:

> The Minister's powers of direction are designed to put into place the policy decisions of executive government, and are intended to protect or give effect to a State interest. These powers are intended to allow a more proactive and management-based approach to Ministerial involvement in matters of State interest.
>
> The Minister's powers are not intended to be used routinely or often. However, occasions may arise where a State interest (such as an important environmental value) could be severely affected by the implementation of a development approval. In these situations, exercising these reserve powers allows the Minister to redress what otherwise may affect State interests.[349]

Committee comment

The committee notes that it is intended that the Ministerial power provided by clause 21 be used sparingly and in circumstances where a State interest maybe adversely affected. Given the justification provided, the committee considers that appropriate regard has been given to fundamental legislative principles in this instance.

Scrutiny of the Legislative Assembly

Section 4(2)(b) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to the institution of Parliament. Sufficient regard to the institution of Parliament depends on whether, for example, the legislation sufficiently subjects the exercise of a delegated legislative power (instrument) to the scrutiny of the Legislative Assembly.

Appropriate delegation of legislative power

Several clauses in the Bill allow for matters to be implemented by regulation. These include clauses 9, 14, 15, 16, 23, 29, 30, 38, 39, 40, 43, 48, 49, 50, 51, 57, 60, 65, 66, 67, 73, 77, 103, 105, 107, 109, 110, 111, 112, 149, 180, 187, 189, 191, 196, 217, 223, 227, 231, 239, 240, 243 & 273.

The widespread use of regulations is acknowledged in the explanatory notes which state:

> The Bill provides for certain matters currently provided for in the repealed Act to be instead prescribed under the Regulation. The resulting changes will be extensive. In particular, the Bill allows the Minister and the chief executive to make subordinate legislation and rules which establish the development assessment process, including for the criteria for deciding an application and how a decision on an application will be made.
>
> The development assessment process provided for in subordinate legislation, rules and guidelines will be generally consistent with the current planning and development assessment framework. These processes are detailed in nature and are better attended to in other places, such as in subordinate legislation or subsidiary instruments or guidance, rather than the Bill. This frees the Bill of unnecessary detail, which assist its clarity and enables these processes to be more responsive; more easily adapted to changing circumstances when the need arises.
>
> The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment, Parliamentary scrutiny and disallowance.[350]

[349] Planning and Development Bill (Planning for Prosperity) Bill 2015, explanatory notes, p 7.

[350] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 12.

Examples of the use of Regulations

Clause 23

Clause 23(5) provides an example where a regulation may prescribe the following in relation to a superseded planning scheme request:

- that the request must be made in an approved form;
- the information that must be given with the request;
- how the local government may set a fee for considering the request; the period for deciding the request, and how the period may be extended;
- when and how a local government must notify the person making the request of the local government's decision; and
- any other matter related to deciding the request.

Clause 48

The reliance on regulations can also be seen at clause 48(3) where a regulation may prescribe development for which public notification is required, and development for which a local categorising instrument may not require public notification.

Clause 231

Clause 231 provides that a regulation may prescribe additional matters related to Part 4 (Urban Encroachment) of the Bill. The regulation may include, but is not limited to, requirements or processes relating to the making or deciding of an application to register premises, or the requirements relating to the notification of registered premises.

Potential FLP issues

Appropriate delegation of legislation

Pursuant to section 4(4)(b) of the *Legislative Standards Act 1992* a Bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly. Further, section 4(5)(c) of the *Legislative Standards Act 1992* provides that subordinate legislation should contain only matters appropriate to that level of legislation.

The OQPC Notebook states "For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation". [351]The matter involves consideration of whether the delegate may only make rules that are subordinate legislation, and thus subject to disallowance.

"The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when the power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny".[352] The SLC commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the SLC considered:

[351] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 154.
[352] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.

