



March 2021

Submission on
Reform of HEA Act 1971 & Related Legislation

Reform of the Higher Education Authority Act 1971 (and related legislation)

Response by the Irish Universities Association (IUA)

5 March 2021

Introduction

The IUA welcomes the publication by the Minister for Further, Higher Education, Research, Innovation & Science of the consultation document on proposed changes to the Higher Education Authority Act, 1971, and related Acts (the ‘Proposals’).

The legislation governing the sector is now half a century old and requires updating to provide for the significant changes in the profile of the sector over the last five decades, changes in governance arrangements to bring them into line with current best practice and to provide a legislative base that will enable the sector to grow and develop in the years ahead.

Universities are critical partners in the development and achievement of the vision for *“the innovative, adaptive, inclusive, high quality higher education system aligned with the needs of the learner”* outlined in the consultation paper. They can and do support the achievement of government policy objectives, including in the context of the Strategy and Performance Dialogue led by the HEA, but they are not instruments of government. As distinct from many other organisations in the wider public service, the principle of autonomy is intrinsic to the value of Universities in democracy and society, to their pursuit of knowledge and their contribution to the public good in finding solutions to problems as yet unknown and in generating independent research discoveries in areas critical to national and global health and prosperity.

It is also essential that the legislative reform is accompanied by decisive action from government on a sustainable funding model for the sector with appropriate levels of multi-annual budgets for current and capital spending.

A Shared Approach

The framing of the legislation under the principles of ‘co-regulation’ and ‘shared governance’ is welcome but this approach needs to be appropriately reflected in the Act both in terms of language as well as in the design of a governance framework. We believe that adherence to these principles will provide for the necessary robust accountability while ensuring that the higher education sector retains the agility to respond to the rapidly changing needs of the economy and society.

It is essential that the detailed provisions of the legislation are in accordance with the principles of ‘co-regulation’ and ‘shared governance’, underpinned by mutual trust, and that the balance of accountability and agility is appropriately maintained. In support of a co-regulation approach, it is proposed that the Statutory Code of Practice and the Performance Framework, would be developed and agreed by the HEA and HEIs as key elements of the shared governance framework.

Empowering universities to take their own decisions in an agile manner, and to implement them, while remaining fully accountable for State funding is of critical importance. IUA welcomes the strong focus on accountability and the proposed provisions for a renewed HEA to underpin the highest standards of higher education in Ireland within an appropriate compliance framework.

The provisions to ensure that universities / HEIs are “*accountable to the learner and to the State*” must be accompanied by the responsibility of the government to adequately resource the sector. Without such resources, the vision as outlined for excellence in teaching, learning and research, cannot be realised.

The HEA will be provided with the necessary statutory basis for its functions, including working with the HEIs to implement Government policy. It is critical, in terms of both institutional autonomy and the ability of the institution to respond in an agile manner to the needs of the country and society, to ensure that there are limits to prescriptive central policy direction and that each university has genuine autonomy. If policy parameters are too narrowly defined, then the opportunity for any university to differentiate its mission would be severely limited with a resultant bland uniformity across the sector. A significant advantage of university autonomy is the ability to work and develop strategic education and research initiatives at long range and outside of the parameters of prescriptive government policy planning which may be subject to more frequent change.

Specific Proposals

We have outlined below our observations on the Proposals, including clarifications provided by the Secretary General of DFHERIS and his senior team at a meeting with Chairs and Presidents of universities on February 22nd 2021, and our recommendations for certain additions in key areas.

1. [Overall legislative framework](#): The provisions for a dual framework whereby responsibility for strong internal governance of HEIs rests with the Governing Authority (GA) with oversight provided by the HEA is a sound one. The high-level provisions of the respective roles of the Governing Authority and the HEA as outlined in the Proposals are generally welcome. However, it is essential that the detailed provisions of the new Act reflect the appropriate balance in those provisions and ensure that the GA retains the authority and decision-making capacity over the HEI in order to fulfil its obligations to all stakeholders including students, staff, alumni, funders, enterprise partners, local communities and government.
2. [Accountability and Agility](#): Noting the clear articulation of the principle of autonomy within a robust accountability framework in the Proposals, we are concerned that this principle may not be followed through in some of the more detailed provisions. It is essential that the new Act does not result in a centralisation of control in higher education.

