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Attention: Shanaaz Isaacs

Portfolio Committee on Science and Technology

**Per email:** shisaacs@parliament.gov.za

Dear Ms Isaacs

**WRITTEN COMMENTS ON THE PROTECTION, PROMOTION, DEVELOPMENT AND MANAGEMENT OF INDIGENOUS KNOWLEDGE SYSTEMS BILL [B 6 - 2016]**

[A] Introduction

1. The South African Rooibos Council (the "Rooibos Council") is an independent organization which aims to responsibly promote rooibos and its attributes to the consumer and protecting the interests of the rooibos consumer and stakeholders.
2. The Rooibos Council [[1]](#footnote-1) which has been tabled for ratification by Parliament.
3. As stated in the introduction to the IKS Bill, its aim is to provide for the protection, promotion and management of Indigenous Knowledge Systems and to put in place institutional arrangements for this to take place. The Rooibos Council supports the need better co-ordination between government departments, and between government departments and the private sector, with regard to the protection and management of the Indigenous Knowledge. With that in mind, the Rooibos Council is broadly supportive of the IKS Bill. Our comments below must be considered in this context.
4. In this submission, we focus on three broad areas of concern. First, the competing jurisdictional responsibility when the IKS Bill is considered in the context of other legislation and the extra-territorial application of the IKS Bill. Second, interpretation and effect of various sections and clauses. Third we raise issues relating to the committees and offices which the IKS Bill seeks to establish.

**[B] Competing jurisdictional responsibility, trans-border application and transitional arrangements**

Conflict with other legislation

1. Section 32 does not detract from or alter the protection afforded in the Intellectual Property Law Amendment Bill. There will be a conflict as to which act applies in the event of both the IKS Bill and the Intellectual Property Law Amendment Bill entering into force.
2. The IKS Bill, like the previous Bill, seeks to provide *sui generis* protection for Indigenous Knowledge. The IKS Bill notes that it does not alter or detract from any right in respect of intellectual property. The IKS Bill however silent on how these rights are to co-exist with other intellectual property rights such as designs, patents, copyrights and trademarks. This is problematic as it is entirely conceivable that a product protected as Indigenous Knowledge may by further development and research properly qualify as subject matter protectable by patent law. The IKS Bill should thus be amended to address such scenarios.

Trans-border application

1. IKS Bill applies to all persons in South Africa, including the State and applies to all Indigenous Knowledge registered under the IKS Bill.[[2]](#footnote-2) Thus, persons in South Africa may be prevented from using Indigenous Knowledge while access to such knowledge of persons in other jurisdictions remains unimpeded (unless the Indigenous Knowledge has been registered). Conversely, the Indigenous Knowledge originating in a foreign jurisdiction must be given the same protection given to Indigenous Knowledge originating in South Africa.[[3]](#footnote-3) This could be exploited by persons living outside South Africa.

Transitional arrangements

1. The transitional arrangements[[4]](#footnote-4) provided by the IKS Bill provide only that an Indigenous Knowledge Holder wishing to register Indigenous Knowledge which existed prior to the commencement of the IKS Bill must register such Indigenous Knowledge within 12 months from the date of commencement of the IKS Act. The section does not provide for retrospective application of the protection provided by the IKS Bill. Legislation does not operate retrospectively unless such operation is expressly stated.
2. As the section uses mandatory language ("must") Indigenous Knowledge which existed prior to the commencement of the Act must be registered within 12 months of the Act coming into effect - any later claims cannot be registered.

**[C] Interpretation and effect of various sections and clauses**

The meaning of "Indigenous Knowledge"

1. Indigenous Knowledge is defined in the IKS Bill as *"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 knowledge of a scientific or technical nature; knowledge of natural resources; and indigenous cultural expressions."*
2. This definition is vague and has been drafted widely to attempt to capture a wide range of knowledge. No guidance is given as to the meaning of Indigenous Knowledge having "*been assimilated into the cultural make-up or essential character of that community*" and this will most likely be a judgment call by the authority which will create uncertainty. As the aim of the IKS Bill is to protect Indigenous Knowledge and provide redress to indigenous communities it is likely that the relevant authority will be generous in determining whether knowledge falls within this definition.

