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Contents

<i>No.</i>		<i>Gazette No.</i>	<i>Page No.</i>
GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS			
Higher Education and Training, Department of/ Hoër Onderwys en Opleiding, Departement van			
404	Skills Development Act (97/1998): Call for public comments on the document titled "The National Skills Authority (NSA) Draft Regulations to conduct Investigations" in terms of section 36 read with section 5 of the Act	43154	3

GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF HIGHER EDUCATION AND TRAINING

NO. 404

26 MARCH 2020

CALL FOR PUBLIC COMMENTS ON THE DOCUMENT TITLED “THE NATIONAL SKILLS AUTHORITY (NSA) DRAFT REGULATIONS TO CONDUCT INVESTIGATIONS” IN TERMS OF SECTION 36 READ WITH SECTION 5 OF THE SKILLS DEVELOPMENT ACT 97 OF 1998:

I, Bonginkosi Emmanuel Nzimande, Minister of Higher Education, Science and Technology, after consulting with the National Skills Authority, intend to promulgate Investigation Regulations under section 36 read with section 5 of the Skills Development Act. I hereby invite the Sector Education and Training Authorities, organizations, interested stakeholders and the public to submit comments on the document titled “The National Skills Authority (NSA) Draft Regulations to Conduct Investigations”, to the National Skills Authority offices.

All inputs and submissions should be submitted by 30 April 2020 to the National Skills Authority by e-mail or post to:

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By post: The Executive Officer: National Skills Authority

Department of Higher Education and Training

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Any enquiries in connection with this gazette notice can be directed to Ms. C Perumalsami, telephone: 012 312 5329 / 072 072 4924.



NATIONAL SKILLS AUTHORITY (“NSA”) RATIONALE ON THE PROMULGATION OF INVESTIGATION REGULATIONS

BACKGROUND

1. In terms of section 5(1)(d) of the Skills Development Act 97 of 1998 (“Skills Development Act”) as amended, one of the functions of the National Skills Authority (NSA) is to conduct investigations on any matters arising out of the application of the Skills Development Act.
2. Furthermore, section 5(2) provides that the NSA has prescribed powers of entry, to question and inspect.
3. However, since its establishment the NSA has had no regulations drafted/ promulgated supporting or giving rise to its powers as stipulated in section 5(2) of the Skills Development Act.

RATIONALE

4. Owing to the non-existence of Regulations on the investigative powers of the NSA of entry, to question and inspect, the NSA experiences the following challenges:
 - 4.1 Sector Education and Training Authorities (SETAs) challenged and slowed down the pace of investigations commissioned by the NSA on instruction of the Minister; and
 - 4.2 The SETAs do not understand the legislated investigative role of the NSA and as a result do not cooperate with the NSA.
5. It is against this background that the NSA saw a need for the development of Investigation Regulations for the purposes of strengthening the role of oversight of the NSA.
6. The intention of the regulations is to:
 - 6.1 Regulate the manner in which the National Skills Authority conducts its investigations;

- 6.2 Give expression to the investigative powers of the National Skills Authority, as contained in section 5 of the Skills Development Act; and
- 6.3 Create a framework within which a standardised approach is followed for all National Skills Authority investigations arising from the application of the Skills Development Act.
7. Further, the White Paper on Post-School Education and Training (WP-PSET) provides for the NSA to monitor and evaluate the performance of SETAs and the NSA has, since 2018, been engaging with the SETAs through its EXCO and Board meetings. These meetings focused on the following four areas: Skills development policy matters; National Skills Development Strategy (NSDS) (implementation, outcomes and impact); sector skills plans and governance matters.
8. During the said engagements the NSA often picked up governance issues which may require to comprehensibly be looked into. With the promulgation of the Investigation Regulations the NSA will be able to commission a preliminary investigation to look into issues in its early stages, and ensure that proper governance is maintained within the SETAs.
9. Moreover, the promulgation of the regulations will support the monitoring and evaluation role of the NSA.
10. The Regulations will provide for the establishment of an investigation task team, thus ensuring that there is separation of powers within the Authority, as the investigation task team will be separate from the NSA members.

NSA DRAFT REGULATIONS TO CONDUCT INVESTIGATIONS, IN TERMS OF SECTION 36 READ WITH SECTION 5, OF THE SKILLS DEVELOPMENT ACT.

