

REPUBLIC OF SOUTH AFRICA

**PROTECTION, PROMOTION,
DEVELOPMENT AND
MANAGEMENT OF INDIGENOUS
KNOWLEDGE BILL**

*(As presented by the Portfolio Committee on Science and Technology (National Assembly))
(The English text is the official text of the Bill)*

(MINISTER OF SCIENCE AND TECHNOLOGY)

[B 6B—2016]

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BILL

To provide for the protection, promotion, development and management of indigenous knowledge; to provide for the establishment and functions of the National Indigenous Knowledge Systems Office; to provide for the management of rights of indigenous knowledge communities; to provide for the establishment and functions of the Advisory Panel on indigenous knowledge; to provide for access and conditions of access to knowledge of indigenous communities; to provide for the recognition of prior learning; to provide for the facilitation and coordination of indigenous knowledge-based innovation; and to provide for matters incidental thereto.

PREAMBLE

RECOGNISING that the liberation of South Africa and its people from centuries of racial discriminatory colonial rule and domination and the establishment of a constitutional democracy was, is and will remain a historic achievement of all our people;

EMPHASISING that the Constitution of the Republic of South Africa, 1996, enshrines the founding values of human dignity, the achievement of equality, non-racism and non-sexism, as well as the Bill of Rights entrenches inalienable rights to and freedom of human dignity, equality, education, culture, religion, language, research, creativity, environment and property, among others;

NOTING that the Republic of South Africa as a sovereign democratic state has taken its rightful place in the family of sovereign states and is committed and obligated to observe international treaties, covenants, as well as international law;

REALISING that the Government of the Republic of South Africa is committed to the economic, cultural and social upliftment and well-being of its people, free of discrimination;

TAKING into account that in the exercise of its sovereignty, South Africa has enacted and continues to enact legislation that underpins the protection, promotion and development of indigenous knowledge systems and indigenous knowledge;

RECOGNISING that indigenous knowledge is a national asset and that it is therefore in the national interest to protect and promote indigenous knowledge through law, policy and both public and private sector programmes;

WISHING to encourage the use of indigenous knowledge in the development of novel, socially and economically applicable products and services;

ACCEPTING that indigenous innovation is a unique approach to social innovation that informs and underpins the work of indigenous communities,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa,
as follows:—

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CHAPTER 1

DEFINITIONS

Definitions

- 1. In this Act, unless the context indicates otherwise—
 - “**access**” includes the acquisition of indigenous knowledge by natural and legal persons as facilitated by NIKSO in terms of this Act;
 - “**accreditation**” means a formal procedure by which NIKSO grants or delegates authority to an assessor to assess and verify the qualification of indigenous knowledge practitioners in accordance with pre-determined requirements for purpose of certification;
 - “**assessor**” means a qualified person accredited and assigned by NIKSO to assess applicants according to applicable pre-determined standards having regard to that person’s possession of indigenous knowledge, expertise and skills for the purpose of being certified as an indigenous knowledge practitioner;
 - “**benefit sharing**” means the fair and equitable sharing of monetary and non-monetary benefits in terms of a benefit sharing agreement between the trustee of the indigenous community and the licence holder;
 - “**certification**”, in respect of indigenous knowledge practitioners, means the formal qualification acknowledgment, subject to an assessment by an assessor of a practitioner within a discipline or practice, according to applicable, pre-determined standards, having regard to that person’s possession of indigenous knowledge expertise and skills;
 - “**commercial use**” means the use of indigenous knowledge for financial gain;
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996;
 - “**cultural and social identity**” means the particular and distinctive identity or characteristics of a certain indigenous community or of an individual as far as he or she is influenced by belonging to a certain indigenous community;
 - “**Curator**” means the Curator of indigenous knowledge as the head of the Registration Office of Indigenous Knowledge appointed in terms of section 18 of this Act;
 - “**Department**” means the department responsible for science and technology;
 - “**discipline of practice**” means a group of people who share the same understanding and methodology of a given practice, craft or profession, which—
 - (a) evolved spontaneously, or

