




**Bill for the Protection, Development,
Management and Protection of
Indigenous Knowledge Systems**



19 August 2015
Portfolio Committee

 science
& technology
Department:
Science and Technology
REPUBLIC OF SOUTH AFRICA



Presentation Outline

- Historical background
- Rationale for the development of IKS legislation
- Process of drafting
- Substantive clauses
- Process leading to Cabinet acceptance

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Historical background

- Approved by Cabinet in 2004, the national Indigenous Knowledge Systems (IKS) Policy contains overarching principles for the recognition, affirmation, development and promotion of indigenous knowledge (IK).
- DST established the National Indigenous Knowledge Systems Office (NIKSO) to implement the policy and coordinate IKS activities in the country.
- The Policy also proposed the development of legislation for the effective protection, promotion, development and management of IKS.



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Drafting Process

- The Bill was collectively drafted by a DST internal task team comprising NIKSO officials, the Legal Service Unit and NIPMO.
- During the drafting process, inputs and comments were also solicited from Programmes 2 and 5, and these were integrated into the draft IKS Bill.
- On 27 March 2013, EXCO approved the draft IKS Bill for consultation with relevant national and provincial government departments and other organs of state.
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POST EXCO APPROVAL

- Letters were sent via the Director-General's office to relevant government departments having an interest in IKS. The letter requested a focal person to be appointed by the relevant Department.
- A number of consultation meetings were also held with representatives from the relevant government departments, both in bilateral discussions and in roundtable sessions.
- An overwhelming majority of responses received from government departments and organs of state were extremely positive.



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Government Gazetting of the Bill

- The draft Bill was reviewed by a team of international and national experts in December 2014.
- DST officials met with the CSLA in January 2015.
- Cabinet approved the publication of the Bill on 12 February 2015.
- The IKS Bill was published in the Government Gazette on 20 February 2015, with a 60-day public comment period.
- A total of 29 written submissions were received, and 13 meetings with the public held in the nine provinces.




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Why a Legislation

- South Africa's current legislation and its concomitant amendments by the *dti* on intellectual property rights cannot accommodate and adequately protect IK.
- While there is consensus that indigenous knowledge is worthy of protection, there appears to be some difference on how best to protect IK, with two main options being put forward:
 - 1. *Using the existing IP rights system*
 - 2. *Developing an alternate system of rights*




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International Consideration

- The draft IKS Bill takes into account key legal provisions of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation, which was ratified by South Africa in 2013.
- It also takes into consideration the guiding principles and substantive provisions for the protection of traditional cultural expressions and traditional knowledge agreed to by the World Intellectual Property Organisation (WIPO).




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IP Laws Amendment Act (IP Act) and IKS Bill	
IP Act	IKS Bill
The scope of protection of the IP Act is limited to positive protection of indigenous knowledge in relation to misappropriation and misuse.	IKS Bill has a broader scope of protection that covers the defensive protection, positive protection (as in innovation) and for preservation i.e. preserving IK against loss; saving IK for future generations of the original community and ensuring fair and appropriate terms when making IK available more widely.
The IP Act provides protection for third party users of the IK, it does not grant a right to communities to provide access or deny access to their knowledge.	IKS Bill introduces new rights that allow indigenous communities to grant or deny access to their knowledge.
The IP Act only affords commercial incentives to IK residing in the dti database which is publicly accessible	IKS Bill protects both publicly accessible and confidential IK.




IP Amendment Act and IKS Bill	
IP Amendment Act	IKS Bill
IP Act requires the reduction of IK to material form for it to qualify for protection. This challenges the principle that the object of protection is knowledge, in this case IK is largely kept in an oral form and it might not be readily reduced to material form to qualify for protection.	The focus is not on the knowledge, but focuses on the protection of the knowledge.
The IP Act overlooked the trans-border nature of IK.	The IKS Bill makes provision for trans-boundary nature of IK.
Limited term of protection, subject to the condition that, upon the expiry of the term of protection, IK is surrendered to the public at large and becomes free to use.	Protection is guaranteed as long as the eligibility criteria are satisfied.




Indigenous Knowledge Systems Bill: Main Title

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; and to provide for the:

- **management of rights;**
- **establishment of an advisory Panel where required;**
- **access and conditions of access to knowledge;**
- **registration, accreditation and certification of practitioners and holders of IK;**
- **development of IKS-based innovation.**




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Definitions, Interpretation and Application

- **Section 1:** Definitions of concepts - according to the Act
- **Section 2 :** Interpretation – How the courts will interpret the Act?
- **Section 3:** Application of the Act – To whom and what will the Act apply?




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Purpose of the Bill

Section 4:

- Protects the knowledge from illicit use and misappropriation
- Acknowledges prior art in the examination of the novelty and inventiveness of patents granted.
- Promotes public awareness and understanding of IK.
- Promotes the strengthening and development of the potential of the indigenous communities.
- Promotes the commercial utilisation of indigenous knowledge.
- Creates legal recognition for the cataloguing, documentation and recording of knowledge held by indigenous communities.
- Establishes accreditation and certification mechanisms.




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Establishment of NIKSO

Section 5:

The Act establishes within the Department a non-juristic entity to be known as the National Indigenous Knowledge Systems Office.




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Functions and duties of NIKSO

Section 6:

- Protects and restore the recognition of indigenous knowledge systems.
- Facilitates redress of indigenous communities.
- Facilitates and coordinate the development and innovation of IKS.
- Manages the national recordal and documentation system, registration, accreditation and certification.
- Mobilise indigenous communities.

Administration of NIKSO, Establishment of Advisory Panel & Role of the Panel

Section 7 : Administration of NIKSO


The Minister must appoint Head of NIKSO.
The staff of NIKSO will consist of employees as may be appointed by the Minister.


