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QELA, a not for profit organisation, consults with and educates interested professionals and government representatives about planning, development and environmental laws which apply, or are proposed to apply in Queensland. QELA provides a collegiate forum for multi-disciplinary interaction and collaboration.

13 July 2015

The Research Director
Infrastructure, Planning and Natural Resources Committee
Parliament House
George Street
BRISBANE QLD 4000

Email: ipnrc@parliament.qld.gov.au

Dear Director,

Submission about the Planning and Development (Planning for Prosperity) Bill 2015 (Qld) and Planning and Development (Planning Court) Bill 2015

Thank you for inviting the Queensland and Environmental Law Association (**QELA**) to make a submission about the above Bills (**Bills**) to the Infrastructure, Planning and Natural Resources Committee.

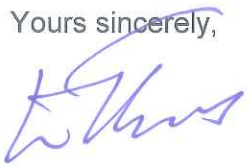
QELA is a non-profit, multi-disciplinary association. Its members include lawyers, town planners, and a broad range of consultants who represent and advise a miscellany of participants in the development industry.

QELA is aware that other stakeholders may have strong views about the policy objectives sought to be implemented by the Bills. QELA's membership is diverse and QELA's submissions do not address the desirability of the policy objectives underpinning the Bills such as the balance between economic and environmental drivers.

Over the past two years QELA has demonstrated its willingness to work collectively with the Department of Infrastructure, Local Government and Planning in relation to the planning reform activities pursued by the former State Government. Many of the matters raised in QELA's previous submissions remain relevant to the Bills and we enclose a table outlining those matters QELA raised in relation to the earlier Planning and Development Bill 2014 and Planning and Environment Court Bill 2014.

We thank you for the opportunity to make a submission about the Bills. Representatives of QELA would welcome the opportunity to discuss this submission in further detail, if required.

Yours sincerely,



James Ireland

President
Queensland Environmental Law Association

Planning and Development Bill 2014 - QELA Submission		
Issue No.	Clause Ref	Issue
1.	3	QELA supports the inclusion of a reference to ecologically sustainable development in the P&D Bill's purpose.
2.	7(4)(d)	Clause 7(4)(d) says that a TLPI applies instead of a planning scheme policy to the extent of any inconsistency. Clause 20(3) says that a TLPI may suspend or otherwise affect the operation of another local planning instrument. A local planning instrument is defined in clause 7(3) to include a planning scheme, a TLPI or a planning scheme policy. However, the hierarchy in clause 7(4) does not adequately deal with the relationship between a planning scheme and a TLPI, it only deals with the relationship between a planning scheme policy and a TLPI. The note to clause 7(4) attempts to deal with this issue. The note, while helpful, is not sufficient. Clause 7(4) should explicitly deal with the relationship between a TLPI and a planning scheme. It should state: "To the extent of any inconsistency between planning instruments- ... (d) a TLPI applies instead of a planning scheme or a planning scheme policy."
3.	14(2)	This provision has the potential to be problematic in its application and interpretation. It would require a user of every local planning instrument to read, not only the local planning instrument, but also the required contents and make a determination if the local planning instrument is inconsistent with the required contents. If a local planning instrument and the required contents are inconsistent, this should be a matter that is capable of being addressed through a Ministerial direction. The provision is directly contradictory to the purpose of the legislation to have an effective and efficient system of planning. Furthermore, the chief executive's involvement in plan making should alleviate this concern. Perhaps the solution to overcome the concern is to remove clause 14(2) but ensure that the guidelines referred to in clause 15(1) incorporate the required contents for the contents of local planning instruments under a regulation made under clause 14. Similarly clause 16(8) could be amended to ensure that Ministerial approval requires satisfaction that the planning scheme incorporates those required contents.