This is not to argue for ‘autonomy for autonomy’s sake’. Rather, it is to ensure that the co-regulation framework enables universities to maintain the maximum level of agility in order to respond nimbly to the needs of students and other stakeholders, including the State. It is essential, therefore, that all detailed provisions of the new Act are rigorously tested against the accountability-agility principle.

The IUA fully supports the proposal that rigorous accountability procedures should be provided for under the proposed legislation. It is essential that such procedures must be

appropriate to the status of universities as autonomous institutions. The best performing universities in Europe and globally are those that have the maximum possible level of flexibility. In Ireland, the autonomy of universities has been eroded in recent years.

3. [Providing for Unique Sub-sectoral Characteristics](#): The higher education landscape is extremely varied and the question of what makes a university education different from other tertiary education a complex one. The higher education landscape ranges from small, single-discipline colleges to quite large multi-disciplinary institutions. In addition, there are substantial variations in the financial profile and related classification of HEIs. The universities represented by the IUA share the common feature of receiving less than 50% of their core funding from the State. This, in tandem with their statutory basis of being governed by the Universities Act, 1997, has enabled them to borrow independently and to be classified as ‘market producers’ by Eurostat. Consequently, their borrowings, now approaching €1 billion, are not carried on the State Balance Sheet.

It is imperative, both from the State’s and the universities perspective, that the new legislation does not result in an alteration of the universities classification by Eurostat. Such a re-classification risks having the university borrowings added to the national debt and would seriously impair or, indeed, close off the future borrowing capacity of universities. It is essential, therefore, that the governance arrangements under the new legislation facilitate the continued borrowing capacity of the universities by ensuring that the appropriate levels of institutional independence and autonomy are maintained.

4. [Role of Governing Authority, Chief Officer and Academic Council](#): The proposed roles for Governing Authorities, Academic Councils and Chief Officers in the new Act are broadly supported. The proposals to underpin academic freedom in the new Act by retaining the key provisions of the Universities Act 1997 are welcome. Confirmation that the development, approval and oversight of Strategic Plans for the HEI rests with the Governing Authority is welcome. While noting the proposed statutory provision for the establishment of an Audit and Risk Sub-Committee of the GA, we propose that GAs should retain flexibility in relation to the establishment of other sub-committees in accordance with the individual context and requirements of the HEI / university.

While the consultation document lays down a range of provisions for the accountability of the GA for current / past activities, there is not the same degree of prominence on its leadership role in the future development and growth of the institution. It is essential that the legislation supports and enables the entrepreneurial capacity of universities and underpins their capacity for innovation and risk taking. This should be rebalanced in the more detailed legislative proposals to come.

Consideration should be given to more explicit referencing of the leadership role of the Chief Officer in the legislation and to provisions of the effective and regular review of the performance of the Chief Officer in line with best governance practice.

The reaffirmation of the Chief Officer as *“the Accountable Officer in respect of public funding with an obligation to attend at the Committee of Public Accounts in such capacity”* is appropriate and in accordance with the requirements for the Accountable Officer within the meaning of the Comptroller and Auditor General Amendment Act, 1993.

Mindful of the potential contradictory scenario of the Chief Officer holding the position of being both accountable to and accountable for the Governing Authority, additional consideration should be given to the accountability of the Governing Authority as a whole both with respect to public funding and the activities of the University. There are principles of accountability and collective responsibility established in company law which may be helpful in this regard and careful consideration should be given to these.