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- (b) is created based on people’s engagement, in a process of collective learning in a shared domain of human endeavour;
- “**functional**”, in relation to indigenous knowledge, means knowledge that is scientific and, or technical in nature;
- “**indigenous community**” means any recognisable community of people— 5
- (a) developing from, or historically settled in a geographic area or areas located within the borders of the Republic;
- (b) characterised by social, cultural and economic conditions, which distinguish them from other sections of the national community; and
- (c) who identify themselves as a distinct collective; 10
- “**indigenous cultural expression**” means expressions that have a cultural content that developed within indigenous communities and have assimilated into their cultural and social identity, including but not limited to—
- (a) phonetic or verbal expressions;
- (b) musical or sound expressions; 15
- (c) expressions by action; and
- (d) action tangible expressions;
- “**indigenous knowledge**” means knowledge which has been developed within an indigenous community and has been assimilated into the cultural and social identity of that community, and includes— 20
- (a) knowledge of a functional nature;
- (b) knowledge of natural resources; and
- (c) indigenous cultural expressions;
- “**indigenous knowledge practitioner**” means a person who is certified as sufficiently knowledgeable in indigenous knowledge practices to render a related service, subject to section 15 of this Act and relevant prescribed practice standards being met; 25
- “**licence holder**” means any person who successfully enters into a licence agreement with an indigenous community to use indigenous knowledge;
- “**Minister**” means the Minister responsible for science and technology; 30
- “**natural resources**” means any materials and components that can be found within the environment and may exist as a separate entity, such as genetic resources, fresh water, air, and mineral deposits with actual or potential use or value;
- “**NIKSO**” means the National Indigenous Knowledge Systems Office established in section 4; 35
- “**prescribed**” means prescribed by regulations;
- “**prior informed consent**” means the consent in respect of indigenous knowledge granted by a trustee, which has been obtained— 40
- (a) free from any manipulation, interference or coercion;
- (b) after full disclosure of the intent and scope of the activity; and
- (c) in a language and process understandable to the community;
- “**Registration Office**” means the Registration Office for Indigenous Knowledge within NIKSO;
- “**Register**” means the Register of indigenous knowledge provided for in section 19, and includes any official documents, compilations or records, including databases, reflecting information in respect of indigenous knowledge kept by NIKSO; 45
- “**Register of Designations**” means a register of names and levels of competencies of certified indigenous knowledge practitioners and accredited assessors; 50
- “**regulations**” means regulations made in terms of this Act;
- “**this Act**” includes the regulations; and
- “**trustee**” means a natural or legal person that is duly delegated in terms of the practices of an indigenous community to represent that indigenous community in matters pertaining to indigenous knowledge and to be vested with the custodianship of indigenous knowledge emanating from it, which person is deemed to be a trustee appointed in terms of the law of trusts and to have the powers and duties of such a trustee, with any reference in this Act to an act performed, or the rights held, by an indigenous community deemed to be a reference to that act performed, or rights held, by the trustee of that indigenous community. 55 60

CHAPTER 2

APPLICATION AND OBJECTS OF ACT

Application of Act

2. This Act applies to all—
- (a) persons in the Republic, including the State; and 5
 - (b) indigenous knowledge registered under this Act.

Objects of Act

3. The objects of this Act are to—
- (a) protect the indigenous knowledge of indigenous communities from unauthorised use, misappropriation and misuse; 10
 - (b) promote public awareness and understanding of indigenous knowledge for the wider application and development thereof;
 - (c) develop and enhance the potential of indigenous communities to protect their indigenous knowledge;
 - (d) regulate the equitable distribution of benefits; 15
 - (e) promote the commercial use of indigenous knowledge in the development of new products, services and processes;
 - (f) provide for registration, cataloguing, documentation and recording of indigenous knowledge held by indigenous communities;
 - (g) establish mechanisms for the accreditation of assessors and the certification of indigenous knowledge practitioners; and 20
 - (h) recognise indigenous knowledge as prior art under intellectual property laws.

