

REPUBLIC OF SOUTH AFRICA

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

*(As introduced in the National Assembly (proposed section 76); explanatory summary
of Bill published in Government Gazette No. 39910 of 8 April 2016)
(The English text is the official text of the Bill)*

(MINISTER OF SCIENCE AND TECHNOLOGY)

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BILL

To provide for the protection, promotion, development and management of indigenous knowledge systems; to provide for the establishment and functions of the National Indigenous Knowledge Systems Office; to provide for the management of rights of indigenous knowledge holders; to provide for the establishment and functions of the Advisory Panel on indigenous knowledge systems; to provide for access and conditions of access to knowledge of indigenous and local communities; to provide for the registration, accreditation and certification of indigenous knowledge practitioners; to provide for the facilitation and coordination of indigenous knowledge systems-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 to or 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 obliged 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 Systems 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 non-holders as authorised by NIKSO in terms of this Act; 20
 - “**accreditation**” means a formal quality assurance process by which NIKSO grants or delegates authority to qualifying agents for the purpose of overseeing the assessment of learners and accreditation of indigenous knowledge practitioner mentors or instructors within a discipline of practice according to applicable, pre-determined standards having regard to that person’s possession of indigenous knowledge, expertise and skills; 25
 - “**agent**” means a qualifying agent appointed by NIKSO for the purpose of overseeing the assessment and accreditation of indigenous knowledge practitioners within a discipline of practice according to applicable, pre-determined standards having regard to that person’s possession of indigenous knowledge, expertise and skills; 30
 - “**benefit sharing**” means the fair and equitable sharing of benefits in terms of a benefit sharing agreement between NIKSO and the licence holder, including monetary payments that accrue from access to, or use of, indigenous knowledge, and may comprise participation in scientific research, fair and equitable sharing of research and development results and commercial and other benefits derived from indigenous knowledge, access to, use of, and transfer of technology, priority access to results and benefits accruing from such access; 35
 - “**certification**” means the formal procedure by which NIKSO grants or delegates authority to an agent to assess and verify the qualification of indigenous knowledge practitioners in accordance with pre-determined requirements; 40
 - “**commercial use**” means the exploitation of indigenous knowledge for financial gain;
 - “**Constitution**” means the Constitution of the Republic of South Africa, 1996; 45
 - “**cultural and social identity**” means the particular and distinctive identity or characteristics of a certain group or culture or of an individual as far as he or she is influenced by belonging to a certain group or culture;
 - “**Department**” means the Department of 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 evolves spontaneously or is created based on people’s engagement in a process of collective learning in a shared domain of human endeavour; 50

- “holder”**, in relation to indigenous knowledge, means the indigenous community from which indigenous knowledge originates;
- “indigenous community”** means any recognisable community of people developing from, or historically settled in, a geographic area or areas located within the borders of the Republic characterised by social, cultural and economic conditions which distinguish them from other sections of the national community, and who identify themselves and are recognised by other groups as a distinct collective; 5
- “indigenous cultural expressions”** means expressions having cultural content developed within indigenous communities and assimilated into their cultural make-up or essential character, including but not limited to— 10
- (a) phonetic or verbal expressions;
 - (b) musical or sound expressions;
 - (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 make-up or essential character of that community, and includes— 15
- (a) knowledge of a scientific or technical nature;
 - (b) knowledge of natural resources; and
 - (c) indigenous cultural expressions; 20
- “indigenous knowledge practitioner”** means a person who is accredited and certified as an indigenous knowledge practitioner to render a service utilising indigenous knowledge;
- “licence holder”** means any person who applies for and is granted a licence by NIKSO to use indigenous knowledge; 25
- “Minister”** means the Minister responsible for science and technology;
- “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; 30
- “NIKSO”** means the National Indigenous Knowledge Systems Office established by section 4;
- “prescribed”** means prescribed by regulation;
- “prior informed consent”** means the consent in respect of indigenous knowledge granted by an indigenous community trustee which has been obtained free from any manipulation, interference or coercion and after full disclosure of the intent and scope of the activity, in a language and process understandable to the community; 35
- “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; 40
- “Register of Designations”** means a register of names, levels of competencies and accreditations of indigenous knowledge practitioners;
- “regulations”** means regulations made in terms of this Act;
- “this Act”** includes the regulations; and 45
- “trustee”** means a natural or juristic 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.

CHAPTER 2

APPLICATION AND OBJECTS OF ACT 50

Application of Act

2. (1) This Act applies to all persons in the Republic, including the State.
- (2) This Act applies to all indigenous knowledge registered under this Act.

