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Submission to the  
Oireachtas Education Committee  
On the  
General Scheme of the Higher Education Bill 2021

# General Scheme of the Higher Education Authority Bill 2021

## Response by the Irish Universities Association (IUA)

### A Shared Approach

The IUA welcomes the publication by the Minister for Further, Higher Education, Research, Innovation & Science of the *'General Scheme of the Higher Education Authority Bill 2021'* (the 'Scheme').

The legislation governing the sector is now half a century old and requires updating to provide for the significant changes since then and to provide a legislative base that will enable the sector to grow and develop in the years ahead.

The higher education landscape is extremely varied and the question of what makes a university education different from other tertiary education a complex one. Universities are critical partners in the development of an innovative, adaptive, inclusive, high quality higher education system aligned with the needs of the learner and supporting economic growth and societal development. The role of universities has been transformed by the research and innovation agenda over the last two decades.

Universities now play a vital role in the national innovation and research ecosystem and are central to the economic prosperity and social wellbeing of the nation. They can and do support the achievement of government policy objectives, and to enable them further to contribute to the public good by securing the talent and innovation needs of the country, it is essential that they retain their autonomy and agility. The role of universities in attracting and securing Foreign Direct Investment is likely to become even more important as the focus of FDI moves "From Tax to Talent".

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. We believe that adherence to principles of 'co-regulation' and 'shared governance' must be central tenets of the legislation which must be underpinned by mutual trust and that the balance of accountability and agility is appropriately maintained. More stringent controls will not enable a poorly funded system to perform better. Adequate resourcing for the sector must be the priority for government.

The HEA has been provided in the Scheme with the necessary statutory basis for its functions, including working with the HEIs to implement government policy. However, 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, unnecessarily curbing innovation and ambition, to the detriment of the international standing of both Ireland and Irish universities.

### Specific Proposals

We have outlined below our observations on the Scheme and our recommendations for amendments and 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 Scheme 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, philanthropic donors, funders, enterprise partners, local communities, government and society.

2. [Accountability and Agility](#): The IUA proposes that the principle of autonomy within a robust accountability framework is enshrined in the detailed provisions of the Scheme. It is essential that the new Act does not result in a centralisation of control in higher education.

It is critically important 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 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 severely eroded in recent years at a time when the level of State funding in real terms has fallen by more than one-third over the last decade.

The legislation should not constrain universities in their role or the scope of their functions given the diverse range of disciplines and interests that apply in universities and their multiple sources of funding. The majority of universities now receive less than 50% core funding from the State.

3. [HEA role in Promoting and Supporting Higher Education: \(Heads 7 – 11\)](#) It is essential that the role of the HEA in advocating, promoting and supporting higher education is clearly provided for in the legislation. It is essential that the HEA is 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. The HEA, as part of its core remit, must retain a key role of advising the Minister on the level of public funding required to enable universities to fulfil their responsibilities under the legislation and their performance goals agreed with the HEA. Legislative reform has no value unless it is accompanied by a sustainable funding model. The list of additional obligations on HEI's and GA's will require sustained additional resources. It is critical that provision is made for such resources.

4. [Codes, Guidelines and Policies: Heads 13, 40, 42, 66 and related Heads](#)

**4.1** The combination of powers arising from these Heads will enable the Minister to direct the HEA to implement a broad range of guidelines and codes and, in turn, enable the HEA to enforce such codes and guidelines. This, in effect, means that the 'guidelines' are not in fact such, but rather amount to directives with the HEA having the powers to implement a wide range of sanctions if the 'guidelines' are not implemented. This, de facto, undermines the principle of autonomous higher education institutions.

In relation to Head 42 and, in particular, the remedial measures contemplated in section 42(3), what safeguards or constraints are established or to be established in relation to the exercise of those powers? A right of appeal is not provided for. The basis upon which and the process under which the HEA will decide to impose a remedial measure must be set out in considerable detail. It should not be the case that universities' only remedy is judicial review.