CHAPTER 3

NATIONAL INDIGENOUS KNOWLEDGE SYSTEMS OFFICE

Establishment of NIKSO 25

4. NIKSO is hereby established within the Department.

Functions and powers of NIKSO

5. (1) The functions and powers of NIKSO include—
- (a) implementation of this Act;
 - (b) protecting and recognising indigenous knowledge as property owned by indigenous communities; 30
 - (c) facilitating the redress of rights and benefits to indigenous communities which have previously been deprived of such rights and benefits;
 - (d) facilitating and coordinating the development of indigenous knowledge;
 - (e) establishing and managing the registration of assessors and indigenous knowledge practitioners; 35
 - (f) empowering indigenous communities through education and awareness campaigns to enable them to recognise and utilise indigenous knowledge for cultural and economic benefit;
 - (g) determining the criteria for issuing licenses for the use of indigenous knowledge; 40
 - (h) certifying licence agreements for the use of indigenous knowledge;
 - (i) assisting indigenous communities in the negotiation of benefit sharing agreements for the use of indigenous knowledge;
 - (j) facilitating the negotiation of licenses between trustees and users for the use of indigenous knowledge for commercial purposes; 45
 - (k) making recommendations to the Minister regarding norms and standards for the certification of indigenous practitioners;
 - (l) liaising with the Department to facilitate the entering into of license agreements with users of indigenous knowledge on behalf of an indigenous community where the relevant indigenous community cannot be identified; 50

- (m) ensuring that the Register of Designations is maintained and made available; and
- (n) carrying out any functions that are consistent with the objects of this Act.

Administration of NIKSO

6. (1) The Minister must appoint a suitably skilled and qualified person as the Head of NIKSO in accordance with the Public Service Act, 1994 (Proclamation No. 103 of 1994). 5

(2) The Head of NIKSO—

- (a) is responsible for the administration and general management of NIKSO, subject to directions and instructions issued by the Minister or the Director-General as delegated by the Minister; and 10
- (b) must report to the Director-General on all matters relating to the management of NIKSO.

(3) The staff of NIKSO consists of such number of employees as may be—

- (a) appointed by the Minister, in accordance with the Public Service Act, 1994; or 15
- (b) seconded from any organ of state,

as are necessary to enable NIKSO to perform its functions.

Establishment of Advisory Panel

7. (1) The Minister may establish an Advisory Panel based on criteria as prescribed, consisting of a minimum of five, but no more than ten, members on specific matters relating to the objects of this Act. 20

(2) The Advisory Panel must be broadly representative of the—

- (a) different relevant government departments;
- (b) indigenous knowledge practitioners;
- (c) industry; and 25
- (d) specialists in the discipline of practice,

based on criteria as prescribed.

(3) The Advisory Panel may be convened by the Head of NIKSO, as and when the need arises.

(4) The members of the Advisory Panel, with the exclusion of subsection (2)(a) 30 representatives who are subject to public service remuneration prescriptions, must only be remunerated for time spent on the business of NIKSO, in accordance with rates determined by the Minister, with the concurrence of the Minister of Finance.

(5) A member of the Advisory Panel holds office for a period of three years and may, upon expiry of that period, be reappointed for a further period of three years. 35

(6) Notwithstanding subsection (5), for the sake of continuity, the Minister may reappoint a core of at least three members of the Advisory Panel, as prescribed.

(7) The Minister may, subject to the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), remove a member of the Advisory Panel for—

- (a) non-performance; 40
- (b) serious misconduct;
- (c) conduct that undermines the integrity or objective of the Advisory Panel; or
- (d) being convicted of a criminal offence and sentenced to imprisonment without the option of a fine.

(8) NIKSO must provide administrative and secretarial support to the Advisory Panel. 45

Role of Advisory Panel

8. The Advisory Panel must—

- (a) provide expert and strategic advice to NIKSO in respect of the protection, promotion, development and management of indigenous knowledge;
- (b) assist with the mobilisation of indigenous communities for purposes of 50 pursuing specific activities conducted by NIKSO; and
- (c) advise NIKSO on any specific issue referred to it and execute any task that NIKSO may entrust to it in terms of this Act.

CHAPTER 4

PROTECTION OF INDIGENOUS KNOWLEDGE

Subject matter of protection

9. (1) This Act protects registered indigenous knowledge.
 (2) Indigenous knowledge constitutes property within the meaning of section 25 of the Constitution.
 (3) The ownership of indigenous knowledge as property vests in the relevant indigenous community.

Term of protection

10. (1) Indigenous knowledge is protected for as long as it meets the eligibility criteria set out in section 11.
 (2) If indigenous knowledge ceases to meet the eligibility criteria set out in section 11, it falls into the public domain from the date of proven ineligibility.

Eligibility criteria for protection

11. The protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge which—
- (a) has been passed on from generation to generation within an indigenous community;
 - (b) has been developed within an indigenous community; and
 - (c) is associated with the cultural and social identity of that indigenous community.