- The importance of the subject dealt with;
- The practicality or otherwise of including those matters entirely in subordinate legislation;
- The commercial or technical nature of the subject matter;
- Whether the provisions were mandatory rules or merely to be had regard to.[353]

The SLC considered that despite an instrument not being subordinate legislation, if there is a provision requiring tabling and providing for disallowance there is less concern raised.[354]

The SLC also determined that if a document that is not subordinate legislation is intended to be incorporated into subordinate legislation, then an express provision should require the tabling of the document at the same time as the subordinate legislation.[355] Similar considerations apply when a non-legislative document is required to be approved by an instrument of subordinate legislation.[356]

Committee comment

As recommendations 4-6 were not supported by the majority of the committee, the committee offers no comment in relation to this matter.

Clause 15

Clause 15(1) states that the Minister must make a statutory instrument that contains rules and guidelines about the process for making and amending a local planning instrument.

Pursuant to clause 15(1)(a) the instrument is required to contain guidelines about the matters that must be considered when making a notice about the process for making or amending a planning scheme. The instrument must also contain the rules that establish the processes for amending a planning scheme and for making or amending a planning scheme policy or temporary local planning instrument (TLPI).

Pursuant to clause 15(2) the Minister's rules and guidelines come into effect when a regulation applies these rules and guidelines.

The explanatory notes provide the following justification for the clause:

> The plan-making and amendment processes provided for in rules and guidelines will be generally consistent with the current planning framework provided for in the repealed Act. These processes are detailed in nature and subject to changing circumstances as needs arise. As such these are better attended to in other places, such as in subsidiary instruments or guidance, enabling these processes to be more responsive. This in turn frees the Bill of unnecessary detail, which assists its clarity.
>
> The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment and Parliamentary scrutiny and disallowance.[357]

Clause 65

Clause 65 states that the Minister must make development assessment rules for the development assessment process, including the following:

[353] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.
[354] Alert Digest 2004/3, pp 5-6, paras 30-40; Alert Digest 2000/9, pp 24-25, paras 47-56.
[355] Alert Digest 2001/8, p 16, para. 7; Alert Digest 1996/5., p 9, para 3.8.
[356] Alert Digest 2003/11, p 23, paras 33-40.
[357] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 12.

- how notification is to be carried out for applications for which public notification is required; and
- the consideration of properly made submissions; and
- the effect on the development assessment process of the assessment manager taking action under the *Native Title Act 1993* (Cwlth), part 2, division 3.

Pursuant to section 65(2) the development assessment rules may provide for:

- circumstances under which a development application is taken to be properly made for section 46(6); or
- the effect on an application of the expiry of a time limit under, or because of a contravention of, the rules, including, for example, the lapsing of the application; or
- the revival of lapsed applications; or
- the standard conditions for a deemed approval; or
- any matter under part 6, divisions 2 to 4.

Pursuant to section 65(3) development assessment rules do not have effect unless applied by regulation however they are not subordinate legislation pursuant to section 65(4).

The explanatory notes provide the following comment on the provision:

> Under the Bill, the decision about whether a particular use, or development type falling outside of certain parameters, should be subject to public notification will continue to be based on factors such as the scale, type and location of the development, its potential for impact on the area in which it will be located, and the extent to which the proposed development falls within the scope of the planning intent of the area in which the development will be located. As under the repealed Act, this decision will be made predominantly by local governments in their role as assessment managers, through the preparation of their planning schemes. This approach continues to provide for local governments to determine which development applications are to be publicly notified, in the context of their planning for local circumstances in the local government area.
>
> Unlinking public notification from the underlying category of assessment has the practical effect of encouraging a more risk based approach to allocating levels of assessment. However, it may also have the effect of potentially limiting the circumstances in which a development application must be publicly notified and potentially lessening the opportunity for the public to become aware of a proposed development. This may result in fewer submissions on development applications, and fewer development applications and approvals being subject to appeal by interested parties other than the applicant.
>
> The Bill does not aim to limit or restrict public involvement in the planning framework and it does not limit third party appeal rights. Where a development application is required to be publicly notified, any person may make a submission on the development application. The Bill will not limit the circumstances in which a submitter may appeal a development decision, or a condition of an approval.[358]

However, the explanatory notes concede that the rules are a statutory instrument and not subordinate legislation.

