





## Terminology and drafting

- Confusing / incorrect terms: author / owner / actions iro works as opposed to actions iro the copyright in works / copyright work v copyrighted work / audiovisual fixation v cinematographic film.
- Drafting concerns:
  - Plain language: Ease of reading; Long sentences; Missing words;
  - Inconsistent use of terms (linked v co-author; community v indigenous community; legally possessed v authorised copy; fair practice v fair use);
  - Consequential amendments not done; and
  - paragraphs not following on the intro sentence and sentences in the paragraphs being incomplete.
- Proposal: a team of drafters (parli – C vd Merwe; dti – J Strydom; SLA – G Hoon), policy developer (dti – M Padayachy) and terminology expert to prepare a B Bill addressing these technical drafting matters.



## Performers Protection and Copyright Amendment Bills

- Definition of **'audiovisual fixation'**:
  - Need to bring the definition contained in the Performers' Protection Bill into this definition so that the two Bills can be passed separately;
- No other amendments are required to pass the Copyright AB before the Performers Protection AB.

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## Concerns clause by clause 1

- **Cl 1: Amending s1. Definitions**
  - Recommend neutral language (disabled persons e.g. art & sound; technology)
  - Additional definitions were proposed and should be considered, but only once the Bill's content has been settled as definitions depend on the content of the Bill. Some of these would depend on whether consequential amendments are required, e.g. "broadcast".
- **Cl 3: Amending s5. Copyright in relation to the state and certain international organisations**
  - (2)(a): Funding issue: The dti is to confirm the policy intention.
  - "funded by" consequences for works resulting from incentives (dti / SABC / NFVF), government commissioned work (e.g. SABC iro musical works), funding of an organisation (indirect funding).
  - If the intention is as the clause reads now – concerns iro expropriation should the value of the work exceed the funding (e.g. partial / indirect funding).
  - Intellectual Property Rights From Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008) grants copyright iro publically funded R&D in the recipient of the money: Conflict of laws

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## Concerns clause by clause 2

- **Cl 3: Amending s5 Copyright - state and certain international organisations**
  - Works "in the public domain" v "owned" by the State (UCT and Nicholson): S12(8)(a) "No copyright shall subsist in official texts of a legislative, administrative or legal nature, or in official translations of such texts,...";
- **Cl 4 – 7: Practical implications of equal portion of royalty**
  - Copyright owners to have the right to claim an equal portion of the royalty payable for the use of such copyright work.
    - Contractual freedom: "buy out"; indigenous communities.
    - Need to be clear on application.
- **Cl 8: Substituting s9A Royalties "9A. (1)(a)(iii)(aA) Any person who intends to perform an act ... before performing that act, submit a prescribed notice..."**
  - Policy decision: Is this practical? E.g.. Phone in requests on radio. Users may opt to contact record labels leaving individual artists to be shunned. Broadcasters will have to obtain permission from indigenous communities.
  - Commercial realities have caused broadcasters and collecting societies to enter into agreements that ensures protection of rights but are not this onerous (NAB).



## Concerns clause by clause 3

- Cl 9: Insertion of ss9B to 9F - 9B. Resale of royalty right
  - Concerns about practical implementation as the clause is broad (for examples - see submission by Strauss & Co).
    - Recommend a limitation (value / registration of works eligible/ formal record of sale) in order to ensure certainty in law (see UCT, Anton Mostert CIP, Nicholson submissions on possible limitations).
    - Various submitters also recommended that collection of these be done via collecting societies, which could assist as formal records would exist.
  - “(1) The author of an artistic work in which copyright vests shall enjoy an inalienable right to receive royalties”
    - Concern: “inalienable” affects the right to trade
- Cl 9, S9D. Duration of resale royalty right
  - Subsection (3), which provides that the resale right in a work revives if the identity of the author becomes known must be made subject to subsections (1) and (2)(b) as it may cause unfairness and uncertainty
    - If the right is revived, does it have a new 50 year period?
    - Anton Mostert CIP: Such author’s work may no longer be protected by copyright as read with the proposed section (read with ss 9D(2)(a) and 3(3)).