**4.2 Head 66** provides the HEA with very broad powers to develop codes, guidelines, or policies “for any purpose relating to the Act and concerning (a) any matter or thing referred to in this Act or any other enactment, and (b) the implementation of any policy or objective of the Minister or the Government”. The IUA proposes that a number of issues are addressed in relation to this aspect of the Scheme:

- The proposal that the HEA shall only “consult with relevant stakeholders” in the preparation of such guidelines, codes or policies signifies a move from a partnership to a unilateral regulatory approach. There is already in place a comprehensive Code of Governance for Universities, aligned with the State Bodies Code, which was agreed by the University sector in partnership with the HEA. This is in keeping with the ‘comply or explain’ principle which is a standard feature of governance code regimes across all sectors and internationally.
- The IUA proposes that this continues to be the basis on which future codes and guidelines are derived. Due cognisance of the resource requirements arising from any additional functions imposed on universities by way of codes, guidelines and policies must be reflected in the adequate financial resourcing of the sector. In summary, we propose that the legislation should make provision for the establishment of codes but that the codes themselves must continue to be developed in partnership with the sector.
- **Head 66** is also explicitly linked to the powers the new legislation gives to the HEA to request a governing authority to undertake a review under **Head 67**, if the HEA has concerns regarding the governance or performance of an institution, which may be followed by a determination for action where it has concerns about the governance or performance of a designated institution of higher education of its functions or responsibilities including in relation to requirements under any Codes, Guidelines or Policies. There should be a right of appeal in relation to a request/specification made by the HEA. Again, the process and procedures by which the HEA makes a decision to request/specify needs to be set out. Most importantly, the process and procedure whereby the HEA may make a determination for action as per section 68 will need to be specified and again the question of a right of appeal arises.

## 5. Government Control of Performance Framework:

**5.1 Head 38** proposes that the Minister shall develop ‘at least every four years’ a Performance Framework for the higher education sector and shall advise HEA of this Performance Framework. It is the view of the IUA that the development of the Performance Frameworks should remain the responsibility of the HEA and that the existing consultative process on agreeing such Frameworks is continued.

**5.2** The mechanism for the development and implementation of Codes and Frameworks is taken into account by Eurostat when considering the degree of public control over HEI’s which, in turn, determines whether or not university loans are carried on the State Balance Sheet. The universities governed by the Universities Act, 1997 share the common feature of receiving less than 50% of their core funding from the State. This 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. Legislation which provides for greater State control will likely result in those loans being transferred to the State Balance Sheet.

6. Research: **Head 53** provide for arrangements to ensure HEA discharges its function in relation to research to promote, support and fund excellent research in the higher education sector across all disciplines. This Head may also provide for arrangements regarding the Irish Research Council following further consultation and consideration. However, the detailed provisions in this regard have not yet been outlined. In anticipation of such provisions, the IUA proposes the following:

**6.1** 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.

**6.2** 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.

**6.3** 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.

**6.4** 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.

**6.5** 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 and European Union agencies, is secured.

**6.6** 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.

The principles of governance 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.

- 7.** [Review of compliance with designation conditions](#): As currently drafted **Head 59** provides that HEA shall review at least once every 7 years the activities of a higher education provider in receipt of a designation as an institution of higher education. Clarification on whether established universities will have to undergo the seven-year cycle of re-accreditation is sought. This would seem to be an unnecessary validation exercise given the ongoing role of QQI in the accreditation of university qualifications and degree programmes.
- 8.** [Oversight by HEA](#): **Heads 67-76** provide for an interlinked set of provisions on oversight giving the HEA a ‘stepped’ range of powers of intervention to address concerns regarding the governance or performance of the institution. It is proposed that the HEA may request the governing body of a designated institution of higher education to undertake a review where HEA has concerns about the governance or performance of a designated institution of higher education or its functions or responsibilities including in relation to requirements under any Codes, Guidelines or Policies. A review may be followed by a determination for action which can include:
- |                                      |                                      |
|--------------------------------------|--------------------------------------|
| (a) provision of assistance;         | (b) imposition of remedial measures; |
| (c) provision of information to QQI; | (d) appointment of an observer;      |

(e) HEA undertake a review.

**8.1** Clarity is required on the criteria or thresholds that will apply in choosing one or other type of intervention by the HEA. For example, what circumstances might lead to a decision to provide assistance versus a decision to impose remedial measures? Without such clarity on the parameters within which that choice would be made, there is a serious risk of confusion as between the powers and responsibilities of the Governing Authority and that of the HEA. The absence of clarity here would also impact negatively on the transparency and effectiveness of the proposed appeals process. It is essential that the trigger mechanism for intervention by the HEA differentiates clearly between minor governance issues and those of a more substantive nature and that the universities, as autonomous institutions, have the appropriate mechanisms to engage meaningfully with the HEA prior to the initiation of any such intervention.