Registered Indigenous Knowledge

1. The IKS Bill applies "*all Indigenous Knowledge registered under the [IKS Bill]*"[[5]](#footnote-5). The memorandum, on the other hand, does not limit the application of the IKS Bill to registered Indigenous Knowledge but states that the IKS Bill, once promulgated, will apply to all persons in South Africa in relation to all matters pertaining to Indigenous Knowledge Systems, and to all Indigenous Knowledge Resources which existed either before the commencement of the act or which are created on or after commencement of the act.
2. Section 2 and the limitation to registered Indigenous Knowledge is at odds with Chapter 4 which provides for the protection of *"Indigenous Knowledge, whether it is cultural or functional in nature, or both, including medical, agricultural and scientific practices…"[[6]](#footnote-6)* as there is no reference to the need for such Indigenous Knowledge to be registered in order to attract such protection.
3. It is not clear whether the intention of the legislature is to protect registered Indigenous Knowledge or all Indigenous Knowledge. The criteria for the protection[[7]](#footnote-7) of Indigenous Knowledge (which shall constitute property rights[[8]](#footnote-8)) are that (a) it must have 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. It would be extremely difficult and impractical to protect such Indigenous Knowledge as there would be no verification of claims of Indigenous Knowledge.

Eligibility and protection

1. The IKS Bill "protects Indigenous Knowledge, whether cultural or functional in nature, or both, including medical, agricultural and scientific practices." Such Indigenous Knowledge constitutes property in terms of section 25 of the Constitution. Furthermore, such protection continues for as long as the Indigenous Knowledge meets the eligibility criteria in section 11 of the IKS Bill.
2. The eligibility criteria for protection under the IKS Bill require that the Indigenous Knowledge:

*"(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."*

1. These requirements are vague and largely subjective. For example, it is unclear what is intended by the "*associated with the cultural make-up and social identity of that indigenous community*". It is thus uncertain how this requirement will be tested by the authorities. Furthermore, as there are no materiality thresholds associated with these requirements it appears that a very large range of such knowledge will fall within these requirements and thus obtain protection.
2. The IKS Bill provides that the protection of Indigenous Knowledge continues for as long as the Indigenous Knowledge meets the eligibility criteria and provides further that in the event that the Indigenous Knowledge ceases to meet such criteria, it shall fall into the public domain with effect from the date on which it fails to meet the eligibility criteria. This provision is practically incapable of being implemented. The wide and vague language of the criteria would make it difficult to determine when Indigenous Knowledge fails to meet such criteria and to attempt to prescribe an exact date thereto would be virtually impossible. Furthermore, the IKS Bill does not provide for application to be made to challenge registered Indigenous Knowledge and it is unlikely that NIKSO would be in a position (administratively and financially) to fulfil a watchdog function to ensure that such lapses do indeed result in deregistration of such Indigenous Knowledge.
3. It appears from the wording of the IKS Bill, that the protection provided by the IKS Bill lasts for as long as the Indigenous Knowledge in question continues to meet the eligibility requirements in the bill. It thus appears that unlike usual IP protection, the protection granted over Indigenous Knowledge can be perpetual.

Registration of Indigenous Knowledge

1. The IKS Bill permits that an Indigenous Knowledge Holder may apply to the Registrar for registration of Indigenous Knowledge. The IKS Bill is however currently completely silent on the process and mechanism for such registration and how such process will be managed, recorded and accessed. The IKS Bill merely provides that NIKSO may determine such process. This provides very little certainty to both the indigenous communities and users of Indigenous Knowledge. When the IKS Bill becomes available for public comment, it should be suggested that the IKS Bill includes a chapter on this process.
2. While the IKS Bill does make provision for publication of registration granted, it does not provide for opposition to be made to an application for registration. Therefore, there is no opportunity for other communities who may have a similar or earlier right to the same or similar knowledge to challenge an application for registration. Furthermore, The IKS Bill does not provide any mechanism for such application or registration to be challenged once granted and allows only for rectification of the register by making an amendment or deletion upon application by an interested person. It is however unclear the nature of such amendment and whether it would permit a complete challenge to the legitimacy of a claim or whether such amendment is merely for administrative errors.
3. This would mean that any challenge by another community or by an interested party would need to be brought through alternative avenues. As the granting of registration is likely to constitute administrative action, a challenge could be brought through administrative law remedies including an application in terms of the Promotion of Administrative Justice Act.