## Concerns clause by clause 4

- Cl9, S9F. Transmission of resale royalty right
  - “(2) In the case of a bequest of an artistic work ...”
    - Anton Mostert CIP concerns to be considered: What about an intestate death, invalid testaments etc? “What is required is that the right should generally be transmissible to beneficiaries through the law of succession”
    - DST: This is also a concern iro indigenous communities: Must provide for individual artists dying intestate or with invalid wills.
- Cl 11: Inserting ss 12 A and 12B
  - 12A: General exceptions from copyright protection
    - “12A(1)(h) use of such work is for the purposes of judicial proceedings or preparing a report of judicial proceedings” – policy consideration: Should quasi-judicial proceedings not be included? (e.g. arbitrations, tribunals).



## Concerns clause by clause 5

- Cl 12: Inserting ss 13A and 13B
  - 13A. Temporary reproduction and adaptation
    - No exception is made for permanent copies that are still incidental for example internet searches that rely on permanent copies (alternative wording proposed)
    - Machine learning and artificial intelligence rely on large numbers of incidental copying (alternative wording proposed).
  - 13B. Reproduction for educational and academic activities
    - The clause is not aligned with the broad exception provided in section 12 (as proposed in this Bill) (alternative wording proposed).
    - “(3) Any person receiving instruction may incorporate portions of works in printed or electronic form in assignments and portfolios, thesis and dissertations for personal use and library deposit, including institutional repositories.”
      - Subsection appears to allow plagiarism as it stands. It needs to be amended.



## Concerns clause by clause 6

- Cl 12: Inserting ss 13A and 13B
  - 13B. Reproduction for educational and academic activities
    - 13B(4)(a) – this and sections 19C(14), 39B(2) are the only sections in the Bill and principal Act where the phrase “public licence” or “public and open licence” are used and should be defined.
- Cl 17: Substituting section 19B General exceptions regarding protection of computer programs
  - Future application: Alternative wording proposed to broaden the section so that following is also included:
    - Interoperable hardware (only software is included);
    - Repairing products that are subject to copyrighted software.

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## Concerns clause by clause 7

- Cl 19: Amending s 20 Moral rights
  - (2) Any infringement of the provisions of this section shall be treated as an infringement of copyright under Chapter 2, ...'
  - "(4) A right contemplated in subsection (1) is non-transferable and, where applicable, limitations and exceptions provided for in this Act, including those specified in sections 12 and 12A, shall apply to this section with the changes required by the context."
    - Concern: infringement of moral rights is not 100% the same as infringement of copyright. Some limitations and exceptions to copyright do not apply exactly the same to moral rights. These subsections may have unintended consequences like double damages for copyright infringement. The intention of the subsections must be made clear and they must be correctly worded.
- Cl 20: Amending s 21 Ownership of copyright
  - (1)(c): "...and the author of the work shall have a licence to exercise any right which by virtue of this Act would, apart from the licence, be exercisable exclusively by such author"
    - "author" iro photograph is the person responsible for the composition of the photograph and for artistic work, the person by whom the arrangements necessary for the creation of the work were undertaken. Where does this leave the actual photographer, painter, artist?

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## Concerns clause by clause 8

- Cl 20: Amending s 21 Ownership of copyright
  - Anton Mostert CIP: Ownership of copyright lies with the person who commissioned, however the author is now given the same right to exploit the work. This cannot apply to all types of commissions. The type of commission where this could work (not example provided by AM CIP) should be identified and clearly set out.
  - DST: Work should reach a maximum audience. Must bring this section in line with RSA's position at the SCCR iro broadcasting.
  - SAGE and SASFED: This section gives the public broadcaster automatic ownership of a commissioned film or TV programme, which prevents local independent production and distribution companies from fully exploiting secondary and ancillary rights. Allowing for a contract to change this status, is not sufficient where the one party has more bargaining power (SABC, other public corporations and independent producers). Proposal: There should be a presumption of ownership of secondary and ancillary rights in favour of the producer.
    - Producer? Author? Or actual photographer, painter, artist as per the previous slide?

