



BH ASSOCIATES

Reform of the Regulatory Regime for the Irish Higher Education System and of the Powers and Functions of the Higher Education Authority

A Briefing Note

(This briefing note is not intended as a comprehensive statement of the proposed legislative reforms or an interpretation of the draft legislation. It is a broad review of the background to reform, as understood by BH Associates, and a summary of the key legislative proposals)

The HEA was established on a statutory basis by the Higher Education Authority Act 1971. The HEA is a classic intermediary body in international public administration terms - in this case intermediary between the government and the higher education sector. The 1971 Act is short on detail. In many respects this has been a strength, but in the changed circumstances outlined later in this note this is much less so. The Act establishes the HEA and provides for its functions, mostly generally stated. The 1971 Act does not provide specifically for the range of functions that the HEA now exercises in respect of the institutions. Arguably therefore, the HEA has quite limited powers. How then has the system developed to the present point where there is a considerable level of oversight and regulation of the HEIs by the HEA? The answer lies in the active co-operation (some might say acquiescence) of the HEIs themselves. The unwritten bargain is that, in return for public funding, the HEIs will voluntarily participate in a system aimed at enhancing good governance and public accountability – a system based on a sense of mutual benefit.

There have been lapses of governance and financial management in the Irish higher education sector since 1971, some of them serious. Overall, however, an objective assessment of the current “voluntary” system of regulation would conclude that the sector and the system of oversight and regulation has performed well to provide for a growing demand for access, a significant improvement in equity of access and participation and the provision of a cadre of graduates with the high level and quality of skills to support strong economic performance.

But there are clear risks to continuing on this “voluntary” basis and some recent episodes have exposed the shortcomings in the HEA’s and the Minister’s powers where the public interest required intervention.

In the intervening 48 years since 1971 a great deal has changed in the environment and context in which the HEA operates. We have seen the development of the institutes of technology, now in many cases in the course of transitioning to technological universities; the creation of a specific quality assurance body in Quality and Qualifications Ireland; the growing role of transnational and private sector education providers, the growth in importance and funding of research and the creation of research funders such as the Irish Research Council and Science Foundation Ireland, and the increased importance of internationalisation and international students. Throughout the period, there has been a consistent increase in student participation from under 20% in the 1970s to over 50% today.

In 2011 the first national strategy for higher education was published charting the way forward to 2030. Foremost among the reforms to the HEA’s responsibilities is the new relationship that has been put in place between it and the publicly funded higher education institutions, based on performance compacts and a focus on outputs/outcomes over inputs. The funding role of the HEA, which forms the backbone of its 1971 legislation, has therefore been significantly overtaken by a much enhanced and expanded system- performance role.

In recent times the demand for improved accountability and transparency from all publicly funded entities has been growing, driven by the political system through the Committee of Public Accounts, by the Office of the Comptroller and Auditor General and by media interest.

Combined, these developments require that the HEA deploy a much wider range of regulatory, accountability and funding powers in order to ensure that the higher education sector delivers strongly positive outcomes for students and the wider society and economy. Few of these developments, and the powers necessary to implement/monitor them, are adequately reflected in the 1971 Act or in post 1971 legislation. Development of the tools of accountability and regulation has occurred on an ad hoc basis through administrative actions based on a very broad interpretation of the powers and functions of the HEA as set out in the 1971 Act, especially its funding powers. As a result, a system of regulation that placed strong emphasis on voluntary adherence to codes, processes and procedures has given rise to uncertainty as to the respective roles of Government, Ministers, HEA and the HEIs

This uncertainty is exacerbated by developments since 1971 in statutory interpretation by the higher courts. These are increasingly less tolerant of catch all statutory provisions and seek greater certainty if a body seeks to exercise a power or discretion. As a result, the courts have demonstrated a reluctance to imply powers and functions to entities such as the HEA and instead adopt a more literal interpretation of legislation, requiring powers to be specifically provided for in relevant legislation.

All of this places the HEA in a difficult position if they are either challenged or face lack of co-operation by higher education institutions. The organisation is, in fact and in law, poorly equipped with the specific legal powers needed to carry out its mandate from government and the wider public, and as such carries the risk of successful challenge when it seeks to act without specific statutory powers. The potential for conflict is real and serves the interests of neither the institutions, the HEA or the wider public interest. What is needed therefore is a clear expression in law and related regulations of the roles and responsibilities of the key

players in the higher education and research system – the Minister and his Department, the HEA and the higher education institutions – balanced against the principle of institutional autonomy which has been a strength of the Irish system to-date and is strongly endorsed in the National Strategy.

Combined, these elements point to the need to review the HEA Act and related higher education legislation and bring as much clarity as possible to the powers, duties and functions of the respective key participants in the system. The Government’s current *Action Plan for Education* commits to “Produce a scoping paper, to inform future legislative updating of the HEA Act, 1971”. It is this commitment which has led to a consultation process and a report by the Department of Education and Skills on a reformed legislative regime for the HEA. The following are, in summary, its key elements.