Objects of Act

3. (1) The objects of this Act are to— 55
 - (a) protect the indigenous knowledge of indigenous communities from unauthorised use and misappropriation;

- (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 of the use of indigenous knowledge; 5
- (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; 10
- (g) establish mechanisms for the accreditation of indigenous knowledge practitioners; and
- (h) recognise indigenous knowledge as prior art in the determination of, and eligibility for, protection of subject matter under intellectual property laws.

CHAPTER 3

15

NATIONAL INDIGENOUS KNOWLEDGE SYSTEMS OFFICE

Establishment of NIKSO

4. The National Indigenous Knowledge Systems Office (NIKSO) is hereby established within the Department.

Functions and powers of NIKSO

20

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;
 - (c) facilitating the redress of rights and benefits to indigenous communities which have previously been deprived of such rights and benefits; 25
 - (d) facilitating and coordinating the development of indigenous knowledge;
 - (e) establishing and managing the registration of indigenous knowledge and the registration and accreditation of indigenous knowledge practitioners;
 - (f) empowering indigenous communities through education and awareness campaigns to enable them to recognise and utilise indigenous knowledge for cultural and economic benefit; 30
 - (g) determining the criteria for issuing licences for the use of indigenous knowledge;
 - (h) assisting indigenous communities in the negotiation of benefit-sharing agreements for use of indigenous knowledge; and 35
 - (i) 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). 40

(2) The Head of NIKSO is responsible for the administration and general management of NIKSO, subject to directions and instructions issued by the Director-General or the Minister.

(3) The Head of NIKSO must report to the Director-General on all matters relating to the management of NIKSO. 45

(4) The staff of NIKSO consists of such number of employees as may be appointed by the Minister, in accordance with the Public Service Act, 1994, or received on secondment from any organ of state, as are necessary to enable NIKSO to perform its functions. 50

Establishment of Advisory Panel

7. (1) The Minister may establish an Advisory Panel consisting of not more than 10 members on specific matters relating to the objects of this Act.

(2) The Advisory Panel shall be broadly representative of the different organs of state, indigenous knowledge practitioners and specialists in the discipline of practice.

(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 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

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

(6) For the sake of continuity, at least five members of the Advisory Panel may be reappointed. 10

(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;
- (b) serious misconduct; 15
- (c) conduct that undermines the integrity or objective of the Advisory Panel; or
- (d) being convicted of an offence and sentenced to imprisonment without the option of a fine.

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

Role of Advisory Panel 20

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 systems;
- (b) assist with the mobilisation of indigenous communities for purposes of pursuing specific activities conducted by NIKSO; and 25
- (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 30

9. (1) This Act protects indigenous knowledge, whether it is cultural or functional in nature, or both, including medical, agricultural and scientific practices, in the manner and to the extent provided for in section 11.

(2) Such indigenous knowledge shall constitute property within the meaning of this term as used in section 25 of the Constitution. 35

Term of protection

10. (1) The protection of indigenous knowledge continues for as long as the indigenous knowledge meets the criteria of eligibility for protection in terms of section 11.

(2) In the event that indigenous knowledge ceases to meet the criteria set out in terms of section 11, it shall fall into the public domain with effect from the date on which it no longer meets the criteria set out in terms of section 11. 40

Eligibility criteria for protection

11. The protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge which— 45

- (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 make-up and social identity of that indigenous community. 50

Vesting of rights in indigenous knowledge

- 12.** (1) The ownership of indigenous knowledge eligible for protection in respect of an indigenous community in terms of section 9 vests in that indigenous community.
- (2) The trustee of the indigenous community holds the indigenous knowledge in trust on behalf of the indigenous community. 5
- (3) The trustee shall be responsible to the community for the protection of their rights in the indigenous knowledge.
- (4) In the event that, and for as long as, the holder of indigenous property cannot be identified and designated, NIKSO must act as custodian of that indigenous knowledge, and the ownership of it shall be deemed to vest in NIKSO, which shall have the rights and obligations of a trustee in respect of that indigenous knowledge. 10