Preamble:

The intent behind these regulations is to:

- Regulate the manner in which the National Skills Authority conducts its investigations;
- Give expression to the investigative powers of the National Skills Authority, as contained in section 5 of the Skills Development Act; and
- Create a framework within which a standardised approach is followed for all National Skills Authority investigations arising from the application of the Skills Development Act.

1. Definitions:

In these regulations, any word or expression to which a meaning has been assigned in the Skills Development Act of 1998, shall have the meaning so assigned, unless the context otherwise indicates-

“chairperson” means the Chairperson of the Investigation Task Team, unless stated otherwise;

“deputy-chairperson” means the Deputy-Chairperson of the Investigation Task Team, unless stated otherwise;

“entity” means an institution, organisation, establishment, operation, unit, structure or system established to give effect to the Act;

“inspection” means the power of the NSA to inspect as per section 5(2)(d) of the Act;

“independent Chairperson” means a person duly appointed by the NSA, selected from the approved panel of Independent Chairpersons on a rotational basis, to act as Chairperson of the Investigation Task Team for the duration of the investigation;

“**investigation letter**” means a letter which indicates the start of an investigation as contemplated in section 5(1)(d) of the Act;

“**investigation**” means an investigation as contemplated in section 5(1)(d) of the Act;

“**investigation task team**” means the Investigation Task Team established under regulation 6;

“**Minister**” means the Minister of Higher Education, Science and Technology;

“**NSA**” means the National Skills Authority as established by section 4 of the Act;

“**SETA**” means a Sector Education and Training Authority established by the Minister in terms of section 9(1)(a) of the Act;

“**the Act**” means the Skills Development Act, 1998 (Act No. 97 of 1998), as amended.

2. Delegation of Powers

(1) In terms of section 7(2)(b)(i) of the Act, the NSA delegates its powers in terms of section 5(1)(d) and 5(2) of the Act to the Investigation Task Team established under regulation 6 to conduct investigations on any matter arising out of the application of the Act.

(2) If the NSA considers it desirable, the NSA may designate any person or service provider to investigate or any part thereof on its behalf and to report to the NSA and for that purpose such a person shall have such power as the NSA may delegate to him or her or it.

(3) The NSA may solicit technical expertise as and when required, such as legal, audit and other skills experts.

3. Investigation by the NSA

(1) The NSA shall be competent-

(a) to investigate, on its own initiative or on receipt of a complaint, any alleged-

(i) maladministration in connection with the affairs of SETAs and other entities established in terms of the Act;

- (ii) abuse or unjustifiable exercise of power or other improper conduct or undue delay by any person performing a function in accordance with the Act;
- (iii) improper or unlawful enrichment of members of the Accounting Authority of SETAs and any other entities established in terms of the Act.
- (iv) mismanagement of finances of a SETA or any other entity established in terms of the Act;
- (v) Reported poor performance of a SETA.

- (b) to investigate any other matter related to the application of the Act, including matters not specified in (a) above, if directed to by the Minister.
- (c) To designate a person or service provider to conduct the investigation or part thereof on behalf of the NSA.

4. Feasibility or merits of a Complaint

- (1) Upon receipt of a complaint and before deciding to investigate, the NSA may: -
 - (i) call for such further information from the complainant as the NSA may deem necessary;
 - (iii) inform the person or entity against whom the complaint is made of the nature of the complaint and enquire whether he/she or it desires to give a written explanation;
 - (iv) make enquiries as it may deem necessary to determine the merits of a case.

5. Decision to Investigate

- (1) Once the NSA decides to investigate a matter, the NSA shall forward an investigation letter to the Minister within 7 days from date of taking a decision to investigate.
- (2) The investigation letter referred to in (1) must: -
 - (i) be signed by the Chairperson of the NSA and must identify the members, Chairperson and Deputy Chairperson of the Investigation Task Team;

(ii) reflect the details of the matter, issues and/or allegations giving rise to the investigation;

(iii) indicate whether the decision to investigate is due to the NSA's own initiative, or as a result of a complaint received; and

(iv) indicate the identity of any other person/service provider designated to conduct an investigation or any part thereof on behalf of the NSA.

(3) An investigation by the NSA may run parallel to any other investigation lawfully commissioned, in compliance with any other law or regulation.

6. Establishment of an Investigation Task Team

(1) Subject to regulation 2, the NSA may establish an Investigation Task Team for purposes of conducting an investigation regarding any matter arising from the application of the Act.

(2) The Investigation Task Team must consist of at least three members appointed from the NSA Executive Committee and in addition, may consist of two members of the NSA.