## Concerns clause by clause 9

- Cl 21: Amending s 22 Assignment and licences in respect of copyright
  - “(3) No assignment of copyright and no exclusive licence to do an act which is subject to copyright shall have effect unless it is in writing and signed by or on behalf of ... as stipulated in Schedule 2: Provided that assignment of copyright shall be valid for a period of 25 years from the date of agreement of such assignment.”
    - It is not clear what the purpose is if the prescribed period of 25 years. It interferes with contractual freedom and thus affects the right to trade, occupation and profession. It also affects competition law.
    - The assignment of copyright further differs from one category to another. Functional and technical works (computer programmes, databases etc. - see Innovus submission) rely on outright transfer of ownership. This reversion of copyright is probably more relevant to literary, artistic and musical works that are not developed into a contract. The CRC report recommending this referred to rights to composers and performers in respect of musical works and performances taken up in sound recordings (DALRO).
    - What happens after 25 years – where does the right reside now? With the author / copyright owner? What if the author wants to assign the rights again? Does the same period apply?

## Concerns clause by clause 10

- Cl 22: Inserting s 22A Assignment and licences in respect of orphan works
  - Concern: The process required to obtain a licence is quite involved, expensive and steeped in red tape. Questions are also raised iro the fund for royalties – iro cost of administration and use of unclaimed funds (copyright owners should be able to claim the royalties up until the expiry of copyright, which means the money can never be used for another purpose). A large number of submitters proposed that it rather be included as a “fair use” exception.
    - ADA: The process is excessive for e.g., works that have almost no commercial value. In most cases the need for the work would have passed by the time authorisation is obtained.
  - Policy matters
    - tentative recommendation: consideration of placing the application process with collecting societies who have a database of authors per category of copyright;
    - Is the period of five years to claim the royalties sufficient given that it is iro orphan works?



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## Concerns clause by clause 11

- Cl 23: Inserting Chapter 1A (Collecting Societies: 22B. Registration)
  - (6) The Commission shall only register one collecting society for each right or related right granted under copyright.
    - The CRC recommendation for one CS was only iro performance, needletime and mechanical rights because of the complexity of collective management.
    - Also, the Committee should consider the impact of one CS per right. VANSa: “The current scale of the visual arts economy does not justify a separation of collection agencies for different rights”. Also see DALRO submission. Also, if a large number of artists do not want to associate with a registered CS, it is not possible for another CS to step in, until the first CS’ licence expires. It thus has many legal implications (competition law, right of association – although conversely it is true that an industry may be regulated). But, registration already provides for a more formal approach.
    - DST: What about a CS for Indigenous works, which spans all categories?
    - It is recommended that the registration requirements are rather made strict, so that it is difficult for multiple CS’s to register, but that more than one CS is allowed. This would also solve the challenge posed by joint CSs (straddling more than one category) alternatively that a clause be inserted for the one CS per the CRC proposed categories and for this limitation to have a sunset period: i.e. the principle be reviewed in 2 or 3 years’ time and that unless the Minister by proclamation extends that period, the limitation expires (i.e. monitoring of the impact is allowed).

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## Concerns clause by clause 12

- Cl 23: Inserting Chapter 1A (Collecting Societies: 22B. Registration)
  - “(7) Where there is no collecting society for a right or related right granted under copyright, the **[user, performer, owner, producer or author]** owner of copyright in the work or the performer may enter into such contractual arrangements as may be prescribed.”
    - Concern: Right of association – this appears as if owners and performers MUST work through a collecting society if there is one. Is that the intention? It seems from section 22C(1)(b) (may withdraw authorisation) that this is not.
    - Concern: what about contractual arrangements will be prescribed? Surely persons can just enter into agreements as standard terms are to be prescribed by regulation (cl 32, section 39(cG))?
  - No provision is made for (UCT proposed wording)–
    - collecting societies who do not apply to register;
    - Refusal by the CIPC to register a collecting society.