Rights conferred

- 13.** (1) Subject to subsection (3), the holder of indigenous knowledge has the exclusive right in respect of that indigenous knowledge to—
- (a) the benefits arising from its commercial use; 15
 - (b) be acknowledged as its source; and
 - (c) restrain any unauthorised use of the indigenous knowledge.
- (2) Subject to subsection (4), a person wishing to acquire the right to use indigenous knowledge shall apply to NIKSO for a licence in accordance with section 26(1).
- (3) The application must indicate— 20
- (a) the identity of the indigenous knowledge holder;
 - (b) the place of origin of the indigenous knowledge; and
 - (c) evidence that the prior informed consent of the indigenous knowledge holder has been obtained and that a benefit sharing arrangement has been entered into with that indigenous knowledge holder. 25
- (4) The holder of indigenous knowledge may authorise the use of that indigenous knowledge by an individual member of the community in a manner and subject to such terms and conditions as it may deem fit.
- (5) A person who uses indigenous knowledge in a manner which is inconsistent with the licence for that indigenous knowledge shall be guilty of an offence. 30

CHAPTER 5

ACCREDITATION AND CERTIFICATION OF INDIGENOUS KNOWLEDGE PRACTITIONERS

Accreditation of indigenous knowledge practitioners

- 14.** (1) Any person who wishes to practise as an indigenous knowledge practitioner must apply, in the prescribed manner, to NIKSO to be accredited and certified as an indigenous knowledge practitioner and recorded in the Register of Designations. 35
- (2) NIKSO may refer the application to an agent who has competence in the particular discipline in which that person wishes to practise, for assessment and recommendation.
- (3) In assessing the eligibility of the applicant, the agent must apply the prescribed norms and standards for accreditation of indigenous knowledge practitioners. 40
- (4) Upon completion of the assessment, the agent must recommend to NIKSO to issue a certificate of competency to an applicant who meets all the prescribed requirements.
- (5) NIKSO must issue the certificate of competency to the applicant and record the applicant as an accredited indigenous knowledge practitioner in the Register of Designations. 45
- (6) Upon certification, a practitioner may commence practising as an accredited indigenous knowledge practitioner.
- (7) NIKSO may, in the prescribed manner, cancel the certification of an indigenous knowledge practitioner if such practitioner has— 50
- (a) made a false declaration or statement or committed fraud or any act or misrepresentation for the purpose of obtaining accreditation;
 - (b) failed to comply with or has contravened any of the conditions set out in the certificate of accreditation;
 - (c) committed any other act or omission that is contrary to the interests of the discipline of practice which has certified the practitioner; 55

- (d) been convicted of a criminal offence without the option of a fine; or
- (e) voluntarily relinquished practice as a traditional knowledge practitioner.
- (8) NIKSO must—
 - (a) make recommendations to the Minister regarding norms and standards for accreditation of indigenous knowledge practitioners; 5
 - (b) ensure that the Register of Designations is established, maintained and made available to the public upon request; and
 - (c) seek recognition of accreditation systems for indigenous knowledge practitioners regionally and internationally.
- (9) No person shall practise as an indigenous knowledge practitioner for gain unless he or she has been accredited in terms of this section. 10

Certification of agents to accredit indigenous knowledge practitioners

- 15.** (1) An agent may apply to NIKSO in the prescribed manner for recognition, certification and registration as an agent.
- (2) NIKSO must evaluate each application in accordance with the prescribed procedures and requirements and may issue a certificate to act as an agent if it is satisfied that the applicant meets the prescribed criteria. 15
- (3) NIKSO may impose any conditions on such certification.
- (4) The Minister must prescribe accreditation procedures to be followed by agents.
- (5) NIKSO may, in the prescribed manner, cancel the registration of the agent if such agent— 20
- (a) fails or refuses to comply with the prescribed accreditation procedures;
 - (b) has intentionally submitted a fraudulent application to NIKSO;
 - (c) accepts unlawful compensation, in respect of the application for accreditation;
 - (d) charges excessive or unreasonable fees concerning the application for the accreditation of an indigenous knowledge practitioner; 25
 - (e) is found guilty of a criminal offence without the option of a fine; or
 - (f) commits any other unlawful act.

CHAPTER 6

REGISTRATION OF INDIGENOUS KNOWLEDGE 30

Registration Office for Indigenous Knowledge

- 16.** (1) NIKSO shall establish a Registration Office for Indigenous Knowledge (Registration Office).
- (2) There shall be prescribed a seal of the Registration Office and the impression of the seal shall be judicially noticed. 35

Registrar of indigenous knowledge

- 17.** (1) The Minister must appoint a suitably skilled and qualified person as the Registrar of indigenous knowledge (Registrar) in accordance with the Public Service Act, 1994.
- (2) The Registrar is responsible for the control of the Registration Office, subject to the directions and instructions issued by the Director-General or the Minister. 40
- (3) The Registrar 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 Registrar must permit the agent to act on behalf of the person for whom he or she is an agent, in connection with registration under this Act or any proceeding relating thereto. 45

Register of indigenous knowledge practitioners and agents

- 18.** (1) NIKSO shall keep a register of indigenous knowledge practitioners and accredited agents in the prescribed manner.
- (2) NIKSO shall ensure the security of any register falling within its remit, and shall maintain a list of all such registers. 50
- (3) Where information may be accessed by persons outside an indigenous community, NIKSO shall facilitate such access on payment of the prescribed fee.

