

# OVERVIEW

1. The Minister of Public Works and Infrastructure (‘**Minister**’) published a policy to guide the development of a draft Bill. The scope of the policy included identifying—
   1. areas, not already covered by existing legislation, based on the White Paper of 1997 entitled *Public Works: Towards the 21st Century* of 1997 and the White Paper of 1999 entitled *Creating an Enabling Environment for Reconstruction, Growth and Development in the Construction Industry*;
   2. old order legislation, not aligned with the Constitution;
   3. other areas for legislating, which are relevant to the functions of the Department and which lack statutory expression.
2. Counsel was instructed to assist the Department of Public Works and Infrastructure (‘**Department**’)with formulating the presentation to the Portfolio Committee. This document includes counsel’s advice.
3. The Minister gave further input into formulating a draft Bill on 25 February 2022, upon receiving other legal advice. A draft Bill was no longer to rationalise existing legislation concerning public works. Accordingly, the Government Immovable Asset Management Act 19 of 2007 (**GIAMA**), the State Land Disposal Act 48 of 1961 and the Land Affairs Act 101 of 1987 would not be affected by a draft Bill; instead, the intention is to amend them in separate processes.
4. The Minister wants to ensure that the five Public Works streams[[1]](#footnote-1) pursue the objectives of good governance, job creation, employment equity, redressing past injustices, preserving the environment, saving energy, and enabling access to disadvantaged sectors of society including women, youth and persons with disabilities.
5. The overarching goal is to streamline the regulatory environment for the public works value chain across all spheres of government and state-owned entities (**SOEs**) for improved service delivery. This purpose informs the approach to problem areas identified in—
   1. conference between the Minister and counsel on 18 March 2022;
   2. the updated memorandum from the Minister to counsel dated 11 May 2022; and
   3. the Department’s brief to counsel and earlier legal opinions.

# INITIATION AND PREPRARATION

1. Both the National Assembly and the executive have the power to initiate and prepare legislation.[[2]](#footnote-2) Moseneke DCJ explained the distinction between these stages:[[3]](#footnote-3) Initiation ‘*implies conceptualisation, envisioning and incubation of legislation*’; preparation ‘*envisages progressively working on a legislative proposal to bring it into a suitable state for some future action; the concretisation or giving shape and life to a legislative idea.*’
2. We are currently in the first conceptual phase – initiation.
3. In considering draft legislation at the initiation phase, these questions are key: What is the nature and extent of the problem? What caused the problem? What attempts have been made to solve the problem without legislation? How and why did the attempts fail?[[4]](#footnote-4)
4. The drafter must ensure that legislating is indeed *necessary*. If the stated policy objectives can be achieved through administrative means or through existing legislation, that should be the preferred course. And the drafter must advise on whether legislating will offer an effective and practical solution to the problem.[[5]](#footnote-5)
5. The methodology followed so far will continue to explore whether: the nature of the problems are economic, political or social; existing law covers or should address these problems effectively; existing laws prevent or impede the implementation of the policy objectives, and if so, what facts justify that conclusion; implementing existing tools in legislative or regulatory provisions, policies or plans differently would be more effective and expedient; a new legislative mechanism is required and how it should operate; there are any constitutional danger points; other departments should be consulted.[[6]](#footnote-6)

# DISCUSSION

1. Listed below are the preliminary views on the bulk of the issues that the Minister and Department have raised. This is not intended to be an exhaustive exposition; it invites closer scrutiny and dialogue as part of the ‘initiation’ phase.

## Legislating the Public Works mandate

1. We have considered examples of legislation in foreign jurisdictions that define the powers of a minister of public works and establish departments of public works. Many useful pointers can be gleaned from them for a draft Public Works Bill. The legislation consulted thus far are—
   1. the Public Works Act 1902 (updated in 2019) from Western Australia;
   2. the Public Works and Procurement Act 1912 No 45 (last amended in 2018, not yet commenced) of New South Wales;
   3. the Public Works Act 1981 (last updated by Parliamentary Counsel in 2019) of New Zealand;
   4. the Department of Public Works and Government Services Act S.C. 1996, c. 16 of Canada;
   5. the Public Works Act 2016, c.108 of New Brunswick;
   6. the Public Works Act C.C.S. M. c. P300 of Manitoba; and
   7. the Public Works Act RSA 2000 of Alberta.
2. In defining the Minister’s powers in legislation one must be careful not to exclude by implication other functions powers that arise under different legislation or future legislation. To do so may hamper the effectiveness of the office.
3. Careful attention will and has been paid to the network of other legislation that confer functions and powers on the Minister.