5. Size and make-up of Governing Authorities: IUA broadly welcomes the proposal to move to a competency-based approach to the appointment of members to the GA and notes that a number of universities have already developed Competency Frameworks and have moved in the direction of competency-based membership within the parameters of the 1997 Act. The mechanisms for appointment of GA members needs careful consideration in order to ensure that the appropriate balance of expertise and experience is available to GAs so that the GA as a whole can fulfil its fiduciary duty. It is not clear from the consultation document how the proposed number and mix of members will achieve the desired 'credibility in the accountability role'. Likewise, the size of the GA should be carefully considered in order to ensure the appropriate balance of internal and external nominees and to provide for scenarios of temporary or enforced absences of GA members. We make the following proposals:
- a) Consideration should be given to providing for a range in the size of GAs. This would facilitate the accommodation of the individual circumstances and needs of each HEI/university which may vary. A GA size range of not less than 11 and not more than 15 might be considered.
 - b) We strongly support the need for gender balance on GAs. In addition, the membership of GAs should seek to reflect the diversity of Irish society and be inclusive in the broadest sense.
 - c) The Chief Officer and at least one but no more than two senior officers of the university having responsibility to the chief officer for academic, financial or administrative affairs should be ex officio members of the GA.
 - d) In accordance with best practice governance, each GA should appoint a Nominations Committee to identify suitable nominees to the GA and to oversee the process for selection of such nominees, including internal and external nominees.
 - e) An independent Chairperson should be appointed under a process overseen by the Nominations Committee and approved by the GA.
 - f) Internal nominees, other than the ex officio members, should be appointed by open competition. The legislation should provide the flexibility to individual HEIs to run an internal selection process relevant to their own unique features and needs with due reference to the overall competency requirements of the GA.
 - g) A student nominee should also be selected through an open recruitment / election process. It would also be appropriate to consider the appointment of students for a minimum two year-term in the interests of GA continuity. However, it is recognised that the feasibility of this in all cases may be somewhat challenging.
 - h) External nominees should also be identified through an open recruitment process overseen by the GA Nominations Committee. The competency requirements of the external nominees should be determined having considered the competencies of the students and internal nominees. A shortlist of external nominees would then be provided to the Minister for appointment.

- i) A majority of the GA should be comprised of the combined external members together with the independent Chair.
 - j) Consideration should also be given to providing a mechanism for removal of members of a GA should that be required as is currently provided for in the Universities Act 1997.
 - k) It is essential that there is a rolling renewal of the GA rather than a complete turnover on a 4 or 8-year cycle. This should be enabled by the legislation and provided for in the statutes / local arrangements of each GA.
6. [HEA role in Promoting and Supporting Higher Education](#): It is essential that the role of the HEA in promoting and supporting higher education is provided for in the legislation. While the Proposals state the HEA will have a role *“to promote, support and evaluate excellent research in the higher education sector”*, there is no such statement in relation to the HEA’s role in promoting higher education more generally. This should be addressed in the detailed legislation with the HEA given the appropriate powers and responsibilities to promote and support the sector.

The HEA should also have a role in ensuring that the sector is adequately financially supported, especially in areas which are stipulated in the legislation. Legislative reform has no value unless it is accompanied by a sustainable funding model. Taking the Equity of Participation Plan as an example, a list of additional obligations on HEI’s is referenced in the consultation document which will require sustained additional resources to support. It is critical that provision is made to provide such resources.

7. [Reporting and Review Provisions](#): The proposed stepped approach to the reporting and review provisions for the HEA in cases where issues arise which have not been addressed by the HEI is to be welcomed. It is essential that the detailed provisions in this regard are carefully considered in order to ensure that GAs have the appropriate powers to complete internal reviews before the external mechanisms are triggered.

The provision for an appeal by the designated institution of higher education against any determination for action and an appeal against any decision by the Minister to dissolve a governing authority is to be welcomed. The process of agreeing the membership of an appeals panel and board should be set out in the legislation and should provide that the appeals panel and the appeals board be comprised of experts independent of the HEA / DFHERIS / Government / affected HEI with an international expert dimension with relevant experience of higher education.

As is currently the case under the Universities Act, 1997, the appointment of an observer / visitor to observe and report to the HEA or undertake a review should be a person of standing, independent of the HEA and DFHERIS / government, such as a retired Judge of the High Court / Supreme Court.

8. [Codes and Frameworks](#): The requirement to provide the HEA with the statutory authority to develop Codes and Frameworks in consultation and in partnership with the sector is accepted. However, a number of issues arise from the outline indications in this regard in the Proposals:

- a) The provisions for a Code of Practice / Code of Governance would seem to suggest a 'green field' approach to this issue. It should be recognised that there is already in place a comprehensive Code of Governance for Universities, aligned with the State Bodies Code. This was agreed following lengthy and detailed consultations with the HEA. The IUA proposes that this continues to be the basis on which future Codes are derived while recognising that there is a requirement to update the Code on an ongoing basis.
- b) The clarification that the requirement for a Code of Practice for Governance will be provided for on a statutory basis but that the provisions within the Code itself will be agreed between the HEA and HEIs through a consultative process is welcomed. This is in keeping with the 'comply or explain' principle, as is currently the case, which is a standard feature of governance code regimes across all sectors.
- c) Likewise, in relation to Performance Frameworks, it is proposed that the legislation provides for a statutory basis for such Frameworks but that the existing consultative process on agreeing such Frameworks is continued. In this regard, work is already underway between the HEA and representative bodies to update and improve the existing Frameworks. It is worth noting that how Codes and Frameworks are developed is taken into account by Eurostat when considering the degree of public control over HEI's.
- d) The provision in the Proposals that the legislation should include *"compliance with public sector numbers and remuneration for public sector HEIs"* raises serious concerns and is suggestive of a uniformity of ambition being set for all HEI's. This contradicts the stated aim of government that the sector needs *"a diverse range of strong, autonomous institutions"*. Embedding the Employment Control Framework in the legislation is contrary to the principle of autonomy and agility for HEIs.

Ireland is already 28th out of 29 European countries in terms of staffing autonomy (comparative analysis of autonomy by EUA). The reform of the sectoral legislation offers a unique opportunity to address that. Over the last decade or more, student numbers have grown by more than one-third while permanent staff numbers have risen incrementally by low single digit % figures. As a result, the student-staff ratio has risen to unacceptable levels with universities forced to hire additional staff on a casual or contract basis. This must not be allowed to continue.

The Independent Expert Panel on Funding that reported to government in December 2017 emphasised the need for HEI autonomy on human resource policy when it said: *"Finding a means to offer greater autonomy to institutions in this and other areas is essential in facilitating the agile and responsive system we will need to underpin future social and economic progress."* We urge the government to heed the advice by its own expert group.

It is imperative that the control mechanism in relation to staff is moved from the crude and rigid staff ceiling approach under the ECF to a delegated sanction model whereby each university's overall staff budget is capped, but the university has the flexibility and autonomy to manage its staff affairs within that budget envelope. Any moves to provide for a more inflexible model on a statutory basis would be a retrograde step that will damage the sector and limit its potential to grow and develop.

9. [Research](#): The Proposals outline the intent to provide a role for the HEA in relation to the ongoing policy, operations and funding of research under the new legislation. However, the detailed provisions in this regard have not yet been outlined. In anticipation of such provisions, the IUA proposes the following:
- a) The HEA should have a designated role in the promotion and support of research, the development of research policy and the provision of a key component of research funding.
 - b) As the agency nominated to oversee the sector including universities as research-intensive institutions, the HEA should have a central role with regard to research policy and functions. This would be consistent with the principles of shared governance envisaged for the whole sector.
 - c) The HEA, including the revised structure or statutory basis for the IRC, must have a pivotal role in supporting and funding basic /discovery research across all disciplines, not limited by “prioritisation” and that values impact in all its forms including knowledge creation, human capital development, enhancement of teaching and learning and broader impacts for the benefit of society.
 - d) The HEA role should also encompass key support elements for the higher education research function including those covered by the Higher Education Good Research Practice Framework e.g., research integrity, open science etc.
 - e) The HEA plays a pivotal role in funding the foundations of the higher education research system through the recurrent grant, approx. €300m of which is spent on research activity annually. The new legislation needs to fully recognise and strengthen this support on which all competitive national and international investment, including from third parties such as industry, is secured.
 - f) The research / scientific advisory role to government should be separated from the research funding role. We propose that a Research Advisory Council, as exists in the majority of EU Member States and international competitors, is established so that government can avail of a broader range of expertise on research matters including research strategy and policy.
 - g) The principles of governance articulated in the consultation paper need to be supplemented with a recognition of the principle of research freedom and the special duty of the HEIs to protect the research independence of their members. Likewise, the provisions for academic freedom must be extended to recognise institutional research autonomy. This should be clearly laid down in the legislation with regard to the powers and responsibilities of the HEA in respect of research.

In addition to this sectoral submission by the IUA, individual member universities may make submissions to reflect their own perspectives on the proposed update of the Higher Education Act, 1971 and the Universities Act, 1997. Trinity College, Dublin has a different position to the IUA consensus as described in this document on a number of the issues and will make a separate detailed submission on changes to these Acts and in the context of its distinct legal structure and of the Trinity College, Dublin (Charters and Letters Patent Amendment) Act, 2000, which governs the composition of the Board of Trinity College Dublin.