

PUBLIC CONSULTATION
UPDATE OF THE HIGHER EDUCATION AUTHORITY ACT 1971

In the context of the Minister for Education and Skills' stated ambition for Ireland to have the best education and training system in Europe by 2026, we are committed to ensuring that the Higher Education Authority is appropriately equipped as an oversight / regulatory body to support higher education institutions to be the best in Europe in key areas such as supportive learning environments, inclusion of under-represented groups, promoting continuous improvement, building bridges between education and the wider community, linking research and enterprise, and governance and accountability.

In order to assist in achieving this ambition, the Action Plan for Education includes a commitment to update the HEA Act, 1971 (Action 92.4).

The Higher Education Authority Act, 1971 established the Higher Education Authority (HEA), set out the functions of the HEA and also provided for the governance of the HEA. The HEA is the statutory funding authority for the universities, institutes of technology and a number of other designated institutions and is the advisory body to the Minister for Education and Skills in relation to the higher education sector. The HEA also has responsibility for the effective governance and regulation of higher education institutions and the higher education system.

The Act has been updated on a number of occasions. However it is now timely to reflect on whether the current legislation fully reflects the functions, governance and authority of a modern oversight / regulatory body for the higher education sector.

In line with the Action Plan commitment and our ambition to be the best in Europe by 2026, the Department is now proposing to put in place new legislation which will provide the HEA with any necessary authority in relation to revised functions, governance and other related matters which more fully reflect its current central role and responsibilities in relation to higher education.

The development of a revised legislative framework also provides an opportunity to examine changing and/or expanding the role of the HEA in the future and addressing other areas within higher education which may need a clearer statutory underpinning. A key priority for the new legislation will be to clearly differentiate between the regulatory / oversight role of the HEA and the strategy and policy responsibilities of the Minister for Education and Skills in relation to the higher education sector.

The Department is requesting the views of all interested parties on the proposed update of the Higher Education Authority Act, 1971. The views received from this consultation process will be considered by the Minister in the context of the process of reviewing and revising the HEA legislation.

The following documents may be of assistance in informing and guiding the response to this consultation: The Higher Education Authority Act, 1971 is [HERE](#). The Universities Act, 1997 is [HERE](#). The Institutes of Technology Act, 2006 is [HERE](#). The Qualifications and Quality Assurance (Education and Training) Act 2012 is available [HERE](#). The Technological Universities Act 2018 is [HERE](#). The National Strategy for Higher Education to 2030 is [HERE](#). The System Performance Framework for HEIs is [HERE](#). The Codes of Governance for HEIs are [HERE](#).

It is proposed that there will be a feedback session in the Autumn following the completion of the consultation process. If you wish to attend this session it is requested that you include relevant contact details in your submission.

Note: Any personal details you provide will remain confidential and will only be used for the purpose of this project, in accordance with data protection legislation. However, all information and opinions you provide will be subject to the Freedom of Information Act (2014) and may be released.

The Department requests your views by completing the key questions in the questionnaire. Please forward your submissions to heconsultation@education.gov.ie by 31 August 2018.

UPDATE OF THE HIGHER EDUCATION AUTHORITY ACT 1971

Submission on behalf of the Technological Higher Education Association

Contact Detail: 

The Technological Higher Education Association welcomes the opportunity to contribute to this important public consultation and appreciates that the facility is provided by the Department of Education and Skills (DES) to make a submission that is appropriately informed by the technological sector. The fifth goal within the *Action Plan for Education* commits the DES to strengthening strategic oversight, advancement of relevant legislation, the delivery of appropriate infrastructure, and further improvement in the quality of the national support services and shared services. It is in this context that the *Action Plan* specifies that the DES produce a scoping paper to inform future legislative updating of the HEA Act, 1971. THEA supports this intent and anticipates that there is universal agreement that the 1971 legislation no longer current or fit for purpose. It is too general and of its age. Even allowing for subsequent amendments, there is a need for a comprehensive update. In so doing, there is opportunity better to align with the work of other related agencies and even to consider some alternative structural concepts that might better reflect our fast-changing higher education sphere.

