QELA

Ph 07 3832 4865

Email info@qela.com.au

Web qela.com.au

Unit 65, Christie Offices
320 Adelaide Street
Brisbane Qld 4000

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.

9 February 2017

The Honourable Jackie Trad MP
Deputy Premier, Minister for Infrastructure, Local Government and Planning and Minister for Trade and Investment
c/- State Interest Feedback
Planning Group
Department of Infrastructure, Local Government and Planning
PO Box 15009
CITY EAST QLD 4002

Email: planningpolicy@dilgp.qld.gov.au

Submission about the Draft Planning Regulation – 21 November 2016 consultation draft

Dear Deputy Premier,

Thank you for the opportunity for the Queensland Environmental Law Association (**QELA**) to make a submission about the above draft Planning Regulation (**Draft Regulation**).

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 has provided a number of submissions about planning reform, including about the recent planning reform agenda and the *Planning Act 2016* (**Planning Act**).

The tables **attached** provides commentary on various aspects of the Draft Regulation, the Draft State Planning Policy and the Draft State Development Assessment Provisions.

We thank you for the opportunity to make a submission about the draft documents. We would welcome the opportunity to assist your Department further, if required.

Yours sincerely

Leisa Sinclair

President

Queensland Environmental Law Association

Planning Regulation 2017 – Consultation Draft 21 Nov 2016	
General	The Draft Regulation is still incomplete. Importantly, it does not include the SEQRP SPRPs. This is understandable given that a draft SEQRP is presently subject to public consultation, however, it would be helpful to review the drafting of this component (given its importance) prior to the final regulations being promulgated.
Section 6	Section 6(2)(a) states that if a local planning instrument includes land in a zone stated in Schedule 2, Column 1, the instrument must include the purpose statement for the zone stated in Schedule 2, Column 2. Section 6(3) states that a local planning instrument may change a purpose statement for a zone if the Minister considers the change is necessary or desirable having regard to the circumstances in the local government area that the instrument will apply to. Section 16 of the Planning Act 2016 (**Planning Act**) states that a regulation may prescribe requirements for the contents of a local planning instrument and the contents prescribed by regulation apply instead of a local planning instrument, to the extent of any inconsistency. How will a third party (eg developer, consultant, member of the public) know that a change of purpose has been made to a zone under section 6(3)? In the absence of this knowledge, the third party would need to assume that the regulated requirements override the planning scheme. It may assist to require a notation as to whether a change has been made under section 6(3) in the planning instrument in the part the purpose statement is made.
Schedule 8, Table 2, Item 1(d)	Schedule 8, Table 2, Item 1(d) appears to be the equivalent of Schedule 6, Table 1, Item 1(d), however, the drafting has been altered. Schedule 8, Table 2, Item 1(d) refers to prescribed tidal works partly in the tidal area of a non-port local government area and partly in the tidal area of another non-port local government area. The assessment manager is identified as the "local government". It is not clear which local government is the assessment manager in these circumstances or whether, in fact, both local governments are assessment managers.
Schedule 10, Part 5, Section 5(2)	The prohibition introduced by this item similar to that contained in clause 11 of the Vegetation Management (Reinstatement) and Other Legislation Amendment Bill 2016, which failed to be approved by Parliament in August 2016.

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	QELA is concerned that the prohibition puts the onus on local governments to consider the relevant purpose under the *Vegetation Management Act 1999*, which requires a level of expertise that better falls within SARA's functions, and SARA will be a concurrence agency for the material change of use application in any event. The prohibition may also remove an existing right to clear vegetation where a particular process has been followed. Consideration should be given to removing this prohibition from the regulation.
Schedule 10, Part 6, Section 7	This section relates to development on land on the contaminated land register and the environmental management register. The effect of this item is to convert a matter which currently requires compliance assessment (Schedule 18, Table 3) into prohibited development. QELA urges the Committee to seek an alternative to prohibiting this development. It is desirable that applicants be able to obtain suitability statements either concurrently with development applications, or in compliance with a condition of a development approval.
Schedule 10, Part 12, Section 13(1)	This section relates to a prohibited material change of use in a priority koala assessable development area. The prohibited development refers to a material change of use of premises "for an urban activity". The current South East Queensland Koala Conservation State Planning Regulatory Provisions refer to "for an urban activity, other than rural residential development". The approach in the Draft Regulation would appear to be inconsistent with the policy position in the South East Queensland Koala Conservation State Planning Regulatory Provisions.
Schedule 10, Part 13, Table 1, Item 3	This item relates to land within the limits of a port and corresponds with Schedule 7, Table 2, Items 16 & 17 of the Sustainable Planning Regulation 2009 (SPR).