Rights conferred on holders of Indigenous Knowledge

1. Section 12 of the IKS Bill states that *"the ownership of Indigenous Knowledge eligible for protection in respect of an indigenous community in terms of section 9 vests in that indigenous community"* and that the trustee of the indigenous community holds the Indigenous Knowledge in trust on behalf of the indigenous community. Such trustee is vested with the responsibility of protecting the community's rights in the Indigenous Knowledge. As mentioned above, in the event that the holder of Indigenous Knowledge cannot be identified, NIKSO must act as a custodian of that knowledge and the ownership thereof shall be deemed to vest in NIKSO.
2. According to the IKS Bill, the trustee is *"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"*. The IKS Bill provides for very little oversight over such a trustee and does little to ensure that such a trustee will act in the best interests of the larger indigenous community. The lack of oversight coupled with the economic benefits that could accrue may result in abuse.
3. There can be multiple claims of ownership of rights[[9]](#footnote-9), which if recognised may result in conflict between the claimant communities. Although provision is made for the appointment of trustees to protect the interests of the community, or if this is not possible, then NIKSO would act as custodian of such rights, it likely that multiple claims of ownership will result in conflict.
4. The IKS Bill provides that *"the holder of Indigenous Knowledge has the exclusive right in respect of that Indigenous Knowledge to: (a) the benefits arising from its commercial use; (b) be acknowledged as its source; and (c) restrain any unauthorised use of the Indigenous Knowledge".*
5. The IKS Bill seeks to confer the "exclusive" economic benefit to the holder of the Indigenous Knowledge. These rights are extremely wide and can have financial consequences for the rooibos tea industry as this may impact on the relative bargaining powers of the communities in respect of benefit sharing agreements.

Licence to use

1. The IKS Bill requires that a party wishing to acquire the right to use Indigenous Knowledge must apply to NIKSO for a licence. The application[[10]](#footnote-10) must indicate the following:

*(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 agreement has been entered into with that Indigenous Knowledge holder."*

1. The requirements for commercial use of Indigenous Knowledge are set out in Chapter 7 of the IKS Bill. Any person who intends to use Indigenous Knowledge for commercial purposes shall apply for a licence in the prescribed form and enter into a "*non-exclusive Standard Benefit Sharing Agreement*" with NIKSO on behalf of the holder of the Indigenous Knowledge. NIKSO is required to consult with the trustee on the terms of the agreement for the intended use and benefits payable by the licence holder. In the event that the Indigenous Knowledge is scientific or technical in nature, the obligation on the licence holder to pay royalties shall expire 20 years after the date of the agreement.
2. It is thus a requirement that a person wishing to acquire the right to use Indigenous Knowledge must apply for a licence. Such licence will only be granted in the even that a "benefit sharing agreement" has been entered into. In terms of NEMBA, benefit sharing agreements are required to be entered into in relation to biotrade and bioprospecting. In terms of the IKS Bill, "benefit sharing" means "*the fair and equitable sharing of benefits in terms of a benefit sharing agreement between NIKSO and the licence holder*" (emphasis added).
3. It does not appear that the entering into of a benefit-sharing agreement with the indigenous community in terms of NEMBA would suffice to meet the requirement of having a benefit sharing agreement in terms of the IKS Bill as it is not entered into with NIKSO. This will result in a situation where a third party whose commercial (or otherwise) activities may constitute biotrade or bioprospecting in terms of NEMBA and the use of Indigenous Knowledge in terms of the IKS Bill. This third party would then have to enter into two separate benefit-sharing agreements, one with the indigenous community in terms of NEMBA and one with NIKSO in terms of the IKS Bill. This could result in a third party having to pay royalties or some other benefit twice for the same activity. This is illogical and commercially unworkable and should be raised once commentary opens for the IKS Bill.
4. Furthermore, as NIKSO has the absolute discretion to grant such licences, it is granted inordinate bargaining power against applicants for licences, as well the determination of royalties payable by a licence holder. There should be criteria for determining the maximum threshold for royalties.