In that spirit, one can state that ideally this task will be approached conscious of the broader HE landscape. Such a reflection allows for a deeper consideration of larger themes and should lead to reflection around related statutory instruments and to better alignment between various state agencies that operate, either in whole or part, within the sphere of higher education. We currently experience some confusion over roles and responsibilities as a result of statutory requirements that occasionally overlap. We have seen one such example recently in relation to responsibility for quality which emerged in system compact discussions and a related example concerns oversight of provision (see section 35 of the Universities Act 1997 where procedures to ensure the quality of education and related services are subject to periodic consultation with An tÚdarás um Ard-Oideachas), and through such as the addition to the Act of 1971 through an amendment in the IoT 2006 Act which mandates promoting the attainment and maintenance of excellence in learning, teaching, and research in higher education. Serving two or more masters equally is proving difficult for the system. Given alignment of responsibility for FE and HE in DES, what might that suggest for the structure of the agency or agencies that support those functions? It may be too early and too radical at this point to hint at fundamental structural change especially given the advent of the impending new QQI legislation, but a scoping paper might usefully consider better alignment between various agencies and especially those under the aegis of the Department.

At the heart of this are the simple questions as to what the HEA is, and what it might be. In the light of recent developments, there must be a question as to whether the HEA should become more centrally a regulator or whether this can be combined with other functions as proposed in the original legislation. Separately, the question must remain as to whether the Authority should be independent of the minister. A legislative review might also usefully encompass the role of the Department of Education & Skills. Its mandate is all-encompassing and the question can be raised as to whether the oversight of such as first, second, and third levels are best managed within a single cultural approach. The creation recently of a Minister for Higher Education might propose that the sector requires a specific focus and with an approach that is distinct and appropriate. Thus if a renewed HEA is envisaged, then it is worth considering whether this might have structural implications for the Department itself.

In reviewing the specific and the general functions to be performed under the parent Act of 1971, one would have to conclude that the Higher Education Authority is firstly an advisory body. It does not create policy but should inform, promulgate, and implement it. It is clearly intended as a regulatory body but the careful triangulation of its powers with those of a mature governance structure in an autonomous institution is key. And there have been significant advances in the thinking around governance in the four decades and more since the enactment of the original legislation. There have also been governance challenges that might propose that the legislation is no longer fit for purpose. What is required is a system that affords the independence necessary to foster innovative institutions balanced with provisions that can ensure accountability and afford avenues for intervention in the exceptional circumstances where such an action is inevitable. In this respect, it is worth acknowledging that third level in Ireland is not immune to deficiencies in governance. It has raised questions as to how best we equip our directors and executive for a more demanding governance environment. Thus there is an interdependence between the question of autonomy and that of strong and consistent governance at third level.

A separate consideration is the character of a renewed HEA and the appropriate balance between its obligations as a regulator, an investment coordinator, its responsibilities in respect of financial oversight, promoting equality, raising appreciation, and such as promoting the attainment and maintenance of excellence in learning, teaching, & research. The list is not exhaustive, but it raises a number of considerations. In a multiagency setting, is the scope of responsibility too broad and does it cut across responsibilities that might, at least in part, be covered elsewhere? If there is openness to such a consideration, then it is equally worth asking whether, in a relatively small state, we continue to require such a multiplicity of agencies and whether they serve the very democratization of education that was given to the HEA as a function in its original legislation. This in turn raises a further question: how ambitious are we as a higher education community prepared to be in considering this renewed legislation; is it essentially a tidying, and updating, or consolidation, or is there an appetite to think on a bigger scale?

And what of objectivity and independence? Should the HEA be placed at a further distance from the minister? Are the dispersal of monies, the oversight, and the reporting functions in any manner weakened if the HEA is invested with greater autonomy but working consistent with policy which it can inform and must implement but which is fundamentally the province of the minister? Such independence presupposes that the policy framework is clear and such a separation will enhance

transparency and indeed protect any minister from the charge that s/he is too engaged with, for example, the detail and decision around competitive calls.