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		If the provision is to stand as currently drafted, an effective transitional provision would need to ensure that the provision does not apply to existing planning schemes.
4.	15	Clause 15(2) should read: "The Minister's rules and guidelines start to have effect when a regulation applies the rules and guidelines." That is, the words "and guidelines" should be inserted at the end of the clause.
5.	19(6)(c)	If a TLPI takes effect from a date prior to it being approved by the Minister, a person who undertakes development contrary to that TLPI in the period between the local government resolution and the Ministerial approval may be liable to prosecution for a development offence. The fact that the retrospectivity dates back to the date on which the local government at a public meeting resolves to give the TLPI or amendment to the Minister for approval does not ameliorate this concern. Making a TLPI retrospective may have unintended and unjust consequences for members of the public, who cannot be expected to read all minutes of every local government meeting prior to undertaking development. The justification provided at page 35 of the Explanatory Notes (ENs) for making TLPIs retrospective is not satisfactory. The ENs state that "this would only apply in very limited circumstances where the Minister is satisfied that immediate intervention was required". However, there is no such limitation in clause 16(6). Further, the ENs state the "local government resolution must be made at a public meeting to ensure that the decision to make the TLPI or amendment is transparent and publicly notified". This would require every person to review the minutes of every public meeting of every local government. Not all public meeting minutes are available on local government websites, and in some cases, the minutes are not released until they are confirmed at a subsequent meeting. Accordingly, the fact that the local government resolves to give a TLPI or amendment to the Minister at a public meeting does not make this information transparent or publicly notified.
6.	21(9)	The drafting of this subclause is unclear. The power of the Minister, under clause 21, is to direct a local government to take an action. The action may require the local government to "do" or "not do" something.

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		We suggest the clause should say: "A local government does not incur liability for anything the local government does in complying with a direction by the Minister to add something to or remove something from – (a) an existing or proposed local planning instrument; or (b) a proposed amendment of a local planning instrument." If clause 21(9) is amended to refer to "adding", as well as "removing" then there will also need to be consequential amendments to clauses 40(7)(b), 78(2)(e) and 84(2). It is also unclear whether the subclause excludes liability of the local government for the payment of compensation in circumstances where a person would be entitled to compensation under the P&D Bill.
7.	23(2)(b)	It is unclear why it is necessary to refer to a planning scheme policy being "replaced". There does not appear to be a process for this to occur elsewhere in the legislation.
8.	26	Clause 26(1)(c)(i) provides that if a claim for compensation relates to a public purpose change the local government may decide the claim by giving a notice of intention to resume (NIR) the affected owner's interest in the premises under section 7 of the *Acquisition of Land Act 1967* (ALA). The giving of a NIR may not, however, result in the interest being resumed and compensation paid. For example, a local government may issue a NIR and either decide not to proceed with the resumption or to allow the NIR to lapse. Further, the taking of the land may not be approved by the Governor in Council. In these situations, no compensation would be payable to the affected owner and the affected owner would be left without redress. Clause 26 needs to be amended to deal with the situation where the affected owner's interest in the premises is not ultimately resumed under the ALA.
9.	General	The removal of the right to request a hardship acquisition is not supported. In its place, the P&D Bill proposes a right for a person with an interest in designated land to request the Minister to repeal the designation. There are no appeal rights for any parties. The former hardship provisions are preferable. Those provisions gave a person with an interest, who claims to be suffering hardship, a defined process by which to be compensated for their hardship.

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		If the currently proposed provisions are retained, an appeal right against the Minister's decision should be included for both the person who made the request and the affected infrastructure provider.
Development assessment		
10.	40	Exemption certificates are supported and the matters raised by QELA in its earlier submission have been satisfactorily addressed. Two further matters arise in relation to the way QELA's earlier issues have been addressed : a) The content of standard planning and development certificates are dealt with in the draft access rules. A standard planning and development certificate should include all exemptions certificates given by the local government, whether or not they are in effect; b) The reference to a "notice withdrawing an exemption certificate" should be deleted, as clause 41 no longer provides for the withdrawal of an exemption certificate. The draft access rules also still refer to notices withdrawing an exemption certificate, which is no longer relevant.
11.	43	Clause 43(3) provides for the assessment manager to be a chosen assessment manager. The ability for a person to engage a chosen assessment manager for a development application that is subject to only standard assessment is supported. There are, however, concerns regarding the lack of machinery provisions in the P&D Bill about chosen assessment managers. The ENs refer, at page 60, to the prescribed assessment manager and the chosen assessment manager negotiating "service level agreements or any other administrative arrangements to ensure appropriate development outcomes". The chosen assessment manager will be an assessment manager (see the definition in Schedule 2) for the development application and have statutory rights and obligations as an assessment manager. The chosen assessment manager is not a delegate of, or a contractor to, the prescribed assessment manager. As such, the appropriateness of the prescribed assessment manager and the chosen assessment manager entering into contractual arrangements about the chosen assessment manager's statutory rights and obligations is questionable. The ENs state, at page 61, that the chosen assessment manager will be the respondent in any appeal made by an applicant against the chosen assessment manager's decision. The ENs further state, at page 61, that "the chosen assessment manager and the applicant would each bear their own costs in any such appeal". This statement does not appear to be reflected in the provisions of either the P&D Bill or the P&E Court Bill.