Register of Indigenous Knowledge

- 19.** (1) NIKSO must keep a Register of Indigenous Knowledge in the prescribed manner.
- (2) The Register shall record in respect of each item of indigenous knowledge—
- (a) particulars of the indigenous community from which the indigenous knowledge originates; 5
 - (b) whether the indigenous knowledge is functional indigenous knowledge or an indigenous cultural expression;
 - (c) whether the information provided may only be shared with persons outside the indigenous community with its consent; 10
 - (d) whether any licenses 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 15
 - (f) such other particulars as may be prescribed.
- (3) The registration of an item of indigenous knowledge in the Register shall be designated by the Registrar as being in respect of functional indigenous knowledge or indigenous cultural expressions, or as falling in both these categories.
- (4) The Register shall be *prima facie* evidence of any matters directed or authorised by this Act to be inserted in the Register. 20

Registration of indigenous knowledge

- 20.** (1) An indigenous knowledge holder may apply to the Registrar in the prescribed manner for registration of the indigenous knowledge.
- (2) Subject to the provisions of this Act, the Registrar may— 25
- (a) approve the application;
 - (b) approve the application subject to any conditions or limitations, and register the indigenous knowledge; or
 - (c) refuse the application if it does not meet the criteria set out in section 11.
- (3) The Registrar shall, within 30 days after the registration of the indigenous knowledge— 30
- (a) issue to the applicant a certificate of registration in the prescribed form and sealed with the seal of the Registration Office; and
 - (b) cause to be published in Indigenous Knowledge Bulletin or any appropriate publication, in the prescribed form, a notice of such registration. 35

Inspection of Register

- 21.** (1) Subject to the provisions of this Act, the Registrar must make the Register available for inspection by the public during working hours, upon payment of the prescribed fee.
- (2) Documents relating to registration of indigenous knowledge shall not be available for inspection by the public unless the person seeking such additional documents enters into a non-disclosure agreement as prescribed. 40
- (3) The Registrar shall, 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, in the prescribed manner. 45

Certificates of Registrar to be *prima facie* evidence

- 22.** (1) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that is authorised by this Act to be made or done, shall be *prima facie* evidence of the entry having been made and of the contents thereof.
- (2) Printed or written copies or extracts purporting to be copies of or extracts from the Register, or any document relating to indigenous knowledge kept in the Registration Office, and certified by the Registrar and sealed with the seal of the Registration Office, shall be admitted as evidence in all courts and proceedings without further proof or production of the original. 50

Register to be constructive notice

- 23.** In any proceedings relating to in respect of rights of respect of registered indigenous knowledge, it shall be presumed—
- (a) that every party to those proceedings had knowledge of the particulars entered in the Register from the date of the advertisement of that registration in an Indigenous Knowledge Bulletin; and 5
 - (b) that any person using the indigenous knowledge did so in the knowledge that it was registered and that it was a pre-condition of such use that such person should have entered into a benefit sharing agreement prior to commencing such use. 10

Rectification of Register

- 24.** (1) The Registrar may direct the Register to be rectified by making an amendment or deletion of any entry in the Register upon application by an interested person in the prescribed manner.
- (2) The Registrar may not rectify the Register unless the holder has had an opportunity to make representations on the proposed rectification. 15
- (3) The Registrar shall rectify an entry in the Register in accordance with any finding or judgment of the court in respect of that entry.