The notion of advocacy is contentious. The legislation currently speaks of promoting appreciation of the value of higher education and research (HEA 1971, Section 3 on general functions). It is reasonable to conclude that this mandates the Authority to adopt a stance on behalf of the system. If, for example, there were a view that HE collectively might better understand how it is perceived and how it might enhance its reputation, does the HEA have a legitimate role in that exercise? If yes, is that role compatible with the role of a regulator? It's a distant parallel admittedly, but one might equally ask if community policing is a legitimate role for the guardians of the peace. There is a view that a regulatory role is incompatible with that of promotion. We propose that this be questioned; in so saying, it should be acknowledged that there is a distinction between advocacy, representation, and promotion. We exist on a small island and our system for all its diversity is essentially small and interconnected. As a people we value personal relationships and trust and ultimately we are all – providers, agencies, and policy makers - striving toward a common goal. In this one presupposes some political nous and the acceptance, as above, of the obvious distinction between advocacy and representation. The notion of objective promotion of the system of higher education and its quality is stitched into the original legislation. We believe it would be regressive to remove this; not only is it not incompatible with a core regulatory role but a strong central independent body that is an agent for informing, identifying, and sharing good practice can serve only to enhance the system as a whole.

Balancing the functions of coordinating state investment, regulation, monitoring and reporting, and promotion is not easy and the demand to be made of a renewed Higher Education Authority is significant. The Commission on Higher Education took seven years to complete its work before publication in 1967. The time taken was adjudged in part at least to be a consequence of the fact that the higher education system of the time was to a degree incoherent. It was clearly not a system prepared for what was to emerge quickly as the massification of higher education. History reminds us that one of the great achievements of the Authority is the realization, notwithstanding its faults, of a complex and interwoven system of higher education that has assisted the constituent institutions to meet the primary purpose of contributing to the social and economic development of the country. And any assessment of the progress of the state in the half century since the publication of the Commission's report would have to conclude that higher education has made a critical contribution to both economic success and the social cohesion. The role of an tÚdarás um Ard-Oideachas in helping to build and sustain a cohesive and dynamic higher education system should not be underestimated.

QUESTIONNAIRE

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1. What should be the key functions of the Higher Education Authority?

The existing general functions of the HEA are outlined in Section 3 of the Act. Other specific functions of the HEA are outlined elsewhere in the Act. The HEA is the statutory funding authority for the universities, institutes of technology and a number of other designated institutions and is the advisory body to the Minister for Education and Skills in relation to the higher education sector.

The HEA also has responsibility for the effective governance and regulation of higher education institutions and the higher education system. The views of stakeholders are invited in particular on whether there are any additional functions and responsibilities that the HEA should fulfil in the future in order to support and regulate an effective higher education system. In identifying the key functions of the HEA, stakeholders views are also invited on the most appropriate level of institutional autonomy for higher education institutions in order to deliver on national priorities while balancing governance and accountability requirements, and whether the level of autonomy should be linked to the institution's performance in areas such as governance, delivering on national priorities etc.

International exemplars would suggest that strong autonomous higher education institutions perform admirably and are best placed to contribute to realizing national ambitions as set out in a clear policy framework. Such institutions need to be accountable and should operate under a robust and consistent governance code. In a mature higher education system with the type of diversified provision that characterizes the Irish situation, the role of a Tertiary Education Authority might best be to advise the minister and inform policy development, to oversee the implementation of such policy, to distribute monies in accordance with the tenets of that policy, to monitor the performance of tertiary education organizations and report on same, to collect and analyse aggregated data that can inform policy and can help institutions better to formulate their own strategies.

The Tertiary Education Commission in New Zealand, a system of comparable size and maturity, offers an interesting comparator. A key statement for the TEC is that their purpose is to help all New Zealanders prosper through tertiary education and careers services. Their functions include giving effect to the Tertiary Education Strategy. That the TEC has a mandate to support institutions is clear from its functions and it echoes the question above which links support and regulation in a manner that is fully supported in this return. The functions of the TEC are set out in the New Zealand Education Act 1989. This is a comprehensive and inclusive instrument that comprehends education at various levels. It ascribes to the Tertiary Education Commission objectives that include in the first instance delivery of the higher education strategy, advice to the minister including advice on policy formulation, the implementation of funding mechanisms, management of a careers database and related information service, the strengthening of connections between education levels and to the world of work, and the monitoring of performance. Interestingly, in what is a large piece of legislation, the functions of the TEC are succinctly described and it manages those functions in a manner that is supportive of the system and the providers concerned. The equally interesting inclusion of a function relating to the management of a careers database and related information service means it is public-facing and this too has a merit worth considering.