> The development assessment rules are not subordinate legislation but they are a statutory instrument made by the Minister under the Bill. The inclusion of detailed process in the development assessment rules rather than the Bill assists with clarity and ensures the Minister can more easily adapt the rules to address emerging circumstances as the need arises. However, the

[358] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, pp 5-6.

clause clarifies that the development assessment rules and any amendment of the rules do not have effect until they are approved under the Regulation.[359]

Clause 239

Pursuant to clause 239(1)(a)&(b) the Minister or chief executive may make guidelines about the matters to be considered by a person performing a function or exercising a power under the Bill, or for any other matter related to the administration of the Act.

Clause 239(2) provides that the Minister or chief executive must consult with the persons or entities the Minister or chief executive considers appropriate, before making a guideline. The Minister or chief executive must notify the making of a guideline by a notice published in the gazette, pursuant to clause 239(3).

Potential FLP issues

Appropriate delegation of legislation

Section 65(2) provides that the development assessment rules for the prescribed matters are made at the discretion of the Minister. Further, while the rules are applied by regulation they are not subordinate legislation pursuant to section 65(4). Similarly, clause 15 provides that the Minister must make a statutory instrument that contains rules and guidelines about the process for making and amending a local planning instrument. Clause 239 allows for the widespread use of guidelines including for any matter in relation to the administration of the Act.

It is arguable that sections 15, 65 & 239 are in breach of section 4(4)(b) of the *Legislative Standards Act 1992* whereby a Bill should sufficiently subject the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.

The OQPC Notebook states "For Parliament to confer on someone other than Parliament the power to legislate as the delegate of Parliament, without a mechanism being in place to monitor the use of the power, raises obvious issues about the safe and satisfactory nature of the delegation".[360] The matter involves consideration of whether the delegate may only make rules that are subordinate legislation, and thus subject to disallowance.

"The issue of whether delegated legislative power is sufficiently subjected to the scrutiny of the Legislative Assembly often arises when the power to regulate an activity is contained in a guideline or similar instrument that is not subordinate legislation and therefore is not subject to parliamentary scrutiny".[361] The SLC commented adversely on provisions allowing matters, which might reasonably be dealt with by regulation, to be processed through some alternative means that does not constitute subordinate legislation and therefore is not subject to parliamentary scrutiny. In considering the appropriateness of delegated matters being dealt with through an alternative process, the SLC considered:

- The importance of the subject dealt with;
- The practicality or otherwise of including those matters entirely in subordinate legislation;
- The commercial or technical nature of the subject matter;
- Whether the provisions were mandatory rules or merely to be had regard to.[362]

[359] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 66.
[360] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 154.
[361] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.
[362] OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 155.

The SLC considered that despite an instrument not being subordinate legislation, if there is a provision requiring tabling and providing for disallowance there is less concern raised.[363]

The SLC also determined if a document that is not subordinate legislation is intended to be incorporated into subordinate legislation, then an express provision should require the tabling of the document at the same time as the subordinate legislation.[364] Similar considerations apply when a non-legislative document is required to be approved by an instrument of subordinate legislation.[365]

The explanatory notes address the use of guidelines and provide the following justification:

> The Bill allows the Minister to make rules and guidelines which establish the process for making and amending a local planning instrument.
>
> The plan-making and amendment processes provided for in rules and guidelines will be generally consistent with the current planning framework provided for in the repealed Act. These processes are detailed in nature and subject to changing circumstances as needs arise. As such these are better attended to in other places, such as in subsidiary instruments or guidance, enabling these processes to be more responsive. This in turn frees the Bill of unnecessary detail, which assists its clarity.
>
> The Regulation remains a statutory instrument with legal effect. The rules and guidelines will be approved under the Regulation and like all subordinate legislation, will be subject to portfolio committee examination. Any amendments to the Regulation will be subject to the normal requirements of the Statutory Instruments Act 1992 for regulatory impact assessment and Parliamentary scrutiny and disallowance.[366]

