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Department of Agriculture, Land Reform and Rural Development
Directorate: Genetic Resources

Attention:

- Dr Noluthando Netnou-Nkoana – By email to NoluthandoN@dalrrd.gov.za
- Ms Angeline Dibiloane – By email to AngelineD@dalrrd.gov.za

Biowatch SA Comments on the Regulations made in terms of the Plant Breeders' Rights Act, 2018 as published in the Government Gazette on the 24 June 2022

Thank you for the opportunity to provide input on the Regulations made in terms of the Plant Breeders' Rights Act, 2018.

Our submission follows below and consists of:

1. Introduction to Biowatch South Africa
2. Comments on the Regulations made in terms of the Plant Breeders' Rights Act, 2018 as published in the Government Gazette on the 24 June 2022

We appreciate the provision of some exemptions in these Regulations for small farmers that contribute in part towards the realisation of Farmers' Rights to save and exchange seed. However, we also recognise that this is challenging to do this within the confines of legislation, such as the Plant Breeders' Rights Act and associated regulations, which are largely designed to secure the intellectual property rights of a highly commercialised, profit-driven sector. We are looking forward to supporting the Department in efforts to develop policy and legislation that strengthen and secures Farmers' Rights overtly and explicitly.

Yours sincerely

Rose Williams
Director

Trust No. IT 4212/99

Board Members: Dr David Fig (chairperson), Prof. Loretta Feris, Dr Mvu Ngcoya, Mr David Ntseng,
Ms Beni Williams, Ms Rose Williams, Prof. Rachel Wynberg, Ms Stha Yeni

Biowatch South Africa

Biowatch is a non-governmental organisation established in 1999, which strives for social and environmental justice within the context of food sovereignty. Biowatch works to challenge unsustainable agricultural practices and to advocate for agroecology as an ecologically viable alternative that safeguards people and land. This includes supporting smallholder farmers; working with civil society to create joint understanding and action; and constructively engaging with government in implementing policies and practices that promote, facilitate, and actively support agroecology and farmers' rights. We have a long track record of working on policy issues concerning agriculture, biodiversity, and indigenous knowledge systems.

1. Comments on the Regulations made in terms of the Plant Breeders' Rights Act, 2018 as published in the Government Gazette on 24 June 2022

We submit the following comments on the Regulations to the Plant Breeders' Rights Act from the perspective of safeguarding farmers' rights and agrobiodiversity in South Africa as well as in addressing the inequalities in our food system, especially as experienced by the vast majority of rural peoples and those small producers seeking livelihoods from the land in South Africa.

In this regard we note Farmers' Rights to at the very least save, reuse, exchange and sell seed, as described in the ITPGRFA under Article 9 as well as in Article 19 of the UNDROP which South Africa has been an instrumental country in promoting and supporting. However, we also note that the scope of Farmers' Rights in both of these instruments goes beyond these basics to also recognise the critical role that farmers, especially small producers and indigenous communities, play in conserving and developing the plant genetic resources on which we all rely and for their need to be involved in decision-making regarding the use and conservation of these resources. The UNDROP goes even further to outline the ways in which the State should proactively support farmer-led seed systems in all aspects relating to their use, conservation and ongoing development.

In this context we specifically note the importance of supporting farmer-led seed systems so that these can flourish, rather than being stifled through private and profit-based interests. This is essential to enable farmers to conserve and continue developing the agrobiodiversity that is necessary for cultural diversity, good nutrition and adaptability to climate change, pests and our diverse production contexts.

We therefore critique these regulations through the lens of preventing harm to small farmer seed systems, but still note that there is a large gap in policy with respect to State support and strengthening of farmer-led seed systems, which have been marginalised and displaced by industrialised agriculture and related seed and technology systems to our detriment.

Exception to Plant Breeders' Rights

We appreciate that the Minister recognises small producers that should be exempt from Plant Breeders' Rights and that this includes smallholder producers who may be businesses and who produce for both own consumption and sale.

We note that farmer-led seed systems are fluid with farmers both consuming, saving and exchanging propagating material as the need arises. Surplus may be exchanged in various ways both for

consumption and propagation and the use of exchanged materials is beyond the control of the farmer. It is this very fluidity and the custom of exchange that is at the core and the strength of farmer-led seed systems and the agrobiodiversity that we benefit from today. While some farmer seeds are clearly farmer varieties that have no plant breeders' rights over them, not all crops are as clear cut and visually identifiable as different – especially where farmer varieties have great inherent diversity. Also, smallholder farmers embrace diversity as a practice and will often experiment with varieties.

In the South African context there is also distribution of varieties with plant breeders' rights through State input subsidies and extension. Farmers have often reported that the seed accessed through extension is not clearly labelled. It is therefore highly unlikely that farmers will be able to identify varieties with PBR or be aware that they could be contravening any law when these are reproduced and exchanged. Many smallholders have inadequate access to land so it is often difficult to isolate fields and prevent cross-pollination, which can also result in unintentional reproduction of protected varieties in farmer seed systems.

Noting the above, we are concerned as follows:

Clause 3 (a)
This clause says that PBR will not be infringed only if small farmers (described in Clause 5 (2)(a) to(c)): Save on their own holding and exchange propagating material not exceeding the quantities defined in Clause 6. It is not clear if exchange in this clause includes sale. We support that the exemption ***must*** explicitly include the exchange ***and sale*** of seed (given the definition of sale in the PBR Act this would include exchange).

Looking to clause 6 it is not clear, given that propagating material can also be consumed for many crops, if these prescribed maximum quantities for crops include the entire crop for eating, saving as seed, livestock feed and sale. We are concerned that even for small farmers, these are not adequate to include all these uses for many of the crops listed. With climate change, small farmers also need to ensure that they save more seed than is needed for one season in case of a first, or even second planting, failing if there is extreme weather such as drought, desiccating heat or extreme storms.