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## Concerns clause by clause 13

- Cl 24: Amending s 23 Infringement
  - “(1) Copyright shall be infringed by any person[,]—
    - (c) who omits to pay the performer, owner, producer or author of copyright work a royalty fee as and when the copyright work is used;
    - (d) who omits to pay the author of artistic work a royalty fee as prescribed by this Act as and when the artistic work is sold;
  - This cannot constitute infringement of copyright. The work was used /sold with permission. It is a breach of the agreement / non compliance with legislation not to pay royalties and different consequences should follow.
- Cl 25: Amending s 27 Penalties and proceedings in respect of dealings which infringe copyright
  - Recommendation: Consider the effect of criminalising copyright violations on for e.g.. free speech (UCT submission).
  - Would criminalisation – esp. with prosecution being difficult in specialist crimes, be sufficient reprieve for the copyright owner? Should the focus not rather be on civil actions which are a better deterrent (Anton Mostert CIP)?

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## Concerns clause by clause 14

- Cl 27: Inserting ss 280 to 285
- 280. Prohibited conduct in respect of technological protection measures
  - UCT proposed wording to include repairing products that are subject to copyrighted software.
  - “(6) The provisions of this section must be read together with the provisions of sections 86, 87 and 88 of the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002).”
    - These sections deals with offences. Penalties are however dealt with section 89 of the ECTA. The dti to explain whether the intention is for penalties iro offences committed to be included in the Copyright Act, or if ECTA is applicable. Either way, the penalties must be made clear.
- 29A. Functions of Tribunal
  - “(2)(c) review any decision of the Commission, dispute resolution institution or any regulatory authority if it relates to intellectual property rights;”
    - Subjecting decisions of dispute resolution institutions or regulatory authorities in general to the IP Tribunal is too broad, could result in conflicts of law and uncertainty in law. This paragraph should be worded so that the organisations affected by this can clearly be identified.
    - What about the Court of the Commissioner of Patents?

## Concerns clause by clause 15

- **CL 30, Inserting 29B. Appointment of members of Tribunal**
  - Concern: At least eleven members must be appointed (s29(4)), with varied experience. Specialist knowledge in Intellectual Property Law is not a pre-requisite (S29B(1)). Section 29G(1)(a) allows for matters to be referred to one member for consideration. This could result in the law being applied inconsistently – something that can only be remedied by appeal or review (section 29L), which is costly. The powers to interdict and halt commercial activity should ideally only be granted after consideration by persons with legal training.
  - See SAIPL submission for international comparisons.
  - Recommendation: where a matter is allocated to 1 member, such member should have legal qualifications and experience.
- **CL 30: Although S29 states that the IP Tribunal is independent and subject only to the Constitution and the law, the minister is empowered to:**
  1. Appoint members and designate the chairperson and deputy chairperson (29B), renew terms of office (29D) and remove / suspend members (29E);
  2. Determine remuneration, allowances, benefits, and other special terms and conditions of employment in consultation with the minister of Finance (29B); and
  3. Prescribe rules on processes and proceedings (39(cF)).
  - Recommend that the wording be reconsidered so as to ensure that the IP Tribunal can function independently:
- Although the case of *Glenister v President of the Republic of South Africa and others*, 17 March 2011, CCT48/10 was referred to, that case is not on point as it dealt with the establishment of an anti-corruption unit which was required by the Constitution to be sufficiently independent from the institutions which it could be investigating ("there is a constitutional obligation for the state to take effective measures to fight corruption... [par 84]").

## Concerns clause by clause 16

- **CL 30, 29C. Qualifications for appointment**
    - Limitation on political association (section 19 of the Constitution): Many Acts provide for this (Members of the SA Police Service, the Municipal Demarcation Board, the Public Service Commission and Independent Commission for the Remuneration of Public Office-Bearers).
    - Need to make purpose of the section clear (also in the memo on objects) so that the application of the limitations section in the Constitution (s36) can be tested.
  - **CL 30, 29G. Proceedings of Tribunal**
    - S29G(6): the decision / judgment / order is subject to 'review or appeal' to a High Court.
    - S29L(1) however provides for an appeal against a decision of a single member to a full panel;
    - S29L(2) provides that the participant may apply to the High Court to review the decision, or may appeal the decision.
    - Section 29G(4) and (5) only provides for "decisions", yet ss 22F, 29A, 29G(6), 29J, 29M, 29N and 29O refer to "orders". Only 26G(6) refers to judgment.
- Consistency of terms and process are required.