1. The stated aim of legislative reform is to support the differentiated but complementary roles of the HEA, the Minister and the Department and to ensure that the HEA is equipped with a robust legal basis to undertake its key responsibilities in relation to the performance and regulation consistent with best international practice;
2. It is not intended to put in place a new performance and regulatory framework but to modify the existing system, extending it in a proportionate and balanced way in response to identified and considered weaknesses in the current performance and regulatory model.
3. The performance and regulatory model will put an emphasis on the regulation and oversight of the quality of the learning experience and directing regulatory resources to those areas of greatest risk. The guiding principles which will be taken into account in developing this performance and regulatory framework are:
 - A framework which will support the core objectives of the higher education system;
 - Clarity regarding the role of the Minister, HEA, governing bodies and the executive of HEIs and other relevant bodies;
 - Clarity, sustainability and simplicity in relation to funding and regulation;
 - Achieving the correct balance of autonomy and accountability for the HEIs in receipt of funding;
 - Ensuring the model does not impose an excessive administrative burden on HEIs or the HEA;
 - Protecting Exchequer investment in the higher education sector; and
 - Safeguarding the needs of the student including quality.
4. A balanced coregulation model is to be reflected in the new legislation, the features of which it is proposed will be:
 - Strong Governing Bodies with Board members with the necessary skills who exercise their fiduciary duty to the institution;
 - An executive which works effectively with the governing body;

- An internal performance and governance framework, including codes of practice and relevant policies and compliance with this framework;
 - A comprehensive reporting system from the executive to the Board;
 - An effective internal risk management and internal control system;
 - Oversight and performance delivery agreements with the HEA;
 - Compliance with a Code of Practice for governance which will be agreed between the HEA and the relevant sector;
 - Reporting framework to the HEA including annual governance statements, financial reporting and annual report;
 - The operation of the Systems Performance Framework;
 - Compliance with legislative and national regulatory requirements including audit; and Powers of intervention by the HEA in instances where a serious risk has been identified or there has been non-compliance with regulatory standards.
5. The Higher Education Authority will be renamed the Higher Education Commission. The HEC will be an intermediary body between the Government through the Minister, the Department of Education and Skills and the HEIs with its main objective being contributing to the development of higher education policy and strategy and assisting in the implementation of higher education policy and strategy as decided by the Minister while also protecting and maximising the output from the State's investment in the higher education sector and promoting positive outcomes from the allocation of the resources. The HEC will be a significant contributor to the development and adoption by the Minister and the Department of key policies and strategies. The HEC will also undertake the operational role of funding, supporting, regulating and overseeing the higher education sector.
 6. It is envisaged that legislation will provide for the mandatory designation of all higher education providers as institutions of higher education for the purposes of the legislation. It is proposed that the HEC will make a determination regarding which higher education providers are designated. A distinction between different categories of institutions of higher education may be provided for in order to apply different sections of the Act to the different sectors and categories of institution of higher education.
 7. The legislation is to provide that the HEC will develop, in co-operation with the Department of Education and Skills, a Strategy statement for higher education and higher education research at least every 10 years that will set out the long-term strategic direction for higher education and higher education research and will address economic goals, social goals (including equality of access) and environmental goals.
 8. It is proposed to include a provision for the development and implementation of a performance framework for HEIs based on national objectives, providing legislative backing for the existing System Performance Framework and strategic dialogue process.

9. The legislation will provide the HEC with the power to provide funding to designated institutions of higher education and other bodies in accordance with a funding framework developed by the HEC. This may provide for different funds to achieve the principles and functions of the HEC. The framework for the allocation of funding will have a particular focus on outputs and outcomes in accordance with the strategy for higher education and higher education research and may also include recognition/incentive for good performance.
10. Provision is to be made for the HEC to develop and put in place codes of practice for the governance of designated institutions of higher education in consultation with the relevant sector. It is anticipated that in accordance with the current practice, different codes of practice may apply to different sectors of higher education. Designated institutions of higher education will be required to comply with the relevant code of practice and provide a statement to the HEC each year regarding their compliance.
11. It is proposed to include powers of review and intervention by the HEC where there is a concern regarding the performance and regulation of the HEI. The powers of intervention by the HEC which it is proposed are -
 - Review power for the HEC;
 - Provision of assistance to HEIs and their governing body including the appointment of advisors;
 - Appointment of an observer to the governing body;
 - Non-financial penalties;
 - Withholding or refund of grant;
 - Advise QQI of any issue related to a provision under the QQI legislation; and
 - Recommendation to the Minister to replace the governing body.
12. Provision is to be made for the collaboration of institutions of higher education in regional areas and for a high level of co-operation and collaboration between further and higher education and their regulatory bodies. Data collection and sharing will be put on a legislative basis. The key objective of this latter provision is to ensure that the HEC has the capacity to collect the data necessary to carry out its functions.

The proposed legislation carries a number of provisions which are likely to be the focus of an argument that they amount to an unwarranted dilution of the institutional autonomy of universities. To understand the issue one has to refer to the history of the enactment of the Universities Act 1997. This was the first legislation enacted by an Irish parliament which was of general application to the regulation of the universities. The initial proposals well met with a wall of protest from the universities, the political system and the media. In the end, the Act has passed represented a compromise aimed at allaying the fears of the universities of a government “takeover”. The following proposals unwind what were then intended as key protections of the universities’ autonomy.

The provisions relating to the visitor in the 1997 Act, and the role of the visitor in inquires and removal of governing bodies was seen as an important safeguard against oppressive government action, not least because the visitor was to be appointed by the Government in consultation with the President of the High Court – the person appointed to be a Judge of the High Court, or a retired Judge of the High Court or the Supreme Court. The proposed provisions are considerably more straightforward relating to the appointment of a person to conduct a review.

The 1997 Act provides that governing bodies had to have regard to Ministerial guidelines on issues relating to staff (numbers and grades and proportion of budget spent on staffing) but were not obliged to implement them. This provision is removed.

The legislation will remove the provision that allows the president of a university to chair the governing body – a provision relevant to Trinity College only at present.

The governing bodies are to be reduced to a maximum of 15 members and crucially external members are to be in the majority, a significant reversal of the 1997 provisions which were aimed at reflecting the university as a self-governing community.