Vesting of rights in indigenous knowledge

12. (1) Subject to section 9, the custodianship of indigenous knowledge eligible for protection vests in the trustee of that indigenous community.
 (2) The trustee of the indigenous community—
- (a) holds the indigenous knowledge in trust on behalf of the indigenous community; and
 - (b) is responsible for and accountable to the indigenous community for the protection of their rights.
- (3) In the event that, and for as long as, the indigenous community of the relevant indigenous knowledge cannot be identified and designated, NIKSO must act as custodian of that indigenous knowledge, with the rights and obligations of a trustee in respect of that indigenous knowledge.

Rights conferred

13. (1) Subject to subsection (3), the indigenous community holding indigenous knowledge has the exclusive right to—
- (a) any benefits arising from its commercial use;
 - (b) be acknowledged as its source; and
 - (c) limit any unauthorised use of the indigenous knowledge.
- (2) Subject to subsection (3), a person wishing to make commercial use of indigenous knowledge must—
- (a) apply through NIKSO for a licence in accordance with section 26(1); and
 - (b) when so applying, must indicate—
 - (i) the identity of the indigenous community;
 - (ii) the place of origin of the indigenous knowledge; and
 - (iii) whether prior informed consent of the indigenous community has been obtained and a benefit sharing arrangement entered into with that indigenous community.
- (3) An individual member of the indigenous community holding indigenous knowledge who wishes to make commercial use of the indigenous knowledge—
- (a) must obtain permission from the indigenous community; and

- (b) may only make commercial use of that indigenous knowledge in a manner and subject to the indigenous community imposed terms and conditions as formalised in an agreement with the trustee.

CHAPTER 5

RECOGNITION OF PRIOR LEARNING OF INDIGENOUS KNOWLEDGE PRACTITIONERS 5

Accreditation of assessors

- 14.** (1) A certified indigenous knowledge practitioner may apply to NIKSO in the prescribed manner for recognition and accreditation as an assessor.
- (2) In processing a subsection (1) application, NIKSO— 10
- (a) must evaluate each application in accordance with the prescribed procedures and requirements; and
- (b) may issue an accreditation certificate to act as an assessor if it is satisfied that the applicant meets the prescribed criteria.
- (3) NIKSO may impose any reasonable conditions on such accreditation. 15
- (4) NIKSO may, in the prescribed manner, cancel the accreditation of an assessor, if the assessor has—
- (a) made a false declaration or intentionally submitted a fraudulent application to NIKSO;
- (b) failed to comply with or contravened any of the conditions of the 20 accreditation;
- (c) failed or refused to comply with the prescribed accreditation process;
- (d) accepted unlawful compensation, in respect of the certification of an indigenous knowledge practitioner;
- (e) charged excessive or unreasonable fees in respect of the certification of an 25 indigenous knowledge practitioner;
- (f) undermined, through any act of omission, the interests of the discipline or practice for which the assessor is registered; or
- (g) been convicted of a criminal offence and sentenced to imprisonment without the option of a fine. 30
- (5) The Minister must prescribe accreditation procedures to be followed by registered assessors.

Certification of indigenous knowledge practitioners

- 15.** (1) Any person who wishes to register their qualifications as an indigenous knowledge practitioner must apply, in the prescribed manner, to NIKSO to be so 35 certified and recorded in the Register of Designations.
- (2) NIKSO may refer the application for certification to an assessor for assessment and recommendation.
- (3) In assessing the eligibility of an applicant, the assessor must apply the prescribed norms and standards for certification of indigenous knowledge practitioners. 40
- (4) Upon completion of the assessment, if an applicant meets all the prescribed requirements, the assessor must recommend to NIKSO that a certificate of competency be issued to the applicant for purposes of certification.
- (5) Subject to subsection (4), NIKSO must—
- (a) issue the certificate of competency to the applicant; and 45
- (b) record the applicant as a certified indigenous knowledge practitioner in the Register of Designations.
- (6) Subject to subsection (5), no indigenous knowledge practitioner may practice for gain, unless the practitioner is registered with the relevant government department and been granted permission to practice in terms of the applicable prescribed practice 50 standards.
- (7) NIKSO may, in the prescribed manner, revoke the certification of an indigenous knowledge practitioner if such practitioner has—
- (a) made a false declaration or intentionally submitted a fraudulent application to NIKSO; 55
- (b) failed or refused to comply with the prescribed certification procedures;

- (c) failed to comply with or contravened any of the conditions set out in the certificate;
 - (d) undermined, through any act or omission, the interests of the discipline of practice for which the practitioner is certified;
 - (e) been convicted of a criminal offence and sentenced to imprisonment without the option of a fine; or 5
 - (f) voluntarily relinquished practice as an indigenous knowledge practitioner.
- (8) The Minister must prescribe application standards and procedures to be followed by applicants.