Contradiction within the IKS Bill

1. Section 13 requires that a user of Indigenous Knowledge enters into a benefit sharing agreement with the holder of the Indigenous Knowledge. However, section 26 requires that any person who intends to use Indigenous Knowledge for commercial purposes must enter into a benefit sharing agreement with NIKSO. As has been noted above it appears that the intention is that the benefit sharing agreement will be entered into with NIKSO who shall act on behalf of the Indigenous Knowledge Holder. This should be amended to provide certainty.
2. The IKS Bill provides for the accreditation of "Indigenous Knowledge Practitioners" by NIKSO. The IKS Bill requires that such a person makes application "in the prescribed form", however it fails to provide such a form and states only that "NIKSO must make recommendations to the Minister regarding the norms and standards for accreditation". It also fails to mention what the role of an Indigenous Knowledge Practitioner is, once accredited as such.

[D] Institutional mechanisms

The National Indigenous Knowledge Systems Office

1. The ISK Bill establishes the National Indigenous Knowledge Systems Office ("NIKSO"), a non-juristic entity falling within the DST. The functions and powers of NIKSO are wide and include, *inter alia*:
	1. the implementation of the ISK Bill;
	2. protecting and recognising Indigenous Knowledge as property owned by indigenous communities;
	3. facilitating the redress of rights and benefits to indigenous communities which have previously been deprived of such rights and benefits;
	4. establishing and managing the registration of Indigenous Knowledge;
	5. determining the criteria for issuing licences for the use of Indigenous Knowledge; and
	6. assisting indigenous communities in the negotiation of benefit-sharing agreements for use of Indigenous Knowledge.
2. The Minister is required to appoint a suitably skilled and qualified person as the head of NIKSO who shall be responsible for the administration and general management of NIKSO, subject to directions and instructions issued by the Director-General or the Minister and the head must report to the Director-General on all matters relating to the management of NIKSO.
3. The IKS Bill further provides that in the event that the holder of Indigenous Knowledge cannot be identified and designated, NIKSO shall act as custodian of that Indigenous Knowledge and the ownership of it shall be deemed to vest in NIKSO. The IKS Bill does not specify how the funds accrued from such ownership/benefit shall be allocated and utilised and is thus susceptible to abuse. This is a cause for considerable concern.