**8.2** The provision for an appeal by the designated institution of higher education against any determination for action is welcomed. However, it is noteworthy that the only provision for a right of appeal arises in respect of head 68 in respect of the making of a “determination for action”. Again, the process/procedure relating to the making of such a decision needs to be set out in some detail. The right of appeal should also apply to head 69 (provision of assistance) and head 70 (remedial measures) and again the process or procedure leading up to a decision to “impose remedial measures” needs to be set out. The same applies to a decision to appoint an observer as per head 72 and decision to appoint the person to undertake a review as per head 73.

**8.3** **Head 74** provides for the establishment of an Appeals Board by the Minister on receipt of such an appeal. 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.

**8.4** As is currently the case under the Universities Act, 1997, the appointment of an observer to 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.

**8.5** It is proposed that a provision for appeal, similar to that provided for in **Head 74**, is provided for in relation to a request by the HEA that the governing body of a HEI/university undertake a review as set out in d 67. This would underscore the autonomy of the university and the independence of the governing body as provided for under the Universities Act.

**9.** [Size and make-up of Governing Authorities: \(Head 77\)](#) IUA broadly welcomes the proposed move to a competency-based approach to the appointment of members to the GA. The mechanisms for appointment of GA members needs careful consideration in order to ensure that the appropriate balance of expertise and experience is available and that the GA as a whole can fulfil its fiduciary duty. It is not clear from the Scheme how the proposed number and mix of members will achieve the desired ‘credibility in the accountability role’. We make the following proposals:

**9.1** The provision for a range in the size of GA would facilitate the accommodation of the individual circumstances and needs of each university which may vary. We propose a size range of not less than 11 and not more than 17.

**9.2** The selection of student nominees in accordance with procedures agreed by the student union body is welcomed. It is important that clarity is provided to allow for alignment of the term students serve on the GA with the term of their elected office within their students’ union. This would retain

the current practice of appointing elected officers of the students' unions to the Governing Body for the duration of their elected terms of office with the students' unions.

**9.3** 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.

**9.4** The IUA supports the proposal that a number of external members are to be appointed by the governing authority in accordance with an appointments process which is developed by the governing authority and approved by the Minister. Clarification is required on the overall number of external appointees and the proportion to be appointed under this collaborative process. It is essential that all external nominees are appointed in accordance with the competency requirements of the GA.

**9.5** Transitional provisions to allow a governing authority to reconstitute itself to come within the revised overall composition and sub-categories of membership to avoid a major hiatus and loss of corporate knowledge is welcomed. A clear timeline for this should be set out.

**10.** [Role of Governing Authority, Chief Officer and Academic Council: \(Heads 79 – 88\)](#) The proposed roles for Governing Authorities, Academic Councils and Chief Officers in the new Act are broadly supported as are the proposals to underpin academic freedom in the new Act by retaining the key provisions of the Universities Act 1997. Confirmation that the development, approval and oversight of Strategic Plans for the HEI rests with the Governing Authority is welcome.

**10.1** [Head 82](#) requires consultation on a university's strategic plan with a broad range of stakeholders including the Minister and HEA. It is important that this provision does not impair the autonomy of the university and the independence of the Governing Authority. Universities already consult widely in the preparation of their strategic plans and will continue to do so but ultimate responsibility for the strategic plan rests with the GA.

**10.2** [Head 81](#) provides for a limit of 70 on Academic Councils. We propose that this limit should be removed. Academic Councils are essentially the 'parliaments' of universities. They include a diverse range of interests from across the university community. There is no evidence to suggest that limiting the size of Academic Councils to 70 will bring any tangible benefits to universities. Conversely, such a limitation could diminish the quality of debate and discourse in such Academic Councils.

## **11. Other Issues:**

**11.1** [Supply and Sharing of Personal and Non-Personal Data: \(Heads 48-51\)](#) As currently drafted, the Scheme provides a clear legislative base for supplying and sharing a very broad range of personal data particularly in respect of students and staff. Whilst the case for the HEA having access to detailed personal and sensitive data on ethnicity, gender, disability etc. is understood, what is less clear is why data of this nature is needed at the level of identifiable individuals, notwithstanding the acknowledgement in the Scheme that any data so collected must be required by HEA for the purpose of fulfilling its statutory functions and will be subject to GDPR.

**11.2** Powers of the Higher Education Authority and its officers and officials: A clear distinction needs to be made between the authority and powers to be exercised by the Higher Education Authority itself (An tÚdarás) and the authority and powers to be exercised by its officers and officials.