Secondly clause 3 (a) says that these small farmers only may save these varieties on his [her] own holding or exchange *within their category* for *propagating* purposes. This is problematic for several reasons. This implies that the vulnerable can only exchange with the vulnerable and so on. This is a socially unjust requirement that will perpetuate the stigma associated with being on indigent registers for vulnerable households in a community that is likely to include different categories of farmer. Also, as small farmers are trying to make a living, they will sell where they can access a market, which may include producers outside of their 'category' and they can't be expected to control what a buyer does with that material – whether they eat or plant it. It is extremely discriminatory to limit the ability of small producers in this way and makes a mockery of poverty alleviation and undoing the injustice of the past.

Clause 3 (b)
Clause 3 (b) allows for the saving of propagating material on farm for one's own use. However, the requirements under which this is allowed as outlined in sub-sections (aa) – (dd) seem unnecessarily onerous even for commercial farmers. Given the nature of farmer-led seed systems and the capacities of most small producers these would be onerous conditions that most certainly would not be met.

In particular Subsection (cc) requires that any category of farmer exceeding the quantities prescribed for crops in Clause 6 needs to keep an inventory of the volume of the propagating material they have. This is unreasonable as this is a difficult task even with help, and most small producers would have difficulty in making this measurement.

Subsection (dd) further requires the farmer to identify the breeder holding the right to each variety of seed they save on farm and to negotiate in a one-on-one basis for a license and terms for compensation to the breeder. Surely there are less cumbersome ways for breeders to have fair compensation without situating individual farmers in this iniquitous position to agribusiness. ***This sub-clause should be removed.***

Clause 4 in conjunction with Clause 6
We strongly object to what is implied by these 2 clauses. Clause 4 excludes ornamental plants from exemption to PBR for small farmers, yet when one looks at the plants listed in the Table 2 defining the duration of plant breeders' rights several food and important medicinal plants found in diverse smallholder and indigenous systems are listed under ornamental pants. In particular these include the following: Lady's fingers, Yarrow, Buchu, Kiwifruit, Aloe, Amaranth, bulbine, buckwheat, etc.

Numerous Amaranthus species have established in Africa and are widely relied on as a source of nutritious food. Although certain Amaranths have horticultural value, these should be included as a food plant for their potential as hardy and nutritious cultivated food plants, especially in a climate changing world.

Secondly exemption for small producers is **only** for the plants listed in the table in Clause 6 – small producers are not exempt for protected varieties of other plants. The list in this table is sorely lacking in that many important crops in smallholder farming and food systems are not included. These include various beans (such as Lablab/dolichos and Phaseolus lunatus), Pigeon pea, Spinach/Swiss Chard, carrot, capsicum species, and many more.

In this table:

- *Phaseolus vulgaris* L. are listed as a vegetable crop as Garden bean, but in the Table 2 these are listed under Crops as Dry beans. This is more appropriate and exemption for small farmers must relate to all *Phaseolus vulgaris* species.

- Note the spelling mistake in the popular name for *Vigna subterranea* (should be Jugo beans or Bambara nut).

- The quantity for potatoes is not qualified but one assumes the word tubers is missing after the quantity and this is not meaning kilograms, which would be inadequate.

For important food security and nutritional crops all varieties of that crop must be included for exemption, even though there may only be PBR over certain types currently. For these other varieties the table could indicate that there is no maximum limit for their cultivation and exchange. For example, a key staple such as maize shouldn't be confined to only sweetcorn, white and yellow maize varieties but should pre-empt any PBR that might be registered over other colour varieties as well.

Alternative proposal
In summary, the exemptions to Plant Breeders' Rights as currently outlined in the Regulations are difficult for small producers to implement and would be very difficult to regulate requiring a large

inspectorate. These also do not fully serve the purpose of supporting small producers to secure their nutrition and livelihoods as they exclude numerous food plants in smallholder systems, and severely limit their Right to save, reuse, exchange and sell seed.

We therefore propose that:

a) Instead of trying to create a comprehensive list of exempt crops and ensure that adequate maximum quantities are prescribed for each of these, the Regulations simplify the approach by rather ***exempting all protected varieties of all crops*** relating to their interchangeable use for food, feed, seed and exchange including sale ***for defined small producers***. Medicinal and herbal plants and trees should also be included in the exemptions.

b) Furthermore, that all small producers that are eligible for exemption are grouped together by putting an upper limit on the turn-over above which one would no longer be considered a smallholder producer (as previously described in the Producer Support Policy).

Objection to application for grant of plant breeders' right

Clauses 14(1) and (2)
In the event that a breeder collected germplasm from farmers and then registered a new variety with a PBR, the piracy of the variety is only likely to come to the attention of the community after the PBR is registered. It is therefore problematic that appeals to the granting of a PBR should be limited to 60 days after publication of the decision in the Plant Variety Journal, which would in any case be inaccessible to most smallholders. Could the period for appealing a decision be open in the case of potential unauthorised use of communal and historic plant genetic resources.

Table 2 prescribing the duration of plant breeders' rights and the sole right under the PBR Act

We note that the duration of plant breeders' rights given to many of the plants listed exceed what is required by the International Union for the Protection of New Varieties of Plants (UPOV) 1991. As a developing country and given the pressing challenges in our food system, this is unnecessary and should be reduced to conform to what is required by our participation in UPOV 91. We also note the unnecessarily long sole rights provided in the table which limit South Africa's ability to flexibly issue licenses in the public interest.