Advisory Panel and Dispute Resolution Committee

1. The IKS Bill establishes two committees. The first is the Advisory Panel which is to comprise not more than 10 members[[11]](#footnote-11) *"on any specific issue referred to it and execute any task that NIKSO may entrust to it in terms of this Act"*.[[12]](#footnote-12) The second committee is Dispute Resolution Committee.
2. A party aggrieved by the decision of NIKSO in relation to such agreements or the condition pertaining to such access is provided a 60 day period in which to declare a dispute and refer such dispute for resolution before the Dispute Resolution Committee constituted in terms of the IKS Bill. There is no guidance in the IKS Bill regarding the qualification criteria or number of persons to be appointed as members of the Dispute Resolution Committee, the Minister can appoint any person - the only qualification being that the appointment is subject to such terms and conditions as the Minister may determine.
3. Both the composition and functioning of the Dispute Resolution Committee are cause of grave concern for the following main reasons:
	1. There is no provision for private sector participation. The Advisory Panel is to be *"broadly representative of the different organs of state, Indigenous Knowledge Practitioners and specialists in the discipline of practice".[[13]](#footnote-13)*
	2. With reference to the Advisory Panel “*specialists in the discipline of practice”* which forms part of this panel is not clearly defined and a clear definition of what this term means needs to be included when the Bill is promulgated.
	3. The committee has far-reaching powers, including the power to issue a notice prohibiting the unauthorised use of any Indigenous Knowledge[[14]](#footnote-14) and cancelling, suspending or revoking the licence.[[15]](#footnote-15) A particular concern who uses Indigenous Knowledge in a manner which is inconsistent with the "shall be guilty of an offence and liable to any sanction determined by the Dispute Resolution Committee". (Emphasis added) Apart from being inconsistent with the maximum penalties of R30 000.00 or 3 years imprisonment,[[16]](#footnote-16) this unconstrained legislative power would be struck down as being unconstitutional;
	4. There is no provision for how decisions will be made by the committees. Instead, the Bill permits the Minister to determine the procedures. It is therefore unclear whether a consensus or a majority will be required for decisions;
	5. The Bill contains no mechanism for internal appeals. Instead, it is envisaged that the Dispute Resolution Committee can determine any matter referred to it. Any matter referred to the committee can be taken on review to the High Court. For this to happen, the committee must be unable to make a final decision, or a decision must be made before the matter can be referred to the High Court. As there is no time frame or procedure for resolving a dispute, the referral of any dispute for resolution will inevitably be a cumbersome and drawn out procedure and this internal process must be exhausted before approaching the High Court.

Offences and penalties

1. Failure to comply with the IKS Bill is an offence[[17]](#footnote-17) and may render a person liable to any sanction determined by the Dispute Resolution Committee. This unfettered discretion to determine any sanction will likely culminate in the arbitrary and irrational determination of penalties.
2. The use of Indigenous Knowledge without authorisation, or the false claim to be a certified Indigenous Knowledge Practitioner, can result in a fine of R30 000 or imprisonment of 1 year, or to both such fine and imprisonment. Any person who hinders or interferes with the management of an official in the performance of his or her duties, is liable on conviction, to imprisonment not exceeding three years or to a fine of R30 000, or to both[[18]](#footnote-18). The IKS Bill should be amended to provide that the fine should be up to a maximum of R30 000 and the imprisonment for interference with an official should be reduced to 1 year to bring it into line with the other penalties.

Conclusion

1. As stated in paragraph 3 above, the Rooibos Council supports the need for better co-ordination between government departments, and between government departments and the private sector, with regard to the protection and management of the Indigenous Knowledge. With that in mind, the Rooibos Council supports the broad endeavour which has prompted the drafting of the Bill.
2. However, in our view, the IKS Bill contains some fundamental flaws which we have highlighted. These flaws can be remedied through a careful and considered redrafting. We implore the drafters of the IKS Bill to undertake this task.
3. We are also willing to address any questions which this submission may prompt and to amplify any arguments we have raised.
4. Lastly, we thank the Portfolio Committee for Science and Technology for giving us this opportunity to submit written comments.

Submitted on behalf of the Board of the South African Rooibos Council

1. *Government Gazette* Number 39910. [↑](#footnote-ref-1)
2. Section 2 of the IKS Bill [↑](#footnote-ref-2)
3. Section 29 [↑](#footnote-ref-3)
4. Section 33 [↑](#footnote-ref-4)
5. Section 2 [↑](#footnote-ref-5)
6. Section 9(1) [↑](#footnote-ref-6)
7. Section 11 [↑](#footnote-ref-7)
8. In terms of section 25 of the Constitution [↑](#footnote-ref-8)
9. Section 30 [↑](#footnote-ref-9)
10. Section 13(3) [↑](#footnote-ref-10)
11. Section 7(1) [↑](#footnote-ref-11)
12. Section 8(c) [↑](#footnote-ref-12)
13. Section 7 (2) [↑](#footnote-ref-13)
14. Section 27(4) (b) [↑](#footnote-ref-14)
15. Section 27(4) (c) [↑](#footnote-ref-15)
16. Section 28 (2) and (3) [↑](#footnote-ref-16)
17. Section 28(2) and (3) [↑](#footnote-ref-17)
18. Section 28(4) [↑](#footnote-ref-18)