CHAPTER 7

COMMERCIAL UTILISATION OF INDIGENOUS KNOWLEDGE AND ENFORCEMENT OF RIGHTS 20

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.
- (2) NIKSO must, in respect of commercial use of indigenous knowledge, promote partnerships for innovation and product development, coordinate funding, develop market strategies and promote commercial use of products, services, process and the use of technology. 25
- (3) In order to exercise any right in respect of indigenous knowledge under this Act, the holder shall register the indigenous knowledge in terms of chapter 6. 30

Access to and use of indigenous knowledge

- 26.** (1) Any person who intends to use indigenous knowledge for commercial purposes shall—
- (a) apply in the prescribed manner to NIKSO for a licence authorising the use of that indigenous knowledge; and 35
 - (b) enter into a non-exclusive Standard Benefit Sharing Agreement with NIKSO, acting on behalf of the holder, for the use of that indigenous knowledge.
- (2) NIKSO shall consult with the trustee on the terms of the Standard Benefit Sharing Agreement for the intended use and benefits payable by the licence holder.
- (3) In the event that the indigenous knowledge which is the subject of the Standard Benefit Sharing Agreement is— 40
- (a) a scientific or technical in nature, any obligation on the part of the licence holder to pay a royalty shall expire 20 years after the date of agreement; and
 - (b) an indigenous cultural expression, any obligation on the part of the user to pay a royalty shall expire 50 years after the date of agreement. 45
- (4) No prior informed consent for the use of indigenous knowledge is required for any of the following:
- (a) Face-to-face teaching;
 - (b) criticism or academic review;
 - (c) reporting news or current events; 50
 - (d) judicial proceedings;
 - (e) academic purposes;
 - (f) any use that is incidental to the above purposes; and

(g) in circumstances of national emergencies or natural disasters:

Provided that holders are compensated for the use of their indigenous knowledge.

(5) A user of the indigenous knowledge must, in the circumstances contemplated in subsection (1), acknowledge the indigenous knowledge holders by mentioning them or the geographical place from which the indigenous knowledge originated. 5

(6) Any person who is aggrieved by NIKSO's decision or the conditions pertaining to such access, must, within 60 working days of such decision, declare a dispute and refer it for resolution in terms of section 27.

Dispute Resolution Committee 10

27. (1) The Minister must, subject to such terms and conditions as the Minister may determine, appoint members of the Dispute Resolution Committee to resolve any dispute arising from this Act.

(2) In resolving a dispute, the Dispute Resolution Committee shall consider customary laws which may have a bearing on the subject matter of the dispute. 15

(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 shall have the power to impose any of the following sanctions:

- (a) A written warning to the licence holder; 20
- (b) a notice prohibiting the unauthorised use of indigenous knowledge by any person; and
- (c) cancelling, suspending or revoking the licence of a licence holder.

CHAPTER 8

GENERAL PROVISIONS 25

Offences and penalties

28. (1) Any person who uses indigenous knowledge in a manner which is inconsistent with the licence issued for that indigenous knowledge, shall be guilty of an offence and liable to any sanction determined by the Dispute Resolution Committee.

(2) Any person who uses indigenous knowledge without authorisation, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding three years or to a fine of R30 000 or both. 30

(3) Any person who falsely professes to be a certified indigenous knowledge practitioner shall be guilty of an offence and liable on conviction to imprisonment not exceeding three years or to a fine of R30 000 or both. 35

(4) Any person who hinders or interferes with the management of an official in the performance of their official duties in terms of this Act shall be guilty of an offence and liable on conviction to imprisonment not exceeding three years or to a fine of R30 000 or both.

Transnational arrangements 40

29. (1) Indigenous knowledge originating in a foreign jurisdiction must be given the same protection given to indigenous knowledge originating in the Republic: Provided that the laws of that foreign jurisdiction provide reciprocal protection to indigenous knowledge originating in the Republic.

(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 the ownership of that indigenous knowledge. 45

Co-ownership of indigenous knowledge

30. (1) In the event there is multiple ownership of indigenous knowledge, any remuneration payable under a benefit-sharing agreement shall be apportioned equally amongst the co-holders. 50

(2) Where an existing benefit sharing agreement does not include all the co-holders of the indigenous knowledge, the agreement shall be amended accordingly.

Regulations

- 31.** The Minister may make regulations regarding any matter pertaining to—
- (a) the protection, promotion, development and management of indigenous knowledge; 5
 - (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 10 for the proper implementation or administration of this Act.

Effect on other laws

- 32.** (1) This Act does not alter or detract from any right in respect of intellectual property conferred by any statute or the common law.
- (2) Compliance with any procedures or requirements laid down in this Act shall not constitute compliance with any procedures or requirements imposed in any other Act. 15
- (3) Without detracting from the generality of subsection (1) or (2), this Act does not amend or detract from the provisions of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), the Designs Act, 1963 (Act No. 195 of 1963), the Copyright Act, 1978 (Act No. 98 of 1978), the Trade Marks Act, 1993 20 (Act No. 194 of 1993), 1963 and the Performers Protection Act, 1967 (Act No. 11 of 1967), as amended.