Register of Designations 10

- 16.** (1) NIKSO—
- (a) keep the Register of Designations in the prescribed manner;
 - (b) ensure the security of the Register of Designations.
- (2) Where information may be accessed by persons other than the indigenous community or an individual within that indigenous community, NIKSO must facilitate such access on payment of a prescribed fee. 15

CHAPTER 6

REGISTRATION OF INDIGENOUS KNOWLEDGE

Registration Office for Indigenous Knowledge

- 17.** NIKSO must establish a Registration Office for Indigenous Knowledge. 20

Curator of indigenous knowledge

- 18.** (1) The Minister must appoint a suitably skilled and qualified person as the Curator of indigenous knowledge in accordance with the Public Service Act, 1994.
- (2) The Curator is responsible for the control of the Registration Office, subject to the directions and instructions issued by the Minister or the Director-General as delegated by the Minister. 25
- (3) The Curator may delegate any of the powers and entrust any of the duties assigned to him or her by this Act, to any officer within NIKSO.
- (4) The Curator must permit the trustee to act on behalf of the indigenous community for whom he or she is a trustee, in connection with registration under this Act or any proceeding relating thereto. 30

Register of indigenous knowledge

- 19.** (1) NIKSO must—
- (a) keep a Register of Indigenous Knowledge in the prescribed manner; and
 - (b) ensure the security of the Register. 35
- (2) The Curator must record in respect of each item of indigenous knowledge—
- (a) the particulars of the indigenous community from which the indigenous knowledge originates;
 - (b) whether the indigenous knowledge is functional indigenous knowledge or an indigenous cultural expression, or both; 40
 - (c) whether the information provided may only be shared with persons outside the indigenous community with its prior informed consent;
 - (d) whether any agreements have been entered into between an outside party and the indigenous community;
 - (e) whether the indigenous knowledge is closely related to indigenous knowledge registered by another indigenous community, and if so, details of that indigenous knowledge; and
 - (f) any such other particulars as may be prescribed.
- (3) The Register is presumed to be evidence of any matters directed or authorised by this Act to be recorded therein. 50

Registration of indigenous knowledge

- 20.** (1) The trustee of an indigenous community may apply to the Curator in the prescribed manner for the registration of indigenous knowledge.
- (2) Subject to the provisions of this Act, the Curator may—
- (a) approve the application; 5
 - (b) approve the application subject to any conditions or limitations, and register the indigenous knowledge; or
 - (c) reject the application if it does not meet the criteria set out in section 11.
- (3) The Curator must, within 30 days after the registration of the indigenous knowledge— 10
- (a) issue to the applicant a certificate of registration in the prescribed form; and
 - (b) publish, in the prescribed form, a notice of registration in the Indigenous Knowledge Bulletin and any appropriate publication.
- (4) In order to exercise any right in respect of indigenous knowledge under this Act, the indigenous community must register the indigenous knowledge in terms of Chapter 6. 15

Inspection of Register

- 21.** (1) Subject to the provisions of this Act, the Curator must make the Register available for inspection by the public during working hours, upon payment of the prescribed fee. 20
- (2) Notwithstanding subsection (1), additional documents relating to the registration of indigenous knowledge may only be made available to the public, if the person seeking access enters into a prescribed non-disclosure agreement.
- (3) The Curator must, as prescribed, at the request of any person, and on payment of the prescribed fee, furnish a copy of an extract of the Register, or a copy of a certificate of registration. 25

Certificates of Curator to be *prima facie* evidence

- 22.** (1) A certificate appearing to be issued by the Curator, in respect of any record authorised by this Act, is presumed evidence of the content thereof and action authorised therein, unless proven otherwise. 30
- (2) In any judicial proceedings—
- (a) printed or written copies or extracts appearing to be copies of or extracts from the Register; or
 - (b) any document relating to indigenous knowledge certified by the Curator of the Registration Office, 35
- is presumed evidence of the content thereof, unless proven otherwise, and may be admitted as evidence without further proof or production of the original.