## Intergovernmental coordination and cooperation regarding public works

1. The Department has previously been advised that public works is a concurrent competence shared between national and provincial government. But that is only part of the picture.
2. Part A of Schedule 4 to the Constitution provides that provinces have limited competence in respect of public works. Their competence is circumscribed to ‘*[p]ublic works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in term of the Constitution or any other law.*’
3. Because public works is integral to all other state departments that require accommodation, maintenance of buildings and other infrastructure needs, the scope of the constitutional power turns on its interrelationship with other provincial functions.
4. For provinces, their competence in respect of public works coincides with their administration of: **(i)** all the functional areas listed in Schedules 4 and Schedule 5 of the Constitution; **(ii)** a matter outside Schedule 4 and 5 that national legislation expressly assigns to a province; **(iii)** a matter for which the Constitutional envisages the enactment of provincial legislation; and **(iv)** a matter reasonably necessary for, or incidental to, the exercise of a power related to a function listed in Schedule 4.
5. What is also important to consider is the constitutional competence of municipalities in connection with public works.
6. Municipalities’ executive competence, and competence to make by-laws, in respect of public works is listed in Part B of Schedule 4 to the Constitution: ‘*Municipal public works only in respect of the needs of municipal functions specifically assigned to them under this Constitution or any other law.*’
7. According to section 156 of the Constitution, these overlapping municipal functions, to the extent that they require public works, are contained **(i)** the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and **(ii)** any other matter that national legislation assigns to them.
8. The national government’s competence to make and implement laws over public works derives from sections 44(1)(a)(ii) and 85(2) of the Constitution. To the extent that it overlaps with the provincial and municipal competences, Schedule 4 states it in terms.
9. The constitutional premise therefore is that all three spheres of government have distinctive and concurrent constitutional competences in respect of public works. It is not just the national and provincial spheres that laws must recognise for this purpose.
10. Any legislation that would empower the Minister or Department to assume control over provincial or municipal land, beyond sections 100 and 139 of the Constitution, would breach the injunctions **(a)** not to assume a power or function that the Constitution does not afford it and **(b)** to respect the constitutional status, institutions, powers and functions of government in other spheres.[[7]](#footnote-7) The public works function must therefore adhere to the prescripts of cooperative government.
11. The Intergovernmental Framework Relations Act 13 of 2005 (**IGFRA**) was enacted to give effect to section 41 of the Constitution. That section places a constitutional duty on organs of state in different spheres of government to cooperate with one another in mutual trust and good faith. This general duty includes specific duties: **(i)** to assist and support one another; **(ii)** to inform and consult one another on matters of common interest; **(iii)** to coordinate actions and legislation with one another.
12. IGFRA already empowers the Minister to establish a national intergovernmental forum to promote and facilitate intergovernmental relations in the functional area of public works—a concurrent competence among all three spheres of government.[[8]](#footnote-8)
13. Under IGFRA, the Minister chairs the forum. The forum consists of the Minister, the Deputy Minister of Public Works, the MECs responsible for public works, and a municipal councillor designated by the national organisation representing local government (SALGA) to represent public works at the municipal level, in terms of Part B of Schedule 4 to the Constitution.[[9]](#footnote-9)
14. The Minister may also invite any other person to a meeting of the forum, including other members of Cabinet, the provincial executive councils and municipalities. So if the Minister wanted municipalities to confirm which land they own, which land might be available for land reform, given the municipality’s IDP, and which land may be strategically suitable, a national intergovernmental forum affords the Minister the platform in which to undertake that engagement. The same applies to land holdings of provinces and SOEs.
15. A national intergovernmental forum on public works would be designed—
    1. to raise matters of national interest concerning public works;
    2. to consult provincial governments and, if appropriate, organised local government on developing public works policy, implementing national policy, aligning strategic performance plans and priorities, objectives and strategies, and other matters of strategic importance;
    3. to discuss performance in the provision of services, to detect failures and to initiate preventative or corrective action when necessary.
16. A national intergovernmental forum on public works could be assisted by technical support structures.[[10]](#footnote-10) These would consist of officials representing the departments responsible for public works from all three spheres of government and any other assistants. The benefit of these support structures is that whatever the political heads may discuss, resolve or recommend,[[11]](#footnote-11) they will be supported by senior officials from their respective administrations to formulate, monitor and provide feedback on implementation.
17. It would be for the forum to determine its own procedures and adopt rules to suit its business.[[12]](#footnote-12)
18. Utilising a structure like a national intergovernmental forum for public works seems capable of addressing one of the policy proposals, while respecting the institutional integrity of governments in other spheres. It would allow the Minister and the forum to customise their rules and procedures for sharing of information and coordination of public works policy and strategies. And it would avoid the need to create new legislation to achieve substantially the same result.
19. Duplicating a similar deliberative and collaborative structure under new legislation would fail the twin requirements of legislative necessity and restraint.
20. While IGFRA governs the cooperative mechanism to enhance public works service delivery across spheres of government, the substantive obligations to use land well exists in other legislation. GIAMA’s objects include ensuring effective immovable asset management, coordination of the use of immovable assets in the national and provincial government, and optimising the cost of services delivery by ‘*sweating*’ immovable assets.[[13]](#footnote-13) They speak directly to the need to streamline public works