Committee comment

The committee notes that with respect to clauses 15 and 65 the guidelines will be applied by subordinate legislation which is subject to parliamentary scrutiny and disallowance measures. Clause 239 requires a Minister's guideline to be published by gazette notice with prior consultation to take place. In view of the parliamentary scrutiny and consultation which must occur, the committee considers that sufficient regard has been given fundamental legislative principles with respect to these clauses.

3.14 Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015

3.14.1 Rights and liberties of individuals

Power to enter premises

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

Clause 512 amends section 136 of the *State Development and Public Works Organisation Act 1971* to provide that an *authorised person,* in connection with an *approved activity,* may amongst other things, enter upon and temporarily occupy any land.

New section 512(6) provides that an authority in writing from the Coordinator-General is taken to satisfy any requirement for the consent of the land's owner to enter upon the land.

[363] Alert Digest 2004/3, pp 5-6, paras 30-40; Alert Digest 2000/9, pp 24-25, paras 47-56.
[364] Alert Digest 2001/8, p 16, para. 7; Alert Digest 1996/5., p 9, para 3.8.
[365] Alert Digest 2003/11, p 23, paras 33-40.
[366] Planning and Development (Planning for Prosperity) Bill 2015, explanatory notes, p 12.

Legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.[367]

The OQPC handbook provides that this principle supports a long established rule of common law that protects the property of citizens. Power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate.

The SLC conceded that strict adherence to the principle may not be required if the premises were business premises operating under a licence or premises of a public authority.

The SLC's chief concern when considering such matters was the range of additional powers that become exercisable after entry without a warrant or consent.[368]

The explanatory notes for this bill state that:

> … the amendments give sufficient regard to landowner's rights and liberties by requiring that the landowner be notified in writing of the proposed entry and/or occupation of their land and by providing compensation for landowners for any damage suffered as a result from the entry to their land.[369]

The explanatory notes also state that prior to authorising persons to enter land, the Coordinator-General will consider, in detail, the nature of the works to be carried out. It is also noted that any works to be carried out subsequent to entry upon the land will be subject to any required planning approvals.

Committee comment

In light of the safeguards outlined above, and the fact that the land in question is unlikely to be residential property, it is considered that, on balance, clause 512 has sufficient regard to the rights and liberties of land owners.

It is also noted that clause 512 does not introduce a new power to enter upon land, but broadens the application of the existing power found at section 136 of the *State Development and Public Works Organisation Act 1971*.

Clear and precise

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

Clause 337 purports to amend section 33(2)(a) of the *Petroleum and Gas (Production and Safety) Act 2004*, however, the correct reference is to the Note for section 33(2) (there is no section 33(2)(a)).

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.[370]

Committee comment

The committee notes the minor drafting error in clause 337 as identified above.

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[367] *Legislative Standards Act 1992*, section 4(3)(e).

[368] Alert Digest 2004/5, p 31, paras. 30-36; Alert Digest 2004/1, pp 7-8, paras 49-54; Alert Digest 2003/11, pp 20-21, paras 14-19; Alert Digest 2003/9, p 4, para. 23 and p 31, paras 21-24; Alert Digest 2003/7, pp 34-35, paras 24-27; cited in OQPC, Fundamental Legislative Principles: The OQPC Notebook, p 45.

[369] Planning and Development (Planning for Prosperity – Consequential Amendments) and Other Legislation Amendment Bill 2015, explanatory notes, p. 4.

[370] *Legislative Standards Act 1992*, section 4(3)(k).

3.15 Planning and Development (Planning Court) Bill 2015

3.15.1 Rights and liberties of individuals

Clear and precise

Section 4(2)(a) of the LSA provides the principles of FLPs include requiring that legislation has sufficient regard to rights and liberties of individuals. Sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise way.