It is too early in this consideration to engage with detail, but in passing it is worth raising an example whereby the HEA has a responsibility 'for promoting the attainment of equality of opportunity in higher education'. This is discharged through the Office of Equity of Access in the HEA, and it appears to have a budget line which underscores the development and implementation of the various National Access Plans. Quality and Qualifications Ireland, however, has a statutory role in determining policies for access, transfer, and progression (as did its predecessor NQAI) and overseeing their implementation. These too are motivated by a desire to achieve equality of opportunity. QQI's function tends to be interpreted in technical terms

(qualifications, RPL) and do not appear to have a budget line, which must have implications for implementation. There is potentially a level of duplication here which might be made more coherent.

Under the advocacy banner, it is arguable that the move a decade ago to bring the technological sector under the aegis of the Authority has to a large extent helped to address the injunction to promote the democratization of the structure of higher education. Culturally, it is arguable that it has taken some time for the Authority and the technological sector to adjust to the new arrangement. Equally, it can be argued that the democratization of structure continues with the advent of technological universities. Whether this should remain as a function is now a moot point.

Doubtless as the debate progresses, some will reference other models within our broader public service. In so doing, they might be struck by the difference between what is stated of an organization and its practice and, perhaps more important, its public perception. The Health Information and Quality Authority might be cited as one such example. The very title places information before the quality function and its declaration states that it is an independent authority that exists to improve health and social care services for the people of Ireland. The two key elements here are independence and an unequivocal mandate to foster the service as a whole. I expect the public perception would centre more closely on the regulatory role. The object of HIQA under legislation (The Health Act 2007) is to promote safety and quality in the provision of health and personal social services for the benefit of the health and welfare of the public. The functions align with this and along with setting standards they major on monitoring and investigative powers. For absence of any doubt, what is not being proposed here is a HIQA for Higher Education. But it is telling that an authority with a strong and necessary regulatory function has at its core the mandate to promote the safety and quality of provision. There are elements of parallel in the mandate afforded Quality and Qualifications Ireland under the 2012 Act. It has functions in relation to promotion, standard setting, and monitoring in relation to the quality of provision in support of its key role to promote, maintain, further develop, and implement the National Framework of Qualifications.

With respect to a digital age and the need for evidence-based decision making, there would be merit in including in the legislation a clear mandate and with the necessary permissions for the Authority to collect and analyse data for the express purposes of enhancing the system, best targeting scarce resources, and most critically, informing policy.

A further point worthy of consideration is whether we should retain the current concept and title of "higher education" or should move to a tertiary education model. The change would be significant and whether it is feasible in one step is questionable. But it would, for one, reflect better the greater departmental integration between further and higher education. It would also make a statement about democratization of opportunity, as opposed to structures, and might contribute to a more open perception of the value of skills and apprenticeship. Such a step would have major implications for a number of bodies and would inevitably entail structural change but

it would also assist in simplifying the system and would have the potential to enhance progression opportunities for learners.

2. What role should the Minister have in relation to regulation of the Higher Education Sector?

The Act includes a role for the Minister in designating institutions as institutions of higher education for the purposes of the Act, approval of moneys provided by the Oireachtas for institutions of higher education, approval of terms and conditions relating to HEA staff and the payment of allowances to the HEA advisory committee. Other Acts such as the Universities Act, the Institutes of Technology Act and the Technological Universities Act give authority to the Minister in relation to the higher education sector. Stakeholders' views are invited in particular on the issue of what is the most appropriate role for the Minister vis a vis the HEA in terms of regulating the higher education sector, and the relative roles and responsibilities of the Minister and the HEA in this area.