(3) The NSA may appoint an independent Chairperson who shall preside over the investigation.

(4) The NSA shall appoint a Deputy Chairperson from the Investigation Task Team who shall preside over the investigation in the absence of the appointed Chairperson.

(5) The quorum of any meeting of the Investigation Task Team shall be 2 members and the Chairperson or Deputy Chairperson.

(6) An Investigation Task Team may be established and assigned for every new matter that the NSA decides to investigate.

(7) Every Investigation Task Team established shall be dissolved when the investigation for which it was established is concluded.

(8) A final close-out Investigation report indicates the conclusion of an investigation.

7. Format of Investigations

- (1) The NSA must draw up the Terms of Reference for the investigation, setting out the investigation plan, which must be approved by the NSA.
- (2) The Terms of Reference must include the details of the allegations and issues that will be investigated.
- (3) The investigation plan must be developed by the Investigation Task Team or designated service provider and determined with due regard to the circumstances of each case.
- (4) The investigation plan may provide for a preliminary or informal investigation for the purpose of determining the merits of a complaint and a formal investigation.
- (5) The Preliminary or Informal investigation and Formal investigation will be considered as part of the NSA investigation.
- (6) The Investigation Task Team or designated person/service provider may request in writing, at any time after an investigation is initiated, for the individual, SETA or entity being investigated, to produce and make available for inspection within 14 days from the date of request, any document as may determined by the Investigation Task Team as designated person/service provider, relating to the investigation.
- (7) The individual, SETA or other entity being investigated must notify the Investigation Task Team or designated person or service provider at least three days prior to the proposed meeting date if the date identified for the meeting is not suitable.
- (8) The Investigation Task Team or designated person/service provider may, if good cause is shown, postpone a scheduled meeting to a later date not more than 14 days from the proposed meeting.

8. Preliminary Investigation

- (1) The preliminary investigation may take place by way of a meeting between the NSA Investigation Task Team or designated person/ service provider and the individual, the Accounting Authority of the SETA or other entity being investigated.
- (2) The meeting will be held at the venue identified by the Investigation Task Team or designated person/ service provider.

- (3) The Investigation Task Team or designated person/service provider shall give written notice of a meeting scheduled in terms of subregulation (1) to the individual, SETA or other entity being investigated, at least 14 days before the proposed meeting or any other reasonable period as may be determined by the NSA.
- (4) The investigation Terms of Reference must be provided to the individual, SETA or other entity being investigated, at least 14 days prior to the meeting.
- (5) The Investigation Task Team or designated person/service provider may, at any stage during the preliminary investigation, refer the matter for a formal investigation.

9. Formal Investigation

- (1) A formal investigation shall take place by way of an investigation hearing at a date and venue determined by the Investigation Task Team or designated person/ service provider.
- (2) Once the matter has been referred for a formal investigation, the Chairperson of the Investigation Task Team and/or designated service provider must issue a notice for every person required to attend the investigation hearing.
- (3) The notice contemplated in subregulation (2) must contain the following: -
 - (i) the date, time and venue;
 - (ii) the investigation Terms of Reference;
 - (iii) the right to be represented, including the right to legal representation; and
 - (iv) the right to call witnesses.
- (4) The Investigation Task Team or designated person/service provider may: -
 - (i) interview the complainant and other possible witnesses;
 - (ii) gather any evidence relevant to the investigation;
 - (iii) issue a written notice to demand that a member or employee of a SETA , an entity or individual being investigated, submit to the Investigation Task Team any book, document or record that must be kept in terms of this Act, or that is or was in the possession or in the custody or under the control of such member or employee of an entity or person being investigated; and

- (iv) make an extract or copy of a book, document or record referred to in paragraph (iii).

10. Powers Of Entry

- (1) The Investigation Task Team or designated person/service provider may, for any purpose of an investigation and after providing reasonable written notice and a copy of the investigation letter to the SETA, individual or other entity established in terms of or to give effect to this Act, enter any building or premises of a SETA or other entity on or in which anything connected with the investigation is or is suspected to be.
- (2) No person, SETA or entity shall, after receipt of the notice in subregulation (1), refuse the Investigation Task Team or designated person/ service provider entry into premises unless that person, SETA or entity is authorized to do so by any other law.
- (3) Upon entry to the premises, the Investigation Task Team or designated person/service provider shall conduct itself in a professional manner, with due consideration for the staff and operations of the SETA or entity in question.
- (4) The Investigation Task Team or designated person/service provider must take all reasonable steps to ensure that it does not hinder the continued operations of the individual, SETA or entity in question, during the investigation.