Summary of provision

Clause 11 contains new subsection 11(3) which states that a person cannot start a declaratory proceeding for a matter under the Planning Act, chapter 3, part 7, division 2 or 4.

The Planning Act referred to is the *Planning and Development (Planning for Prosperity) Act 2015* (see the Schedule 1 Dictionary), currently before the House as a bill.

The Planning and Development (Planning for Prosperity) Bill 2015 does not contain a division 4 under chapter 3, part 7.

The explanatory notes for clause 11 (p.17) reinforce that the reference to division 4 is an error, stating "Declaratory proceedings cannot be started for a matter relating to the exercise of the Minister's powers to make a direction under chapter 3, part 7, division 2 of the Planning and Development (Planning for Prosperity) Bill 2015", with no reference being made to the division 4 that is referenced in proposed section 11(3) of the Planning Court Bill.

Potential FLP issues

Legislation should be unambiguous and drafted in a sufficiently clear and precise way.

Committee comment

The committee notes the minor drafting error in clause 11 as identified above.

3.16 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the bill, E&C bill, the Consequential Amendment bill, and the private member's bills. The Notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the bills' aims and origins.

With respect to the bill and the Planning and Development (Planning for Prosperity) Bill 2015, it would be helpful for stakeholders if the explanatory notes identified the specific clause(s) when discussing FLPs.

Michael Hart MP State Member for Burleigh

7 April 2016

Mr Jim Pearce
Chairperson
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
Brisbane Qld 4000

Mr Pearce

RE: - Planning Bills 2015

We, the LNP members of the Infrastructure, Planning and Natural Resources Committee, do not agree with the recommendations in the committee's report no. 23 that the Planning Bill 2015, the Planning (Consequential) and Other Legislation Amendment Bill 2015, and the Planning and Environment Court Bill 2015 (the government bills) be passed, and the Planning and Development (Planning for Prosperity) Bill 2015, the Planning and Development (Planning for Prosperity – Consequential Amendments) and other Legislation Amendment Bill 2015, and the Planning and Development (Planning Court) Bill 2015 (the private member's bills) not be passed.

We have enclosed our dissenting report outlining the reasons for our position. We will elaborate on our position in our second reading speeches.

Yours sincerely

Michael Hart
Member for Burleigh

Lachlan Millar
Member for Gregory

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We, the LNP members of the Infrastructure, Planning and Natural Resources Committee, do not agree with the recommendations in the committee's report no. 23 that the Planning Bill 2015, the Planning (Consequential) and Other Legislation Amendment Bill 2015, and the Planning and Environment Court Bill 2015 (the government bills) be passed, and the Planning and Development (Planning for Prosperity) Bill 2015, the Planning and Development (Planning for Prosperity – Consequential Amendments) and other Legislation Amendment Bill 2015, and the Planning and Development (Planning Court) Bill 2015 (the private member's bills) not be passed. This dissenting report outlines the reasons for our position. We will elaborate on our position in our second reading speeches.

Private member's bills

The private member's bills were introduced on 4 June 2015,[1] some five months prior to the introduction of the government bills.[2]

There are many commonalities between the government bills and the private member's bills. The explanatory notes to the Planning Bill 2015 stated:

> From feedback received at the local government and industry workshops and through public submissions, it was clear that stakeholders were broadly supportive of many of the key directions and of the continuation of the legislative reform agenda.[3]

Key differences between the private member's bills and the government bills include the purposes of the proposed Acts, compensation for natural hazards, and costs in the Planning and Environment Court.[4]

In his introduction speech on the Planning and Development (Planning for Prosperity) Bill 2015 (private member's bill), Mr Nicholls said that the bill 'is the result of a comprehensive consultation process that will get the process moving again in Queensland'.[5] He further stated:

> This legislation keeps the momentum that the industry wants to see. This legislation strengthens housing and construction as one of the main pillars of the Queensland economy. This legislation reforms and simplifies planning and this will have a positive economic impact and a positive impact for jobs in Queensland and it is important we get on with the job.
>
> If this government is truly committed to growing the economy and creating jobs it will work constructively with the LNP through the committee process to ensure we can deliver Australia's most efficient planning system right here in Queensland. ...[6]

Consultation

After the LNP government announced in June 2013 that it would replace the *Sustainable Planning Act 2009*, it commenced 'a significant process of engagement with key stakeholders'.[7]

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1 Queensland Parliament, Record of Proceedings, 4 June 2015, pp 1132- 1139.

2 The government's bills were introduced on 12 November 2015: Queensland Parliament, Record of Proceedings, 12 November 2015, pp 2882-2886.

3 Planning Bill 2015, explanatory notes, p 12.

4 Department of Infrastructure, Local Government and Planning, correspondence dated 23 November 2015, attachment.

5 Queensland Parliament, Record of Proceedings, 4 June 2015, pp 1126-1134.

6 Queensland Parliament, Record of Proceedings, 4 June 2015, p 1130.

7 Queensland Parliament, Record of Proceedings, 4 June 2015, p 1127.

The Planning Institute of Australia commended the consultation undertaken by the Department of State Development, Infrastructure and Planning in the lead up to the introduction of the former government's planning bills:

> We note that many members of PIA have been actively engaged with the focus groups and in doing so have helped shape the current direction of planning reform in Queensland. PIA provided comments on the confidential draft Planning for Prosperity Bill and we note that many suggestions in that submission have been considered and reflected in the revised Bill, or are yet to be revealed in the details of the supporting regulation.[8]

Mackay Regional Council also commented on the planning reform consultation:

> Mackay Regional Council extends congratulations to government for the open consultation, availability of senior staff and general readiness to receive feedback during the planning reform process to date. The level of participation has been unprecedented and will serve as a benchmark for future changes in State legislative frameworks.[9]

In November 2014, the Member for Callide introduced a suite of planning bills – the Planning and Development Bill 2014, the Planning and Development (Consequential) and Other Legislation Amendment Bill 2014, and the Planning and Environment Court Bill 2014 - which lapsed with the end of the 54th Parliament. The private member's bills largely mirror those bills.[10]

Development

The purpose of the proposed Planning and Development (Planning for Prosperity) Act is to facilitate Queensland's prosperity, including through ecologically sustainable development that balances economic growth, environmental protection and community wellbeing.[11] The Property Council of Australia expressed support for the purpose because it uses more positive language about development than the current Act and it 'provides a clear overview of the legislation's intention to facilitate development and focus on the triple bottom line benefits it can bring to a community'.[12] The term 'ecological sustainability' as used in the government bills does not allow for this balance or a focus on the triple bottom line.

The likely positive impact of the private member's bills, if passed by the House, was commented on by some submitters.

The Master Builders, for example, submitted that it 'strongly supports planning reform that provides greater certainty and consistency of outcomes. The lack of certainty adds delay which in turn adds to the cost of development, impacting significantly on affordability'.[13] Master Builders continued:

> We commend you for a Bill that is logical and clear – a significant improvement on the existing *Sustainable Planning Act 2009*. A planning framework that is readily understood will go a long way towards providing certainty and consistency of outcomes.[14]

The Property Council of Australia submitted:

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8 Planning Institute Australia, private member's bills (PMB) submission 33, attachment, p 1.
9 Mackay Regional Council, PMB submission 43, attachment, p 1.
10 Queensland Parliament, Record of Proceedings, 4 June 2015, p 1127.
11 Planning and Development (Planning for Prosperity) Bill 2015, clause 3(1).
12 Property Council of Australia, PMB submission 16, p 7.
13 Master Builders, PMB, submission 24, p 1.
14 Master Builders, PMB, submission 24, p 1.

