



NUI Galway
OÉ Gaillimh

Response from NUI Galway to

Reform of the HEA Act, 1971 and related Legislation

Introduction

- NUI Galway is cognisant of the growing and diverse sector for which the HEA now has responsibility and the need to update the 1971 legislation to take account of that. Given that this is the first update to the legislation in fifty years, it needs to address the complex developments in the higher education landscape in recent years. It presents a great opportunity to provide a forward-looking framework within which the future success of the sector as a whole and the ambitions of the institutions within it can be realised and to clarify the respective roles, responsibilities and accountabilities of all sectoral actors. It will also provide the basis for an appropriate balance between the institutional and sectoral autonomy, agility and accountability, consistent with an internationally-competitive, democratically-supported ecosystem. It is therefore critically important to get it right, in substance and in tone.

The role of the University

- 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.
- 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. Therefore, for Irish higher education and research to truly flourish in a globally competitive environment, it is important that the work of individual institutions and the sector as a whole is not constrained by any intrusion on the principle of autonomy. To do so would hamper the University sector and ultimately undermine the achievement of the overarching objective articulated by the Government.

- The policy and governance framework for higher education and research currently being developed to position Ireland for success should therefore be clear about the respective roles, responsibilities and accountabilities of the constituent elements of the sector, while embracing the principle of autonomy for individual institutions in setting their own strategic direction and priorities at institutional level. NUI Galway welcomes both of these principles and supports their articulation in a legislative framework.
- *With reference to Section 5, it would be important to set out how the principle of institutional autonomy is to be addressed in the proposed legislation and the specific ways in which university autonomy is to be recognised?*
- Institutional autonomy is an intrinsic feature of the nature of a University. Historically it has been the matrix within which the intellectual and philosophical basis of the University's independent vision for the benefit of society has flourished, unanchored to prevailing orthodoxies. The State will naturally have legitimate concerns for accountability in the use of public resources, but the University, while attentive to that, also owes a broader allegiance to that ethos for the larger good of society. It is critical that the proposed legislation balances these two priorities of autonomy and accountability.
- The commitment in the consultation paper to the retention of Section 14 of the Universities Act 1997 which provides assurances regarding academic freedom is welcome, as is the reassurance that the reformed legislation will not have any effect on the academic freedom of the staff of HEIs.
- 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.

Accountability

- The constituent universities of the IUA are committed to ensuring good governance and accountability to our diverse internal and external stakeholders, including students, staff, alumni, funders, local communities and the Government.
- The IUA recognises the imperative of accountability to the Government for expenditure of Exchequer funding as well as for compliance with legal obligations in a wide range of areas such as human rights and equality, data protection and freedom of information, protected disclosures, health and safety and financial transparency.
- Section 5.3 (p.19) is welcome in that it:

- (a) states that striking the appropriate balance between institutional autonomy and accountability for performance and public funding is a key objective of the legislation
- (b) explicitly recognises the importance of agility and autonomy in supporting strong and effectively performing higher education institutions.

Clarification of intentions regarding Code of Practice and other legislative provisions

- Clarification would be welcome on the specific approach intended in relation to Codes of Governance.
- The legislative proposals published in July 2019 – <https://www.education.ie/en/The-Education-System/Higher-Education/Legislative-Proposals-Reform-of-HEA-Act-1971.pdf> provided in Section 47 for explicit reference in legislation to Codes of Practice. It also provided that *“Institutions of higher education institutions will be required to provide a statement to the HEC each year that they are in compliance with the relevant Code of Practice or that they are substantially compliant with the relevant Code of Practice and listing any section of the Code of Practice which they do not comply with, providing an explanation for the non-compliance and requesting a time-limited or ongoing derogation from compliance with the relevant section of the Code of Practice.”* This approach suggested a continuation of the ‘comply or explain’ model, but one which would be referenced in the legislation as applying across different sectors or institutions.
- The consultation paper published on 19 February refers to a *‘statutory Code of Practice for the Governance of HEIs’*, but it does not specify whether this is (a) to be taken to mean that the principle/fact of the Code is to be provided for statutorily in the legislation, with the Code itself sitting outside the legislation or (b) whether the provisions of the Code are embedded in the legislation. It also says that *“the codes of practice for governance which will be developed by the HEA following consultation with the HEIs will have statutory basis and will implement in a practical way the Code of Governance for State Bodies. The re-developed codes will elaborate on existing codes of governance taking into account important considerations of the new legislative framework and the principle of HEI autonomy”*.
- Clarification is required on the exact nature of the ‘statutory basis’ for the codes of practice for governance referred to in section 5.1.2; clarification is further sought on whether the implementation of the respective Codes will still follow the ‘comply or explain’ model as set out in the earlier 2019 proposal.
- In any regulated sector, core principles of good regulatory practice – appropriate use of the ‘regulatory toolbox’ –the right type of regulatory instrument for the right purpose; Proportionality, and Validity are key in striking the right balance between autonomy and accountability.

- 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 HEIs. 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.