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	The Draft Regulation appears to expand the scope for referral. Under the SPR, there would be no referral required if the development was not carried out within the relevant distances in Item 16, whereas referral (for advice) is required by Part 13, Table 1, Item 3 of the Regulation.
Schedule 10, Part 15, Division 2, Table 1, Item 1	This item deals with the category of assessment for assessable development on a local heritage place. It continues to perpetuate the anomaly that exists in the SPR whereby assessable development on a local heritage place may require impact assessment under the regulation, if required by a local categorising instrument, whereas assessable development on a State heritage place only requires code assessment. There is no reason to perpetuate this anomaly and assessable development on both a local and State heritage place that is made assessable by the regulation should be code assessable.
Schedule 10, Part 16A	This item relates to prohibited development in connection with the operation of an off-road motorcycling facility. This item appears to reflect Division 5 of the State Planning Regulatory Provisions Off-road Motorcycling Facility on State-owned Land at Wyaralong. Division 3 of the SPRP lists the circumstances in which the SPRP does not apply. We could not find these circumstances identified in the Draft Regulation.
Schedule 10, Part 26A	This Part deals with the urban design referral. It is difficult to see the utility of this referral for a number of reasons. First, the advice provided will come too late – that is, it will be provided after considerable time and expense has been incurred in preparing an application. Second, it would seem that the local government is best placed to address urban design matters, rather than the State. Third, an applicant could find itself in a situation where it receives contradictory advice from a local government and the State about urban design matters. Finally, the fee for the referral appears to be excessive for the provision of advice.
Schedule 18	This Schedule identifies the prescribed amount for infrastructure charging. It does not appear to identify the same amounts as the Adopted Infrastructure Charges Schedule 2016.
Schedule 20, Section 1	This Schedule refers to approving plans of subdivision. Section 1(4) identifies a time limit for giving a plan of subdivision to a local government. It is unclear why this is needed in circumstances where the Planning Act identifies a currency period for approvals and, in section 85(1)(b), specifically provides, with respect to development approvals for

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	reconfiguring a lot, the timeframe for giving a local government a plan of subdivision.
Schedule 20, Section 2	The ability for an applicant to give security to enable a plan of subdivision to be sealed should not be limited to development conditions of operational works approvals but should also be available with respect to conditions of development permits for reconfiguring a lot as is the case under Schedule 19 of the SPR.
Schedule 22, Items 1and 1A	Items 1 and 1A refer to an "Accommodation activity that is for any combination of the following purposes - …". Should these items read "Accommodation activity that is for one, or a combination, of the following purposes- …"?
Schedule 24, Parts 2 & 3	If the assessment manager is a chosen assessment manager and the chosen assessment manager ceases to be a chosen assessment manager, how will a person access documents previously held by the chosen assessment manager? The focus in these Parts is on documents related to development applications. The Parts need to be reviewed to ensure that all documents related to change applications held by responsible entities and affected entities are available for inspection and purchase. This is particularly important as it will be possible under the Planning Act to make a change application for a change that is not a minor change.
Schedule 25, Sections 1(c) and 1(d)	These sections relate to the contents of a limited planning and development certificate. The content requirements in sections 1(c) and 1(d) are particularly onerous and complex. The danger is that the information provided in the short time allowed for limited certificates to be produced will be inaccurate. If a variation approval is in effect for the premises, the requirement should be simply for the local government to provide a copy of the variation approval to the applicant for the limited certificate. If a State planning instrument applies to the premises, this should simply be identified, rather than requiring that a summary of the relevant provision of the instrument be provided.
Schedule 26, Community Residence	The definition refers to no more than 1 support worker. Schedule 6, Item 6 refers to no more than 7 support workers attending the community residence in a 24 hour period. There needs to be some correlation between these provisions.

Draft State Planning Policy (December 2016)	
General	This is a statutory document and comprises an assessment benchmark. As such, the document should more clearly distinguish between those components of the document which comprise background information and explanatory material and those components against which assessment should be undertaken. The outcomes for each State interest need to be carefully drafted. There is different terminology used throughout the outcomes (eg protected, maintained, enhanced, conserved, supported, ensured, enabled). These words need to be chosen carefully. For example, if the outcome sought is to "manage" an item, the word "protect" should not be used. In addition, the introductory section should clarify that it is for local government to determine how to appropriately apply the State interests to their local environment e.g. the areas of high scenic amenity for liveable communities and coastal environments, or the 'acceptable or tolerable' level of risk for a natural hazard for a particular local government. There is reference in the State interest for development and construction to "Efficient development of residential, retail, commercial and industrial development is facilitated by adoption of the lowest appropriate level of assessment that is consistent with the purpose of the zone". This would appear to be a matter that is relevant across the board, rather than being relevant to a single State interest.
General	QELA supports the promotion of affordable housing.
Part C – Guiding principles	QELA queries whether the guiding principles for the preparation of plan making and development decisions should be included in the SPP, or whether this content should be included in the Minister's guidelines and rules about making planning schemes. It is difficult to anticipate what role these principles will play in plan making and the State interest reviews.