This touches upon the notion of independence which was referenced earlier in this submission. The question of whether the Authority is independent of the minister occasionally arises. The argument has been heard that the HEA is not an independent entity but is rather an extension of the DES but with a specific mandate and consciously at arm's length. The 1971 legislation is silent on this matter so the point might be deemed at very least debatable. The recommendation here is that this should be explicit in the legislation and not be the subject of interpretation or a factor of personality at any given time. There is an argument for declaring the Authority an independent body but one governed by clear policy. This would protect the minister and political system from potential charge around interference. Monies would be dispersed consistent with transparent policy and the Authority would monitor, regulate, and report on the system.

The minister has reserved powers in relation to the higher education sector through various other statutory instruments; it is not proposed here to devolve these to the HEA.

The current ambivalence which sees the minister actively controlling certain operational activities such as the access agenda may be interpreted as a factor of frustration at the manner in which such certain agendas have been managed to date, but ultimately if policy is formulated and adopted, the implementation of same should be at a remove from the minister and officials.

3. Are there any related updates required to other Acts?

The legislative project may identify the requirement for amendments to other legislation in order to clarify the current and future role and responsibilities of the HEA in respect of the higher education sector and to ensure that the regulatory system put in place for the HEA is effective. This

could encompass updates to statutory provisions relating to strengthened corporate governance in the Universities. Stakeholders are invited in particular to consider whether the opportunity should be taken to update any other relevant statutory provisions that could impact on the current and future role of the HEA.

The point is noted concerning the strengthening of corporate governance for the universities; this matter has been addressed for the technological sector in the Technological Universities Act 2018. There currently exists duplication of roles or at least overlap in the roles of agencies under current legislation; some changes in related legislation will be necessary, the extent of which will depend on how ambitious this legislation proposes to be.

On the question of duplication or overlap, it is noticeable that the Industrial Development (Science Foundation Ireland) Act 2003 mandates a strong promotion role for that Foundation which specific mention of the study of, education in and engagement with, science, technology, engineering and mathematics, in consultation with the Minister for Education and Skills, where appropriate, and raising awareness and understanding of the value of science, technology, engineering, and mathematics to society and in particular to the growth of the economy. How this might best triangulate with the functions of An tÚdarás um Ard-Oideachas in a revised statute needs consideration not to mention the roles of other critical actors in this space.

4. Is a Registration model for Higher Education Institutions appropriate?

The Act currently defines an institution of higher education as a university, a college of a university, a college to which the Institutes of Technology Acts 1992 to 2006 apply, Dublin Institute of Technology, Royal College of Surgeons in Ireland, National College of Art and Design, Royal Irish Academy and such educational institutions as may be designated by order under section 5 of the Act. An alternative model that could be considered is a 'registration model' where Higher Education Institutions would be registered in different categories and subject to different registration requirements depending on the nature of their relationship with the State. Views are invited on whether a more flexible and responsive regulatory model as might be achieved under a registration system would be more desirable than the current 'designation model'; what would be the main benefits; whether any particular consequences might arise from a transition towards a registration system; and what might be the key elements of such a registration model.

The original HEA Act talks of the democratization of structures. Much of the past decades have been about opening opportunity and providing pathways for learners and in providing a diversified landscape that can accommodate differing modes of intelligence and one better designed to afford the prospect that individuals can develop themselves for their personal benefit and the betterment of society. While the registration model mentioned here is currently vague, it is hard at first sight to see how that can avoid a regression into a more hierarchical system where the very democratization that has so carefully been realized over half a century is undermined. That said, some differential and flexible approach within the legislation is worthy of consideration. For example, an institution that relies on the state for 40% of its core funding is not in the same position as one that has a reliance of 90%. The former deserves a licence to utilize its entrepreneurial facilities. However, the quality of provision across the system is not subject to such flexibility and the reputation of the system as a whole relies on consistency and the oversight

needs to be rigorous to maintain public confidence and the high standing of Irish higher education internationally. The argument in conclusion is that a differential approach should be considered but only where it protects the inclusive perception of the system and where it can be guaranteed to uphold the standards and reputation of the system as a whole.