Register to be constructive notice

- 23.** In any proceedings regarding the rights registered in respect of indigenous knowledge, it may be presumed— 40
- (a) that every party to those proceedings was aware of the particulars entered in the Register from the date of the section 20(3)(b) publication; and
 - (b) that any person using the indigenous knowledge did so knowing that it was registered and that it was a pre-condition of use that the person should have entered into a benefit sharing agreement before commencing use. 45

Amendment of Register

- 24.** (1) The Curator may—
- (a) upon receiving an application from an interested person in the prescribed manner, and
 - (b) after granting the indigenous community an opportunity to make representations in response to the application, amend the Register. 50
- (2) The Curator must amend an entry in the Register in accordance with any finding by a court.

CHAPTER 7

COMMERCIAL UTILISATION OF INDIGENOUS KNOWLEDGE

Product development, commercialisation, services and processes

- 25.** (1) NIKSO may, at the request of an indigenous community, provide assistance or facilitate the commercial use of its indigenous knowledge. 5
- (2) NIKSO must, in respect of commercial use of indigenous knowledge—
- (a) promote partnerships for innovation and product development;
 - (b) coordinate funding;
 - (c) develop market strategies; and
 - (d) promote commercial use of products, services, processes and the use of 10 technology.

Access to and use of indigenous knowledge

- 26.** (1) Any person who intends to use indigenous knowledge for commercial purposes must—
- (a) apply in the prescribed manner for a licence authorising the use of that indigenous knowledge; and 15
 - (b) enter into a licence agreement with the trustee of the relevant indigenous community for the use of that indigenous knowledge,
- as facilitated by NIKSO.
- (2) NIKSO must consult with the trustee on the terms of the subsection (1)(b) licence agreement for the intended use and benefits payable by the licence holder. 20
- (3) In the event that the indigenous knowledge, which is the subject of the licence agreement, is—
- (a) functional in nature, then any obligation on the part of the licence holder to pay a royalty expires 20 years after the date of agreement; and 25
 - (b) an indigenous cultural expression, then any obligation on the part of the user to pay a royalty expires 50 years after the date of agreement.
- (4) No prior informed consent for the use of indigenous knowledge is required for—
- (a) criticism or academic review;
 - (b) reporting news or current events; 30
 - (c) judicial proceedings;
 - (d) non-commercial research purposes;
 - (e) any use that is incidental to the above purposes; and
 - (f) in circumstances of national emergencies or natural disasters, as long as the relevant indigenous community is compensated for the use of their indigenous 35 knowledge.
- (5) A licence holder must, subject to subsection (1), acknowledge the relevant indigenous community by mentioning them or the geographical place from which the indigenous knowledge originated.
- (6) Any person who is aggrieved by a NIKSO decision or the conditions imposed with regard to access, may within 60 working days declare a dispute and refer the matter for resolution in terms of section 27. 40

CHAPTER 8

ENFORCEMENT OF RIGHTS

Dispute Resolution Committee 45

- 27.** (1) The Minister may, subject to prescribed terms and conditions, appoint members of the Dispute Resolution Committee to resolve any dispute arising from this Act on an ad hoc basis.
- (2) In resolving a dispute, the Dispute Resolution Committee must consider customary laws which may have a bearing on the subject matter of the dispute. 50
- (3) Any party to a matter referred to the Dispute Resolution Committee may take the matter for review to the High Court.
- (4) The Dispute Resolution Committee may, as a sanction:
- (a) issue a written warning to the licence holder;

- (b) issue a notice prohibiting the unauthorised use of indigenous knowledge by the licence holder; and
- (c) recommend to NIKSO the cancelling, suspending or revoking of the licence rights of a licence holder.

Offences and penalties 5

- 28.** (1) Any third party who—
- (a) knowingly makes commercial use of indigenous knowledge in a manner which is not in accordance with an agreement entered into with the indigenous community; and
 - (b) infringes the rights of that indigenous community,
- is guilty of an offence and on conviction liable to pay a fine as prescribed. 10

CHAPTER 9

GENERAL PROVISIONS

Transnational arrangements

- 29.** (1) Indigenous knowledge originating in a foreign jurisdiction must be given the same protection granted to indigenous knowledge originating in the Republic, if the laws of that foreign jurisdiction provide reciprocal protection to indigenous knowledge originating in the Republic. 15
- (2) In instances where indigenous knowledge originates in one or more indigenous communities in foreign jurisdictions and in the Republic, NIKSO must assist the relevant foreign authorities and the indigenous community of the Republic to conclude an arrangement to share equitably in the proceeds accruing to the indigenous communities in terms of that benefit sharing agreement. 20