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		The ENs state, at page 62: *The Bill also addresses situations when the ongoing responsibilities of a chosen assessment manager will revert back to the prescribed assessment manager. For example, if the chosen assessment manager no longer exists or is unable to assume the role of the assessment manager at the time a change application or extension application is made, those functions will be the responsibility of the prescribed assessment manager.* The provisions referred to above do not appear in the provisions of the P&E Bill. The ENs, at page 62, list a large number of matters that might be the subject of a "service level agreement" between the prescribed assessment manager and the chosen assessment manager. The appropriateness of the prescribed assessment manager and the chosen assessment manager negotiating such matters is questionable and may amount to an unlawful fetter on the chosen assessment manager exercising its discretion. The keeping of applications available for inspection is one of the matters referred to on page 62 of the ENs. This is a matter which should be governed by the P&D Bill and the access rules made under the P&D Bill, not by contract.
12.	44(4)	QELA maintains that this subclause is likely to be problematic. A preliminary approval is, by its very nature, less detailed than a development permit. There is no reason for it to automatically prevail over a development permit. The ENs state, at page 64, that the subclause affords applicants certainty in relation to rights or obligations attached to a preliminary approval. This statement does not withstand scrutiny for a number of reasons discussed below: a) The subclause has the effect of requiring an applicant to work out which parts of its development permit are inconsistent with an earlier preliminary approval. In the case of a preliminary approval that does not override the planning scheme, understanding the extent of inconsistency would be a difficult exercise as the preliminary approval would, by its nature, be more broad and generic. b) The subclause is not required to protect an applicant, as an applicant will have appeal rights in relation to an unsatisfactory development permit. The Court may consider the earlier inconsistent preliminary approval in making its decision. c) The subclause has no real application in circumstances where the preliminary approval in question does not override a local planning

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		instrument because such a preliminary approval does not authorise the carrying out of assessable development. d) In the case of a preliminary approval that overrides the planning scheme, the issuing of a development permit does not result in the preliminary approval that overrides a local planning instrument falling away. The issuing of a development permit for a lower yield does not preclude the applicant from applying for a different development permit using the assessment regime in the preliminary approval that overrides a local planning instrument. e) The statement in the ENs takes away from the need for each development application to be assessed on its own facts and circumstances (merits) and subject to the planning instruments as they exist at the time that the application is made, subject to weight being given to subsequent planning instruments.
13.	60	The clause provides for the decision notice to be provided to principal submitters at the same time as it is provided to an applicant. Once a submitter receives a decision notice, its appeal period will commence. If the submitter files an appeal within its appeal period, and the applicant utilises the negotiated decision notice process during the applicant's appeal period, it is likely that the assessment manager's ability to respond to representations about the decision notice would be usurped by the Court's jurisdiction to hear and determine the submitter's appeal. Alternatively, the submitter may not utilise its appeal rights, and if a negotiated decision notice is issued, it will have the benefit of a further submitter's appeal period. The split notification that exists under the *Sustainable Planning Act 2009* (**SPA**) should be continued so that submitter appeals can only be made after all of the applicant's rights to negotiate have been exhausted. This issue has not been addressed, despite QELA's earlier submission. It will become a serious issue for the administration of development assessment and appeal processes if left unaddressed.
14.	65	Clause 65(1) provides for development assessment rules. While the matter is one of Government policy, QELA maintains that a further separate document adds another layer of complexity to the process and is inconsistent with the intention of this legislation to provide for an efficient, effective, transparent, integrated and accountable system of land use planning and development assessment.