Transitional arrangements

- 33.** An indigenous knowledge holder wishing to register indigenous knowledge which existed prior to the commencement of this Act, must register such indigenous knowledge in terms of this Act within 12 months from the date of commencement of this Act. 25

Short title and commencement

- 34.** This Act is called the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act, 2016, and shall come into operation on a date 30 determined by the President by proclamation in the *Gazette*.

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

1. BACKGROUND

- 1.1 A National Indigenous Knowledge Systems Policy was approved by Cabinet in 2004. The Indigenous Knowledge Systems Policy contains overarching principles for the recognition, affirmation, development and promotion of indigenous knowledge. It also provided for the establishment of the National Indigenous Knowledge Systems Office to implement the Indigenous Knowledge Systems Policy and to coordinate Indigenous Knowledge Systems activities across the country.
- 1.2 The Indigenous Knowledge Systems Policy also proposed the development of alternate legislation for the effective protection, promotion, development and management of Indigenous Knowledge Systems in the Republic.
- 1.3 During 2013 the Department of Science and Technology (the Department) developed a draft Bill for the protection, promotion, development and management of Indigenous Knowledge Systems, based on the Indigenous Knowledge Systems Policy.

2. SUMMARY OF THE BILL

The Bill provides for, amongst others, the:

- establishment and functions of the NIKSO;
- management of the rights of indigenous knowledge holders;
- establishment and functions of the Advisory Panel on indigenous knowledge systems;
- access and conditions of access to the knowledge of indigenous and local communities;
- establishment of a national recordal system of indigenous knowledge systems;
- registration, accreditation and certification of indigenous knowledge practitioners; and
- facilitation and coordination of indigenous knowledge systems-based innovation.

3. OBJECTS OF THE BILL

3.1 Scope of application

The Bill provides for the application of the new Act to all persons in the Republic in relation to all matters pertaining to indigenous knowledge systems, and to all indigenous knowledge resources which existed either before the commencement of this Act are to be created on or after the commencement of this Act.

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 (NIKSO) as a non-juristic entity within the Department, and for its duties, powers and functions.
- 3.2.2 It also provides for the establishment and role of an Advisory Panel on Indigenous Knowledge Systems.

3.3 Protection of Indigenous Knowledge Systems

- 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 scope and term of protection.
- 3.3.2 It also sets out the list of beneficiaries of such rights, and arrangements for instances where the beneficiaries of such rights cannot be identified.

3.4 Accreditation and certification

The Bill outlines the purpose of the accreditation and 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 NIKSO in the accreditation and certification process.

3.5 Documentation, recording and management of indigenous knowledge

The Bill provides for the creation and maintenance of a system of documenting and recording of indigenous knowledge by NIKSO, and for the Minister to prescribe procedures and conditions for storage, access, transmission, management and security of the documented and recorded indigenous knowledge.

3.6 Product development, commercialisation, services and processes

- 3.6.1 The Bill provides for facilitation and coordination by NIKSO of all indigenous knowledge systems activities which relate to the commercial utilisation of indigenous knowledge products, services and processes will.
- 3.6.2 It also gives the Minister the power to establish mechanisms to promote partnerships for innovation and product development, and for the coordination of funding, development of market strategies and promotion of commercial utilisation of products, services and processes.

3.7 Management of indigenous knowledge rights

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

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 indigenous knowledge resources, including acknowledgement by users of indigenous knowledge holders or the geographical location from which the indigenous resources originated.
- 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 for offences, penalties and complaints processes.
- 3.8.3 The Bill further gives the Minister the power to make regulations on any matter pertaining to the protection, promotion, development and management of indigenous knowledge or indigenous knowledge systems, and for incidental or ancillary matters.

- 3.8.4 It allows holders of indigenous knowledge who wish to register in terms of this Act, to do so within 12 months of the commencement of this Act.

4. PARTIES CONSULTED

The following departments and bodies were consulted:

- Department of Justice and correctional services
- Department of Environmental Affairs
- Department of Arts and Culture
- Department of Health
- National House of Traditional Leaders

Departments that appointed focal persons:

- Department of Trade and Industry;
- Department of Basic Education;
- Department of Agriculture, Forestry and Fisheries

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

- 6.1.1 The State Law Advisers 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.
- 6.1.2 The State Law Advisers are of the opinion that it is necessary to refer the Bill to the National House of Traditional Leaders in terms of section 18(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.