Section 8 : Establishment of Advisory Panel

The Minister may establish an Advisory Panel, consisting of not more than 10 individuals who are recognised by members of their constituency.

Section 9: Role of the Panel

The Advisory Panel must provide expert and strategic advice to NIKSO.






Subject matter of protection


Section 10:

The following are protected in terms of this Act:

- indigenous knowledge;
- indigenous cultural expressions; and
- indigenous knowledge associated with natural and genetic resources.




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Eligibility criteria for protection

Section 11:

- passed on from generation to generation and between generations in indigenous communities;
- the result of the creative intellectual activity of indigenous communities;
- associated with the cultural and social identity of indigenous communities; and
- maintained, used or developed as part of the cultural or social identity of indigenous communities.




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Scope of protection

Section 12:
Beneficiaries will have exclusive rights to :

- Enjoy, control, utilise, maintain, develop, preserve and protect their IK resources.
- Authorise or deny access to and use of their IK resources.
- Prevent misappropriation and misuse, including any acquisition, appropriation, utilisation or practice of their IK resources without their prior informed consent and the establishment of mutually agreed terms.
- Prevent the use of IK resources without acknowledgement and attribution of the source and origin of the knowledge and its holders where known.
- Ensure that the use of IK resources respect the cultural norms and practices of the holders.
- IPR relating to IK resources must comply with the disclosure requirements



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Period of protection & beneficiaries

Section 13 :


- The protection of indigenous knowledge will last as long as the indigenous knowledge satisfies the criteria of eligibility for protection in terms of the Act.

Section 14:

- A beneficiary is any individual or individuals, family or families recognised by the indigenous community or communities as the individual or individuals, family or families to whom the custody or protection of the indigenous resources is entrusted.
- The state will be the custodian of indigenous knowledge rights in the event a beneficiary has not been identified.




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Accreditation and certification


- **Section 15:**
The purpose of accreditation and certification is to provide a system for the recognition, standardisation and professionalisation of indigenous knowledge holders and practitioners' skills, experiences, teaching, learning and practice.
- **Section 16:**
Defines certification and accreditation procedures for the different communities of practice.
- **Section 17:**
Ensures that a register of designation is available to the public as prescribed; and seeks mutual recognition of the accreditation systems regionally and internationally.

Documentation and recording of indigenous knowledge

- **Section 18:**
- NIKSO must create and maintain systems for documenting and recording indigenous knowledge.
- The Minister may prescribe conditions of storage, access, transmission, management and security of the documented and recorded indigenous knowledge.





Product development, commercialisation, services and processes

Section 19:

- Where relevant, NIKSO will facilitate and coordinate indigenous knowledge systems activities related to the commercial utilisation of indigenous knowledge products, services and processes.
- The Minister must establish mechanisms to promote partnerships for innovation and product development, coordinate funding, develop market strategies and promote the commercial utilisation of products, services and process.



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Management of Rights and General Provisions

Section 20: Access to Indigenous Knowledge Systems

Any person who intends to have access to indigenous knowledge systems for the purpose of scientific, commercial and industrial applications must submit an application to NIKSO for consent, in the prescribed manner and form.

Section 21: Benefit sharing

In case of access for the purpose of commercial or industrial application, a benefit sharing agreement between the community and the third party must be concluded.



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Mediation Committee & transborder arrangements

Section 22: Mediation Committee


NIKSO must constitute a mediation committee.

Section 23: Transborder arrangements

Indigenous knowledge resources originating from foreign jurisdictions will in accordance with this Act, be given the same protection given to indigenous knowledge resources originating in the Republic, provided they are the result of reciprocal international agreements with such foreign jurisdictions.



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Exceptions and limitations


Section 24:

No prior informed consent in the use of the indigenous knowledge resources is required for certain instances e.g. teaching.

Section 25:

A person is guilty of an offence if that person:

- Makes non-customary use of the indigenous knowledge resources.
- Acts or makes an omission in relation to an indigenous knowledge resource that is inconsistent with the moral rights of the indigenous community owners.
- Is not a registered holder of indigenous knowledge and he or she enters into a commercial arrangement with another party.



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Penalties

Section 26:

The violations shall be punished as provided for in the Act, with the following penalties:

Written warning; a fine as determined by a court; seizure of all products and suspension of the sale derived from the indigenous resource; embargo of the activity as determined by a court; loss or reduction of funding incentives and benefits granted by the government; loss or suspension of the right to receive financing from an official funding institution; and prohibition from entering into contracts with the government departments up to five years.





Section 27: Regulations

The Minister may make regulations regarding any matter pertaining to the protection, promotion, development and management of indigenous knowledge or indigenous knowledge systems.

Section 28: Consistency with the general legal framework

Protection under this Act takes account of, and operates consistently with, other international and regional instruments, and international laws.







Section 29: Transitional arrangements

Any acquisition, appropriation or use of indigenous resources carried out prior to the entry into force of this Act must comply with the provisions of this Act within 12 months from the effective date.


Section 30: Short title and commencement

This Act is called the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Act, 2015, and comes into operation on a date determined by the President by proclamation in the Gazette.



Future Process

- Presentation to the Portfolio Committee on 19 August 2015.
- EXCO approval of the revised IKS Bill by 31 August 2015.
- Presentation to relevant clusters on 23 September 2015.
- Minister approval to commence the Cabinet process.



Thank You

Cosmology

Social ecology

Public health and medicines

Biodiversity

Indigenous technologies

Indigenous food and food technologies

From Muthi & Myths, Heather Dugmore and Ben-Erik van Wyk