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Issue No.	Clause Ref	Issue
15.	68	There is no equivalent to section 345(2) of the SPA. This is an important provision for providing certainty to applicants.
16.	71	Under clause 71, the negotiated decision notice process is not available to change a currency period. This limitation did not exist under the SPA and it is a practical approach to avoid unnecessary appeals.
17.	72	Reading clause 72(4)(b)(iii) and 184(2)(c) together suggests that the applicant's appeal period restarts upon receipt by an applicant of a negotiated decision notice, however, this is not clear because clause 72(4)(b) describes the appeal period as suspended. If the intention is to restart the appeal period after a negotiated decision notice is given, it would be advisable to include a specific provision to this effect in the P&D Bill for the avoidance of doubt. In addition, under clause 72(4)(b)(iv), the suspension of the applicant's appeal period expires when any period for deciding the change representations under the development rules expires. It is unclear whether this constitutes a "deemed refusal", as defined (see definition in Schedule 2). If it is a deemed refusal, the appeal period under clause 184(2)(b) would apply i.e. the appeal period would be open ended. The alternative interpretation is that the balance of the applicant's appeal period that was suspended, restarts. This is an important matter and needs to be clarified in the P&D Bill.
18.	74	Clause 74 and the heading of Subdivision 2 refer to "after the applicant's appeal period ends" and "after appeal period" respectively. For the reasons below, these should instead refer to "after a development approval starts to have effect", The ability to change a development approval should only be available to a person after the approval takes effect. There may be circumstances where the applicant's appeal period ends, but the submitter's appeal period has not ended. It would be undesirable for an applicant to request a change to a development approval at the same time as a submitter files an appeal against the development approval. The likely outcome is that the responsible entity's ability to respond to the change application would be usurped by the Court's jurisdiction to hear and determine the submitter appeal.
19.	75(3)(c)	This clause provides that the responsible entity is the Court for a change application if the development was originally granted by the Court and there were properly made submissions. It is of some concern that there may be a lack of

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		transparency of records and a potential for misunderstanding for stakeholders if there is a Court ordered approval and then a later assessment manager decision which purportedly varies a Court order. It is noted that the P&E Court Bill (clause 22) contemplates the ADR Registrar will have powers to hear and decide change applications for a minor change. In circumstances where the Court provides a low cost pathway for the determination of change applications it seems unnecessary to divert any change applications to assessment managers as proposed. Additionally, the drafting of this clause provides for 'submissions' in plural, which could be interpreted to mean that if there was only one submission the assessment manager is the responsible entity.
20.	75 & 79	It is not clear how clause 75(6) and 78 interrelate. If the Minister's assessment is to be purely undertaken in accordance with Part 7, then it ought to be made clear that clause 78 does not apply to the Minister's assessment.
21.	79(2)(b)	This clause requires the responsible entity to consider the change (not a minor change) as if the original development application had included the change but was made when the change application was made. The responsible entity is therefore required to consider things in place at the time of the change. Clause 78(3) is in relation to a minor change and requires consideration of matters in place at the time of the original development application. The things to consider should be consistent regardless of the type of change. Further, if the responsible entity is the P&E Court, or the decision goes to appeal, there are implications as a result of clause 46(3) of the P&E Court Bill as to what should be considered.
22.	86(1)(a)	This clause re-introduces the concept of inconsistency which does not exist elsewhere in the legislation.
23.	100	Clause 100(1)(a) states that if the Minister gives a call in notice to the decision maker, the Minister may assess and decide all or part of the application instead of the decision maker. This clause needs to be amended to provide that the Minister must decide all of the application. If the Minister were to assess and decide only part of the application, there is no framework in the P&D Bill for dealing with the balance of the application. In fact, all subsequent dealings (including change, extension, and cancellation requests) would become problematic if the Minister were to assess and decide only part of an application.