11. Power to Question and Inspect

- (1) The Investigation Task Team or designated person/service provider: -
 - (i) has the authority to inspect all books and records relating to the individual, SETA or the entity in question;
 - (ii) may direct any person whom it reasonably suspects of having information which has a bearing on a matter or person being investigated to answer questions posed to him or her; and
 - (iii) may direct any person whom it reasonably suspects of having documentation, to produce or deliver to the Investigation Task Team or designated person/service provider any book, document or record that must be kept in terms of this Act, or

that is or was in the possession or in the custody or under the control of such person or employee of an entity or person being investigated.

- (2) If, during the course of an investigation, it appears to the Investigation Task Team or designated person/service provider that any other person is being implicated in the matter being investigated and that such implication may be to the detriment of that person, the Investigation Task Team or designated person/service provider shall afford such person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.

12. Obligations in Terms of Investigations

- (1) Any person required by the Investigation Task Team/ designated service provider to produce a document for purposes of an investigation, is obliged to produce the document, at no cost to the Investigation Task Team/ designated service provider, unless authorized to withhold the document by any other law.
- (2) Any person questioned by the Investigation Task Team or designated person/service provider is obliged to answer all relevant questions lawfully put to him/her truthfully and to the best of his or her ability unless authorized to withhold information by any other law.
- (3) Any refusal by a person, SETA or entity to co-operate with the NSA investigation, wilfully and without reasonable and lawful cause, will be deemed a failure to comply with a function or duty imposed by the Act.
- (4) The NSA will take reasonable measures to ensure that all investigations are concluded at its earliest convenience.

13. Investigation Report

- (1) After Completion of the investigation, the Investigation Task Team or designated person/service provider shall, within 14 days, compile an investigation report and submit the report to the NSA and a copy thereof transmitted to the person, SETA or entity under investigation, after duly being considered by the NSA.

- (2) Where a preliminary investigation was conducted, the NSA shall compile and submit a preliminary report to the Minister, which may include a final close-out investigation report is provided.
- (3) Where a formal investigation was conducted, the NSA shall submit a formal Investigation report to the Minister which must include a final close-out report.
- (4) An investigation will be deemed to be concluded if a final close-out investigation report is provided.
- (5) The investigation close – out report shall contain: -
 - (i) details of the allegations under investigation;
 - (ii) details of the investigation as the Investigation Task Team or designated /service provider may deem relevant;
 - (iii) the finding/s of the Investigation Task Team or designated person /service provider; and
 - (iv) a recommendation/s and advice to the Minister.

14. Liability of the NSA

- (1) Neither a member, the Executive Officer or secretariat of the NSA, nor its delegation shall be liable in respect of any information reflected in any report, finding, point of view, advice or recommendation made or expressed in good faith and submitted to the Minister or made known in terms of the Act

15. Recourse in respect of the investigation report

- (1) Any party aggrieved by the content of the investigation report may lodge an appeal with the NSA secretariat for the NSA to reconsider the finding.
- (2) The appeal in subregulation (1) must: -
 - (i) be in writing, and lodged within 14 days of receipt of the investigation report; and
 - (ii) provide details of the reasons for the appeal and the relief sought.

- (3) Upon receipt of an application for appeal, the NSA may review all the evidence and may call for further evidence and information as may be required.
- (4) The NSA may, after considering all the relevant evidence: -
- (i) confirm the investigation report;
 - (ii) amend the investigation report; or
 - (iii) produce a new investigation report;
- which may include a final close-out report.

THE NATIONAL SKILLS AUTHORITY (NSA) DRAFT INVESTIGATION REGULATIONS IN TERMS OF SECTION 36 READ WITH SECTION 5 OF THE SKILLS DEVELOPMENT ACT

DECISIONS

- 19 The recommendation in Par 15 requesting the Minister to **approve** the National Skills Authority (NSA) rationale for the draft Investigation Regulations (**Annexure A**); is

approved / not approved / amended.

- 20 The recommendations in Par 16 requesting the Minister to **approve** that the draft NSA Investigation Regulations be consulted with interested groups within the Skills Development System (**Annexure B**), is

approved / not approved / amended.


Dr BE Nzimande, MP
Minister of Higher Education, Science and Technology

Date:

27/02/2020