## Entities established by Cabinet performance public works or infrastructure functions

1. The Property Management Trading Entity (**PMTE**) falls under the purview of the Minister. The PMTE was not established in terms of an empowering provision in legislation. Instead, it was established by Cabinet through an ‘instruction’. It may be appropriate to bring the PMTE under the purview of a Public Works Bill.

## Streamlined procurement processes

1. The Minister and Department have made input into the draft Public Procurement Bill. It is the appropriate the vehicle for improving procurement processes to enhance public works service delivery.

## Extracting elements from existing policies to make rules of law

1. The Expanded Public Works Programme (**EPWP**) is geared towards stimulating Public Employment Programmes to alleviate poverty, inequality and unemployment. It is an executive policy instrument.
2. It may be necessary to extract those elements of the EPWP, which can and should become rules of law, for inclusion in a draft Public Works Bill. Once adopted by Parliament in this way, the statute becomes the font of the policy, which will have been given legislative expression.
3. This exercise will require a careful dissection of the EPWP to formulate rules that define powers, rights and duties. The rules must be capable of enforcement. Flexible principles and guidelines under the EPWP will therefore require careful treatment when crafting a draft Public Works Bill.

# CONCLUDING REMARKS

1. The Department, under the guidance of the Minister, is in the process of preparing a framework memorandum to present to the Portfolio Committee, as part of the initiation phase. This memorandum outlines the work undertaken thus far.

1. 1. Property Investment and Optimisation; 2. Property, Land and Buildings Construction and Lifecycle Management; 3. Project Management across the entire value-chain; 4. Infrastructure Investment, Oversight and Strategic Implementation; and 5. Public Employment Programmes as they relate to the Built Environment. [↑](#footnote-ref-1)
2. Sections 55(1)(b) and 85(2) of the Constitution respectively. [↑](#footnote-ref-2)
3. *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* (6) SA 588 (CC) at para 30. [↑](#footnote-ref-3)
4. Crabbe *Crabbe on Legislative Drafting* 2ed (2008) 12. [↑](#footnote-ref-4)
5. Malherbe & Meyer *Introduction to legislative drafting* (2022) at 4.3.2. [↑](#footnote-ref-5)
6. Xanthaki *Drafting Legislation: Art and Technology of Rules for Regulation* (2014) 27-44. [↑](#footnote-ref-6)
7. Section 41 of the Constitution. [↑](#footnote-ref-7)
8. Section 9 of IGFRA. [↑](#footnote-ref-8)
9. Section 10 of IGFRA. [↑](#footnote-ref-9)
10. Section 30 of IGFRA. [↑](#footnote-ref-10)
11. Section 32 of IGFRA. [↑](#footnote-ref-11)
12. Section 33 of IGFRA. [↑](#footnote-ref-12)
13. Section 3 of GIAMA. [↑](#footnote-ref-13)