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Issue No.	Clause Ref	Issue
	Infrastructure	
24.	123(2)	The clause refers to "either or both" being provided. The word "both" should be deleted. There is no reason why an applicant should provide both the identified (adequate) trunk infrastructure and different trunk infrastructure delivering the same desired standard of service.
25.	148	The requirement (and accompanying examples) in this provision may result in a negotiated infrastructure agreement being challenged due to non-compliance with the proposed obligation to act in good faith. This could undermine the finality and certainty of infrastructure agreements. QELA notes the ability for parties to bring declaratory proceedings in the Planning and Environment Court in relation to a matter that should have been done under the *Planning and Environment Court Bill* 2014, which would include negotiating in good faith under the proposed new clause. Declaratory proceedings can also be brought in relation to the construction of the SPA. Such proceedings have the potential to result in delayed and more costly negotiations of infrastructure agreements. Additionally, QELA notes that the examples contained in subclause (3) are not exhaustive and section 14D of the *Acts Interpretation Act* 1954 may extend the meaning of the provision. The examples are under subclause 148(2), but should be under subclause 148(3).
	Offences	
26.	159	There should also be an exemption if a person carries out prohibited development under a development permit. It may be that development has become prohibited as a result of a planning scheme amendment, a new planning scheme or a TLPI that prior to these planning instruments taking effect was not prohibited and for which a development permit existed, but had not been implemented.
27.	172(1)	The current clause 172 of the Bill does not addresses the problems noted in the Court of Appeal decision in *Ipswich City Council* v *Dixonbuild Pty* Ltd [2012] QCA 98 and the District Court decision in *Bowman v Brown* [2004] 3 QPELR 416. Local governments are likely to be the primary users of these provisions and clause 172(1)(a) essentially requires a Council resolution if the proceeding is

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		brought in a representative capacity, which has been demonstrated to be impracticable. In a previous QELA submission it was suggested that there be a more precise link with these provisions and section 237 *Local Government Act* 2009 (Qld). The note provided goes part of the way to doing this. However, a precise reference within the subclause would avoid any doubt.
	Dispute resolution	
28.	185(1)(b)(ii)	This provision allows the Magistrates Court to order a defendant to pay a third party compensation for a suffered reduction in value of, or damage to property because of the commission of an offence. The Planning and Environment Court and the Land Court are experienced in dealing with the question of reduction of value to property caused by resumptions or adverse planning changes. The determination of a loss in value commonly involves expert advice from a valuer and potentially other expert consultants and it is often a difficult and searching task. QELA queries whether the Magistrates Court is sufficiently resourced and whether the procedure in summary hearings will fairly and competently allow parties to address such matters.
	Schedule 1 Appeals	
29.	10	Clause 10(1) should refer to a "tribunal appeal matter", rather than a "tribunal matter".
30.	15	The right of appeal should be limited under clause 15(1)(a) to "any part of the application requiring merit assessment and public notification". It is not appropriate to give submitters appeal rights against that part of the merit assessable development application that does not need to be publicly notified. Clause 15(6) provides for another eligible submitter to elect to become a co-respondent. If a submitter wishes to challenge a development approval, it should be required to file its own appeal, not co-respond to another submitter's appeal and thereby effectively benefit from an extended "appeal period".
	Schedule 2 Definitions	
31.	Reconfiguring a lot	The definition should explicitly exclude licences, so that it is clear that the grant of a licence is not caught by (d) of the definition.

Planning and Environment Court Bill 2014 - QELA Submission		
Issue No.	Clause Ref	Issue
1.	6	QELA was provided a draft extract from a version of the Bill dated 8 April 2014. That extract contains an alternative section 6 'Judge Administrator'. QELA generally supports the reinstatement of that former provision to the Bill as it could enable a better overall outcome for the administration of the P&E Court. The reinstatement of this provision is not considered to affect the current section 6 regarding the Chief Judge retaining overall responsibility for the Court.
2.	9(2)	Clause 9(2) provides that on the making of an order remitting a matter to the tribunal, clauses 184 and 193 of the P&D Act are taken to apply as if the order were a document starting a tribunal proceeding. It is suggested that the notice of appeal and originating application should continue to be regarded as the documents starting the proceeding as they usually contain the grounds which frame the disputed issues, whereas the remitting order may not. Also, in the case of an appeal to the tribunal under clause 184, the appeal must be started within a prescribed timeframe relative to the decision being appealed against. If the remitting order is taken to be the notice of appeal, it may be well outside the appeal period.
3.	11(3)	The reference to 'or 4' should be deleted as there is no longer a division 4 in the P&D Bill, chapter 3, part 7.
4.	16(3)	Clause 16(3) (ADR process) enables the ADR registrar, as part of the ADR process, to confer with the parties about the way to conduct the P&E Court proceeding. In subclause (2) 'ADR process' includes 'ADR conferences'. 'ADR conference' is defined to include a 'case management conference'. 'Case management conference' is not defined in the P&E Court Bill, but the existing Planning and Environment Court Rules 2010 define the term to mean 'a conference at which the active parties for a proceeding confer about the way to conduct the proceeding to ensure the resolution of the issues in dispute in the proceeding is just, expeditious and conducted at a minimum of expense'. It is therefore suggested that clause 16(3) be deleted. It is also suggested that the definitions in the 2010 Rules for 'case management conference', 'meeting of experts' and 'without prejudice conference' be included in Schedule 1 Dictionary, to give meaning to those terms used in the Bill.
5.	18	Clause 18 (Resolution agreement) requires the ADR registrar to sign an agreement if the parties agree on a resolution of their dispute or part of it at an ADR process, or also 'after an ADR process'. It is suggested that 'after an ADR process' be changed to 'as a result of an ADR process'. This is because parties to a P&E Court proceeding may resolve a proceeding through without prejudice negotiations directly between themselves. These negotiations sometimes occur after an ADR process has finished. Technically, this would be 'after an ADR process', triggering section 18. Presumably however it is not