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## Concerns clause by clause 17

- CI 30, 29M. Interim relief
  - “(2) The Tribunal may grant such an order if—
    - (c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and”
      - This could frustrate the purpose for this type of order. A *rule nisi* could perhaps be incorporated (an order “to show cause” – the tribunal would make a ruling after hearing only the complainant, with a short return date. The ruling would be active and on the return date the respondent may show cause why the ruling should not be made final.)
- CI 30, 29N. Orders of Tribunal
  - “In addition to the powers in terms of this Act and the Companies Act, the Tribunal may...”
    - No basis is given for the Tribunal to exercise authority under the Companies Act. It is a different body and should rather have its own functions.
    - The sections referred to (Ss173 and 175 empowers a Court to make the orders, not the Tribunal: Conflict of laws
- CI 30, 29O. Witnesses
  - The wording of this section could cause interpretation challenges and must be redrafted. The policy intent must be made clear and safeguards built in.
  - The rights guaranteed in section 35 of the Constitution only applies to arrested, detained and accused persons. However, the Western Cape High Court in the matter of Mitchell aa v Hodes aa NNO 2003 (3) SA 176 (C) however held that persons called to testify in terms of an enquiry (s 417 of the Companies Act, 1973 re liquidation) are afforded these right inherent to a fair trial set out in s35 where the evidence pertains to charges against them. In S v Orrie aa [2005] 2 All SA 212 (SCA) the Western Cape High court extended the rights in s35 to suspects questioned by the Police.

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## Concerns clause by clause 18

- Clause 32: Amending section 39 Regulations
  - “(cG) prescribing compulsory and standard contractual terms to be included in agreements to be entered in terms of this Act;” and
  - “(cl) prescribing royalty rates or tariffs for various forms of use;”
    - MNet / Multichoice and NAB submitted that (cG) constitutes broad discretionary powers and as no framework is given, these are unconstitutional. ((cl) is similar)
    - **Affordable Medicines Trust a.o. v Minister of Health aa [2005] ZACC 3; (CC) (11 March 2005)**
      - Discretion is important for decision making, may be given by Parliament in a delegation and its scope may vary (par 33);
      - The delegation must not be so broad or vague that the Minister cannot determine the nature and the scope of the powers (par 34).
      - The scope of the powers need not be fully spelled out in the legislation – the delegation is after all done because all the facts are not known to Parliament at the time - as the scope is subject to the Constitution, the Act and the terms here will have to be rationally related to the purpose for which the discretionary powers were given (para 32 and 35)
  - However, the policy intent behind this clause must be made clear and the wording checked against that intent, and if need be, corrected.

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## Concerns clause by clause 19

- Clause 32: Amending section 39 Regulations
  - (cL) in consultation with the Minister responsible for communication, prescribing the local music content for television and radio broadcasting;”
    - This is a matter that resorts with the Communications portfolio (Also see Kagiso Media submission).
    - Constitution, S85(2)(c) “The President exercises the executive authority, together with the other members of the Cabinet, by ... co-ordinating the functions of state departments and administrations;”; S92: “...national legislation must establish an independent authority to regulate broadcasting in the public interest, and to ensure fairness and diversity of views broadly representing South African society.”
    - The requirement of “IN consultation”, is already an indication that this is not the correct placing of this matter.
    - Sufficient provision is made in Chapter 3 of the Constitution for cooperation between Departments. This is the law that should be used to ensure that Trade is consulted when the Minister for Communications considers local content. If the concept of “local content” is included in this Bill, it should be done taking into account this Chapter and the Intergovernmental Relations Framework Act, 2005 (Act no. 13 of 2005)

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## Concerns clause by clause 20

- Clause 33: Inserting section 39B Unenforceable contractual term
  - Contractual freedom (the right to trade) must be balanced with protection of rights as envisaged in this clause: An alternative would be to identify the category of artist / author / etc. that is to be protected by subsection (1) and limit the application to that grouping. The minister is also allowed to prescribe standard contract terms which will aid in protecting the persons for whom this is intended.