Multiple claims to indigenous knowledge

- 30.** (1) Where there are multiple claims to indigenous knowledge, any remuneration payable under a benefit sharing agreement must be apportioned equally among the trustees. 25
- (2) Where an existing benefit sharing agreement in terms of subsection (1) does not include all the trustees of the relevant indigenous communities, the agreement must be amended accordingly. 30

Regulations

- 31.** (1) The Minister may make regulations regarding any matter pertaining to—
- (a) the protection, promotion, development and management of indigenous knowledge;
 - (b) procedures for securing registration in the Register and obtaining licences to use indigenous knowledge from NIKSO;
 - (c) matters which may or must be prescribed in terms of this Act; and
 - (d) in general, any ancillary or incidental matter that it is necessary to prescribe for the proper implementation or administration of this Act. 35

Effect on other laws 40

- 32.** (1) This Act does not alter or detract from any right in respect of any statute or the common law.
- (2) Compliance with any procedures or requirements laid down in this Act does not constitute compliance with any procedures or requirements imposed in any other Act.

Transitional arrangements 45

- 33.** (1) An indigenous community wishing to register indigenous knowledge already in existence at the time of commencement of this Act, must register such indigenous knowledge in terms of this Act.

(2) Any continued use of indigenous knowledge, after the commencement of this Act, must be regulated in terms of a licence agreement between the trustee of the relevant indigenous community and the potential licence holder, entered into within 12 months from the date of commencement of this Act.

Short title and commencement

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34. This Act is called the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2017, and comes into operation on a date determined by the President by proclamation in the Gazette.

**MEMORANDUM ON THE OBJECTS OF THE PROTECTION,
PROMOTION, DEVELOPMENT AND MANAGEMENT OF
INDIGENOUS KNOWLEDGE BILL**

1. BACKGROUND

- 1.1 Cabinet approved a National Indigenous Knowledge Systems Policy in 2004. The Indigenous Knowledge Systems Policy contains overarching principles for the recognition, affirmation, development and promotion of indigenous knowledge. It also provides for the establishment of the National Indigenous Knowledge Systems Office to implement the Indigenous Knowledge Systems Policy and to coordinate Indigenous Knowledge activities across the country.
- 1.2 The Indigenous Knowledge Systems Policy also proposes the development of a *sui generis* legislation for the effective protection, promotion, development and management of Indigenous Knowledge in the Republic.
- 1.3 Since 2013, the Department of Science and Technology developed the draft bill for the protection, promotion, development and management of Indigenous Knowledge Systems, based on the Indigenous Knowledge Systems Policy. The Bill was published for public comment in the *government gazette* in 2015 and 2016, respectively.

2. SUMMARY OF THE BILL

The Bill provides for, amongst others, the establishment and functions of the National Indigenous Knowledge Systems Office, management of the rights of indigenous communities, establishment and functions of the Advisory Panel on indigenous knowledge, access and conditions of access to the knowledge of indigenous communities, establishment of a register of indigenous knowledge, accreditation of assessors and certification of indigenous knowledge practitioners and facilitation and coordination of indigenous knowledge-based innovation.

3. OBJECTS OF THE BILL

3.1 Application of the Bill

The Bill provides for the application of the Act to all persons in the Republic, in relation to all matters pertaining to registered indigenous knowledge.

3.2 Establishment of the National Indigenous Knowledge Systems Office

- 3.2.1 The Bill provides for the establishment of the National Indigenous Knowledge Systems Office within the Department, as well as its duties, powers and functions. It is envisaged that the National Indigenous Knowledge Systems Office will have a distant but not independent relationship with the Department, the Head of which will be reporting directly to the Minister.
- 3.2.2 It also provides for the establishment and the role of an Advisory Panel on Indigenous Knowledge, the role of which is to advise the Minister on issues around indigenous knowledge systems.

3.3 Protection of Indigenous Knowledge

- 3.3.1 The Bill clearly identifies all the Indigenous Knowledge rights that are protected in terms of the Act, the eligibility criteria for protection as well as the term of protection.
- 3.3.2 Custodianship of indigenous knowledge is deemed to be in the custody of a trustee appointed in terms of the law of trusts and to have the powers and duties of such a trustee, with any reference in this Act to an act performed, or the rights held, by an indigenous community

deemed to be a reference to that act performed, or rights held, by the trustee of that indigenous community.