Draft State Planning Policy (December 2016)	
State interest – liveable communities	Item (7) – a requirement to provide particular types of fire hydrant infrastructure should form part of the building approval process (not part of the planning process) as this is a technical building design matter. Similar fire safety requirements are currently assessed by private building certifiers through the building approval process. Information about fire hydrant infrastructure is rarely known at the development approval stage of a development. Planners are also likely to lack the necessary expertise to properly determine what type of fire hydrant infrastructure is proposed.
Development assessment – liveable communities	As above.
State interests – development and construction (Page 28)	It is stated that: "Planning schemes should encourage the diversification or expansion of a local economy by not placing barriers or limits on the number, size and mix of businesses. This will support the responsiveness of suppliers to the needs of consumers. For example, the provision of a planning scheme should not restrict the number of a particular type of retail store in any particular local area. Likewise, it is not appropriate to include provisions that seek to consider the potential impact of a proposed business on the viability of established businesses or to place proximity restrictions on particular types of retail stores. To support economic activity in the development and construction sections, business zones should be as broad as possible in their intent and the range of activities they can provide." The intent of these statements is not clear. If the intent is to derogate from proper centres planning, the intent is not supported. If the intent is to strengthen the appropriate planning of centres so as to ensure that centres, once identified, are allowed to develop in accordance with the needs of the community, the intent is supported.
State interest -	Item (1) – If the intent is to have findings of State tourism plans reflected in a local government planning scheme then

Draft State Planning Policy (December 2016)	
tourism	perhaps a stronger requirement than just to 'consider' these plans would be preferred. A requirement to 'reflect' or 'integrate' the findings of these plans into local government planning instruments would better achieve this outcome. However, if the intent is merely for the local government to consider these studies and plans, then it may be better to simply rely on communication of those studies and plans to the relevant local government at the relevant time.
State interest – biodiversity	Item (1) – It is unclear how a local planning instrument would 'consider the requirements of the EPBC'. This item should be redrafted to clarify the State's expectations. There has long been a 'disconnect' between federal and state planning and environment legislation. QELA supports the attempt at better alignment and reduced duplication of legislative requirements but only to the extent that it is realistic for local governments to integrate these requirements in plan making.
State interest – cultural heritage	This section refers to the State interest of cultural heritage. In the context of local cultural heritage, the document refers to the adaptive reuse of local heritage places and local heritage areas. This applies equally to State heritage places.
State interest - emissions and hazardous activities	Item (5) – QELA suggests that consideration be given to removing the list of land uses to avoid logical activities 'falling between the cracks'. This provision should apply to all established industrial and entertainment activities and community infrastructure. Consideration should also be given to expanding this state interest to protect reasonable expansion of these established activities over time.
State interest – energy and water supply	Item (4) – QELA supports the promotion of development supporting the renewable energy sector.

Draft State Development Assessment Provisions (December 2016)	
General	In the main, the SDAP is providing criteria for the assessment of code assessable development for which there is a presumption of approval. As such, the criteria needs to be drafted with a view to applicants being able to comply with the criteria. This is particularly important with respect to the purpose statements (which are the highest form of assessment), but applies equally to performance outcomes and acceptable outcomes.
	With respect to performance outcomes, it is important that these outcomes are not drafted as de facto acceptable outcomes.
	Where performance outcomes or acceptable outcomes are drafted in the negative (ie an action should not occur), there should, to the greatest extent possible, be an alternative provision (ie which provides that should the action occur, then it must meet certain criteria).
	Acceptable outcomes should be provided wherever possible to give certainty to applicants about how compliance with codes can be achieved (some codes contain almost entirely performance outcomes which is unhelpful).
	The acceptable outcomes should be drafted so that they can be complied with. For example, it is unrealistic to assume that infrastructure, services and utilities will not be located in a State-controlled road.
	Also, when drafting outcomes in the negative, it is important to identify whether the "prohibition" is on outcomes/actions which have permanent impacts, rather than, temporary impacts. If the "prohibition" is really about permanent impacts, then this needs to be clearly stated.
	QELA supports the more specific identification of where outcome statements are applicable (or not applicable) compared with current SDAP codes. This will reduce triggering irrelevant parts of codes.
	Effectiveness of State codes can be improved by removing unnecessary outcome statements (some outcome statements appear to add little value). Fewer, more impactful, outcome statements will allow for more effective and efficient regulation of State interests.