## Additional Amendments 1

- Incidental use / Panorama right - Section 15 (not in Bill)
  - Will have to ask permission to amend other sections of the Act
  - No authority for the incidental capture of e.g.
    - Backgrounds in a film: a program on a television behind the actors, a song playing on a radio, a street performer;
    - Photographs and paintings capturing key works incidentally;
  - No authority for “panorama rights”:
    - Example of photograph with a statue – i.e. making use of works (public artwork / statues / buildings) that are in public interior and public exterior spaces
  - Wording has been proposed
- Copyright levy
  - In the course of the consultation, officials of the dti indicated that the final draft of the Bill would introduce a copyright levy to make up for losses in income that would be suffered as a result of the exceptions. The Bill does not contain provision for a copyright levy, and we ask that this be urgently considered.



## Additional Amendments 2

- Technology-neutral “no fault” enforcement legislation that would enable intermediaries to take action against online infringement:
  - EU Copyright Directive (2001/29/EC) 8.3. Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.
- Perpetual copyright on unpublished works should be removed so that all works fall within the copyright period of the author’s life plus 50 years, with proper acknowledgement when the source is known.
  - This would open up manuscripts, archives, artworks, posters, historical papers, diaries, letters, Apartheid and anti-Apartheid documents, and other cultural heritage (including many orphan works and works from the Apartheid period) that are ‘locked up’, ‘hidden’, or ‘inaccessible’, particularly for libraries, education, and research (including historical and cultural studies).
  - In many instances, the copyright owners are unknown or untraceable, which means access to these works (much of which are part of our cultural heritage) are virtually impossible. This creates great difficulties for libraries, archives and other cultural institutions that are unable to share old unpublished works with the nation.

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## IPLAA & IKS Bill (DST inputs) 1

- Wherever an indigenous community is mentioned, reference should be made to their representative in accordance with IPLAA
- Clauses 4 – 7 re Copyright owners to have the right to claim an equal portion of the royalty payable for the use of such copyright work: Should this apply to indigenous communities?
- Cl 8, S9B. Resale of royalty right - Iro indigenous communities it must be clear who the author is so that they can benefit from this right.
- Cl 8, S9D. Duration of resale royalty right - This clause is problematic iro indigenous communities.
- Cl 10, S12: The Bill must be aligned with the IKS Bill where indigenous works are being access in terms of fair use and exceptions in general, as additional requirements will be applicable to indigenous works, e.g.:
  - Section 12(1)(a)(i): Cultural clearance (prior informed consent of indigenous communities) must be obtained from a community before the public can access indigenous work for instance in a library or museum;
  - Research: Where indigenous knowledge is confidential, mutual agreement on its use is required.
  - National Register that applies to orphan indigenous works. (NRS)

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## IPLAA & IKS Bill (DST inputs) 2

- Does the Tribunal replace the institutions envisaged in s8B, inserted by IPLAA? The IKS Bill creates an arbitration committee which could be more favourable to indigenous communities.
- The Acts (Copyright and IPLAA) and the IKS Bill must be aligned so that they can work hand in hand.
  - A subsection could perhaps be added in a section to indicate what measures would apply to indigenous works, or the sections inserted by IPLAA could be amended.
  - A “catch-all” phrase could also be added. The IKS Bill for instance includes a section that reads: “32. (2) Compliance with any procedures or requirement laid down in this act does not constitute compliance with any procedures or requirements imposed in any other Act.”
- Proposal: DST drafting proposals to be taken into account and the sub-committee to meet with DST once a B Bill is ready, to ensure that no conflict exists iro laws related to indigenous works and IK in general.



## Transitional provisions

- Given the significant policy shift proposed in this Bill, it is recommended that the committee considers, as each clause is deliberated on, whether any transitional provisions are necessary in order to ensure a smooth transition. The dti must assist the committee to understand the impact of the changes iro each clause.