5. Are there international models of regulation which should be examined as part of the process of updating the Act?

Different jurisdictions have adopted different regulatory models for higher education. The HEA will be commissioning a piece of research to identify best practice internationally that could be considered in an Irish context. Stakeholders are asked to consider whether there are international models or practice that they are aware of that could be considered as part of this process.

Mention has been made above to the Tertiary Education Authority in New Zealand. It has been chosen as it provides a reasonable comparator in terms of size and scope of mission. It is also highly regarded. Scotland offers another interesting exemplar where the Scottish Funding Council now encompasses both further and higher education and its mandate centres on the funding of high-quality fundable education at further and higher levels. The mandate also covers the undertaking of research among the bodies.

It is natural to cast the net widely when looking for models that can inform our thinking at a time of legislative renewal. But in recent Brexit discussions it was noted in respect of higher education that these islands constitute a laboratory with systems that have evolved consciously in differing ways. Given the shared cultural context, it would be a useful exercise to look at what has and hasn't worked well in those systems nearest to us.

6. The following are some of the areas that could be considered for updating and/or inclusion in the Act. Are there other areas which should be considered?

Designation/registration of Institutions, general functions of the HEA, Strategic Plans, governance of HEIs, penalties for governance or other breaches, appointment of Investigator, funding, withholding of funding, review and provision of relevant courses, gathering of information, improved data sharing to support more effective policy making while taking into account GDPR requirements and whether there are additional data sources that could be collated, reviews, research, links with other bodies, the Board. Views of stakeholders are invited on whether there are other areas that should be considered for inclusion in a new HEA Act.

The menu provided above is reasonable. The question is around the balance and around duplication with work of others as mentioned above. Why, for example, would the HEA review provision when QQI has potentially the same function with its thematic review?

7. How should the HEA monitor compliance within the Higher Education Sector?

Consideration should be given to compliance with the Act, financial compliance, governance compliance, compliance with frameworks and codes, provision of data, appropriate sanctions for non-compliance, autonomy of HEIs etc. The views of stakeholders are invited in particular on the

most appropriate model of ensuring that the higher education sector operates to the highest standards of corporate governance and any particular measures that could be considered.

The higher education sector and its constituent institutions appreciate that accountability is key. At the moment we have nationally a growing range of instruments seeking to ensure compliance but in a manner that is not perceived currently to be working to the optimum. The thesis here is that it is the very piecemeal emergence of such an infrastructure that is itself contributing to the problem. Institutions are now faced with resourcing offices that are focused on satisfying the increasing and occasionally overlapping demands of a bureaucratic system that is disproportionate to the very size of the higher education sector.

Best practice would suggest putting this onus back upon the institutions themselves. Equip them with appropriate governance structures and an agreed policy framework. Combine or link the review processes to decrease the transaction costs and energy while equally simplifying the reporting channels. This would help make the monitoring process more consistent, transparent, and rigorous.

It could be contended that even as recently as the formulation of the Technological Universities Act of 2018 there was a compromise on the question of governance structures. The political pressures in this are acknowledged but what emerged was still largely a representative rather than a competency model. New HEA legislation will not of itself address this but it could set a context for further necessary conversation on how best we put in place the optimum governance model that moves the functions from the ritualistic to keen oversight by informed trustees.

8. Are there any other relevant issues which you wish to comment on?

The opportunity to contribute to this consultation is very much appreciated and the anticipation is that this will be a detailed and long discussion. Thus some public forum or event would be a useful platform for the gathering and sharing of ideas and especially given the critical importance of what is likely to emerge from this process.

9. Please provide the following contact details

Note: Any personal details you provide will remain confidential and will only be used for the purpose of this project, in accordance with data protection legislation.

Name

[REDACTED]

Organisation (if applicable)

THEA, on behalf of the technological sector

Address

[REDACTED]

Email Address

[REDACTED]

Please forward your submissions to heconsultation@education.gov.ie by 31 August 2018.

Submissions should be no longer than 2,000 words.

A summary of the key points raised in the submissions will be published on the DES website in due course. Please note that any personal details you provide will remain confidential and will only be used for the purpose of this project, in accordance with data protection legislation. However, all information and opinions you provide will be subject to the Freedom of Information Act (2014) and may be released.