- 3.3.3 It also sets out custodianship of such rights and arrangements for instances where the owners of such rights cannot be identified.

3.4 Accreditation and Certification

- 3.4.1 The Bill outlines the purpose of the accreditation of assessors and the certification of indigenous knowledge practitioners. It also sets out an application process for accreditation and certification of indigenous knowledge practitioners, as well as the role of the National Indigenous Knowledge Systems Office in the accreditation and certification process.

- 3.4.2 The Bill also provides for a Register of Designations. Persons other than the indigenous community, or an individual within an indigenous community, may access the information in the Register of Designations, as facilitated by the National Indigenous Knowledge Systems Office and upon payment of a prescribed fee.

3.5 Registration and management of indigenous knowledge

The Bill provides for the creation and maintenance of a system of registration of indigenous knowledge by the National Indigenous Knowledge Systems Office, and for the Minister to prescribe procedures and conditions for storage, access, transmission, management and security of the registered indigenous knowledge.

3.6 Product development, commercialisation, services and processes

- 3.6.1 The Bill provides for the facilitation and coordination by the National Indigenous Knowledge Systems Office of all indigenous knowledge activities, which relate to the commercial utilisation of indigenous knowledge products, services and processes.

- 3.6.2 The Bill affords opportunities for any person who intends to use indigenous knowledge for commercial purposes to apply in the prescribed manner for a licence authorising the use of that indigenous knowledge; and enter into a licence agreement with the trustee of the relevant indigenous community for the use of that indigenous knowledge.

3.7 Management of indigenous knowledge rights

The Bill sets out the processes for access to indigenous knowledge, resolution of disputes pertaining to custodianship and access to indigenous knowledge, as well as the sharing of benefits, which accrue to such indigenous knowledge.

3.8 Enforcement and other general provisions

- 3.8.1 The Bill sets out the process and conditions for the protection of indigenous knowledge resources originating from foreign jurisdictions, exceptions and limitations relating to access to the indigenous knowledge resources, including acknowledgement by users of indigenous knowledge or the geographical location from which the indigenous resources originated. In addition, where indigenous knowledge originates in one or more indigenous communities in foreign jurisdictions and in the Republic, the National Indigenous Knowledge Systems Office must assist the relevant foreign authorities and the indigenous community of the Republic to conclude an arrangement to share equitably in the proceeds accruing to the indigenous communities in terms of a benefit sharing agreement.

- 3.8.2 It also provides for the State's walk-in-rights and the circumstances under which such rights can be exercised, as well as the offences, penalties and complaints processes.
- 3.8.3 The Bill also gives the Minister power to make regulations on any matter pertaining to the protection, promotion, development and management of indigenous knowledge and other incidental or ancillary matters.
- 3.8.4 The Bill provides for multiple claims to indigenous knowledge. In this context, any remuneration payable under a benefit sharing agreement must be apportioned equally among the trustees. Furthermore, where an existing benefit sharing agreement does not include all the trustees of the relevant indigenous communities, the agreement must be amended accordingly.
- 3.8.5 It also provides for compliance with this Act within 12 months from the effective date in relation to any acquisition, appropriation or use of indigenous knowledge, indigenous cultural expressions, indigenous knowledge associated with natural resources, which was done prior to the coming into force of this Act.

4. PARTIES CONSULTED

Submissions were received from the following departments and individuals:

- Department of Justice
- Department of Environmental Affairs
- Department of Arts and Culture
- Department of Health
- National House of Traditional Leadership
- Department of International Relations and Cooperation

Departments that appointed focal persons:

- Department of Trade and Industry;
- Department of Basic Education;
- Department of Agriculture

5. FINANCIAL IMPLICATIONS FOR THE STATE

It is envisaged that NIKSO will operate under its current budget as a Specialised Services Delivery Unit.

6. PARLIAMENTARY PROCEDURE

- 6.1 The State Law Advisors and the Department of Science and Technology are of the opinion that this Bill should be dealt with in accordance with the procedure established by section 76 of the Constitution, since it contains provisions to which section 76 of the Constitution applies.
- 6.2 The State Law Advisors are of the opinion that it is necessary to refer the Bill to the National House of Traditional Leaders in terms of section 189(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions pertaining to customary law or customs of traditional communities.

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