Appointment of the Governing Authority

- Section 5.1.1 Reform of Governing Authorities of HEIs sets out a number of significant differences to the 2019 legislative proposals in the composition of Governing Authorities including :
 - A range of 10-15 members replaced by a fixed number of 12 members
 - 1-2 Ministerial appointments replaced by four Ministerial nominees and all external members appointed by the Minister (to include student members? And the Chairperson?)
- NUI Galway welcomes the proposed change in the basis for selection of members towards a Competency-based selection, rather than a representational basis, and notes that some universities, including NUI Galway, have already developed Competency Frameworks and have moved in the direction of competency-based membership to the extent possible within the parameters of the 1997 Act.
- However, it is important to recognise that the prime purpose and performance criterion of a university is academic excellence, and the competencies required of governors in the higher education sector need to reflect this. The Legislative Proposals document of 2019 recognised this important aspect of governance in a University context when stating: *“External members to be selected based on a competency framework which reflects the objects of a university as set down in statute and the specific mission of the individual university rather than being nominated by specific groups or political entities”*.
- In addition, the extent to which the proposed number and mix of members will achieve the desired ‘credibility in the accountability role’ and diversity, including how all of the governance duties – including Audit, Risk Management, Fiduciary responsibility, strategic oversight – will be fulfilled with the proposed mix of members should be considered before concluding in this regard.
- It is notable that the 2019 proposal (Section 5.4, Co-regulation Model, p.25) states: *“Governing bodies should be of a sufficient size to allow for effective governance and the members should have the appropriate skills and knowledge to enable them to discharge their respective duties and responsibilities effectively. It is also important to note that Board members have a fiduciary duty to the HEI in the first instance (i.e. the*

duty to act in good faith and in the best interests of the HEI) even if they have been nominated for membership of the governing body by a particular group/sector.”

- NUI Galway welcomes the provision for external members to be appointed via ‘*an open process (approved by the institution with the consent of the Minister)*’ and is encouraged by comparisons in discussions with the process for appointing members to the Board of the Children’s Hospital, where the autonomy of the Board is recognised and the appointment process involves collaboration between the Minister and the Trustees (the reference to ‘*a selection committee from the outgoing Board*’ (p.12) is welcome in this regard). However, care must be taken to balance continuity and change when framing the role of the outgoing Board in this regard. A staggered rotation of membership may also help in this regard.
- Clarity is required on the appointment process for the Chairperson. The Chairperson plays a crucial role in setting the tone, in achieving the appropriate accountability and autonomy of the Governing Authority and in representing the University as appropriate. The 2019 proposal indicated that current process for appointment of the Chairperson – which include a two-thirds majority vote of the Governing Authority – would be maintained. It is unclear in the 2021 proposal how the Chair is to be appointed – as the Chair is an external member it is implied that the appointment will be made by the Minister.

Role of the Chief Officer

- The current proposal indicates that, as in the Universities Act 1997, ‘the Chief Officer is the Accountable Officer in respect of public funding with an obligation to attend at the Committee of Public Accounts in such capacity’.

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.

- Consideration should be given to more explicit referencing of the leadership role of the Chief Officer in the legislation: ‘The Chief Officer is accountable to the governing authority for the effective and efficient management and leadership of the HEI and for the performance of his or her functions’;
- Provisions for the effective and regular review of the performance of the Chief Officer in line with best governance practice might best be expressed as ‘Appointing the Chief Officer and delegating functions to the Chief Officer and establishing and implementing arrangements for the effective and regular review of the performance

of the Chief Officer’, reflecting a broader up-to-date view of the relationship between the Governing Authority and the Chief Officer consistent with good practice.

Role of the HEA

- NUI Galway welcomes the approach to the co-regulation model set out in Section 5 with the aim of *‘striking an appropriate balance between the internal governance of the higher education institution and the oversight role of the HEA’* and looks forward to considering the detail in this regard.
- In support of a co-regulation approach, it is proposed that the Statutory Code of Practice and the Performance Framework, would be *agreed by* the HEA and HEIs as key elements of the shared governance framework.
- Particularly welcome is the introduction of a ‘step-wise approach to reporting and review provisions for addressing governance and accountability issues.
- The provision of additional reserve powers to Governing Authorities *‘to objectively conduct reviews and investigations to determine if policies have been complied with and to initiate action where they have not’* is welcomed as an appropriate first stage in addressing potential governance issues.
- Further clarity is required on the details of an appeals mechanism against sanctions imposed by the HEA, as set out in section 5.3. The 2019 legislative proposal envisioned the following Appeals process:

‘This section provides for an appeals process following determinations made under sections 35 or 50. The appeal will be to an appeals panel and board. There will be provision for a panel of 10 to be established and provision for 3 persons appointed to an appeals board on receipt of appeal to make a determination on that appeal.’

Clarity on the proposed composition of the Appeals panel/and board is requested.

- 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.

Research

- In Section 2 (p.6) it is noted that a new statutory instrument for dedicated research funding is envisaged. NUI Galway welcomes this recognition that the strategic importance of Research and Development investment needs this kind of recognition and co-ordination. We anticipate that the HEIs, as the major stakeholder in research in the country, will be fully involved in any instrument established and will be full

partners in the co-creation of priorities. This would be consistent with the principles of shared governance envisaged for the whole sector.

- On page sixteen the principles of governance are articulated. These 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. The section on academic freedom on pages eighteen and nineteen do not extend far enough as these only protect individuals and do not recognise institutional research autonomy. The provisions recognising ethos and local traditions are not strong enough to protect research independence
- In section 6.5 we suggest insertion of the phrase “while respecting academic freedom of researcher and the research autonomy of HEIs” in the section delineating the functions of the HEA.
- Overall the document does not recognise that research by its nature can be critical and disruptive. Academic freedom, when applied to research and which is so central to democratic discourse, has to have institutional expression and the legislation should support this. The principle of shared governance also applies in this way, or else the national research strategy could be used as a regulative rather than an enabling instrument.