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		intended that the section's requirement for a resolution agreement, signed by the ADR registrar, also apply to such later resolutions.
6.	17 and 18	QELA supports clause 22. It provides a desirable pathway for the determination of change applications for approvals given by the Court. The powers given to the ADR Registrar in respect of change applications are considered to address any policy concerns which prompted the inclusion of clause 75(3(c) of the P&D Bill as referred to above.
7.	37(2)(b)(i)	Clause 37 provides the Court with discretion to deal with noncompliance. The explanatory notes indicate that the section enables the court to give relief in response to proceedings commenced for that purpose or in the context of other proceedings. The explanatory notes also indicate that the court's power is not restricted to proceedings before it and this allows access to the Court for declarations and orders about procedural disputes which do not form part of wider proceedings. It would appear that the power extending to these two contexts is intended to be made clear through clause 37(2)(b)(i), which states that [the Court's discretionary power] is not limited to 'circumstances in relation to a current P&E Court proceeding'. Proceedings brought for the specific purpose of seeking the exercise of the Court's discretion would still be 'current P&E Court proceedings' when heard by the Court and therefore the current wording of subclause (2)(b)(i) does not necessarily remove the doubt. It is suggested that subclause (2)(b)(i) could more explicitly state that subclause (1) also applies to proceedings commenced specifically for the purpose of seeking the exercise of the P&E Court's discretion under subclause (1).
8.	46(1)	Clause 46(1) states that a Planning Act appeal is by way of hearing anew. Clause 43 states that an appeal to the P&E Court is by way of hearing anew. To remove the duplication, it is suggested that clause 46(1) be deleted and current clause 46(2) instead state 'Despite section 43(1), if the appellant …'.
9.	46(5)	Clause 46(5) states that the P&E Court can not consider a 'change to the development approval the subject of the development application' unless the change is only a minor change under the Planning Act to the approval. The reference to 'development application' should be to 'change application'.
10.	59(2)	QELA notes that this provision represents a significant addition to the Court's discretion involving costs orders. There is no indication given about the circumstances or factors which ought to be taken into account by the Court in determining whether a person who is not a party to a proceeding should be ordered to pay costs. The factors identified in clause 60 of the Bill each refer to 'party' or 'parties' and it is unclear whether these same factors are relevant to the Court's direction in clause 59(2).

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Issue No.	Clause Ref	Issue
11.	71	This clause gives continuing effect to sections of SPA which are to be read with the changes necessary to make them consistent with this Act, the rules and the Planning Act. Again this seems to be very inconsistent and imprecise. The new rules ought to ensure there is consistency with SPA and this Act prior to commencement.
12.	76(5)(b)(i)	Same issue as clause 37(2)(b)(i)
13.		QELA notes that the Bill does not propose to confer a criminal jurisdiction on the P&E Court. QELA continues to encourage the creation of a criminal jurisdiction in the specialist P&E Court. QELA has had regard to a paper prepared by the Department of Justice and Attorney General regarding 'Reasons for not conferring criminal jurisdiction on the Planning and Environment Court'. QELA does not consider the reasons identified by that paper to, individually or cumulatively, justify the continued exclusion of the criminal jurisdiction from the P &E Court.