> Regarding the Planning Bill, the Property Council supports the work undertaken to streamline and simplify the legislation, and in doing so significantly decreasing its overall length.
>
> The Planning Bill is an easily navigable piece of legislation, with subtle changes in language from its predecessor – the *Sustainable Planning Act 2009* (SPA) – that will facilitate cultural change, and in doing so support better development outcomes.[15]

The Urban Development Institute of Australia stated:

> The package of private members Bills before the IPNRC involves sensible reforms premised on robust planning principles with the potential to deliver increased job creation, growth and diverse and affordable housing for all Queenslanders. Further, the Bills have the potential to deliver an improved planning culture, better planning schemes and improved planning and development outcomes that meet community expectations.
>
> The Institute and many other stakeholders have been involved in more than two years of good quality engagement with the Department on the topic of planning reform. The package of Bills reflect this two years of consultation and hard work. The Institute congratulates the Opposition for introducing these Bills into the Parliament ... .[16]

Terminology

A difference between the private member's bill and the Planning Bill 2015 is terminology used for the categories of assessment. Under the private member's bill, the terms 'standard' and 'merit' are used. Under the bill, the terms 'code' and 'impact' are used. Submitters were divided on which terms should be part of the planning legislation.

QELA, for example, considered that the categories of assessable development should be called standard and merit assessment rather than code and impact assessment because an assessment benchmark 'might be a different part of a planning scheme than a code, such as a strategic outcome' and therefore the name code assessment would be an inappropriate description.[17]

Townsville City Council stated:

> *If we have time, we would be happy to talk about three other key areas, one of which is levels of assessment. We know that was a key focus of consultation. It was code or impact, which is where it is currently settled, versus code or merit. Council has a view that we were pushing towards code or merit mainly because of some of the cultural outcomes that would change in terms of the preconceived ideas around development assessment and how that is managed.*
> At the moment, impact assessment denotes it is a negative commencement or starting point, whereas merit starts to change the perception about the benefits of the development.[18]

And Mackay City Council stated:

> Through our various submissions we did originally have a view that that terminology should not change, but through the reform process we have changed our view on that. We believe that a change does not matter either way and if it is going to assist in the culture then there is some reason to say that those names should change.[3]

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15 Property Council of Australia, PMB submission 16, p 3.

16 Urban Development Institute of Australia, PMB submission 6, p 1.

17 Queensland Environmental Law Association, submission 65, p 4.

18 Public hearing transcript, Townsville, 28 January 2016, p 7. See also, for example, Large Format Retail Association, submission 9, p 5.

[3] Public hearing transcript, Mackay, 29 January 2016, p 7.

We recognise that there are arguments for each pair of terms labelling the categories of development. Nevertheless, because of the positive connotations related to 'merit' and the negative connotations associated with the term 'impact', we are of the view that the planning legislation should use the terms 'standard' and 'merit' rather than retain the terms 'code' and 'impact'.

General discretion for the Court in relation to costs

In 2012, new costs rules were introduced under SPA to give the Planning and Environment Court general discretion in relation to making costs orders. These costs rules were carried over into the Planning and Development (Planning Court) Bill 2015. Before the reforms in 2012, each party ordinarily paid their own costs, except in specific circumstances, including where the court considered a party had brought a frivolous or vexatious proceeding.

The purpose of making costs at the discretion of the Court was to discourage the use of the court as a means of delaying or frustrating appropriate development outcomes, including deterring vexatious litigants or those looking to gain commercial advantage. These changes ensure that submitter appellants with legitimate and well considered grounds for the appeal. The costs rules are not designed to prevent parties with genuine disputes from bringing proceedings in the Court.[19]

Conclusion

In the second reading debate the Opposition will outline these and other issues we have with the changes made by the Government after they copied and pasted the Private Members Bill into a Bill of their own five (5) months after the Private Members Bill was tabled.

[19] Planning and Development (Planning Court) Bill 2015, explanatory notes p. 5.