



Oifig an Ard-Rúnaí
An Roinn Oideachais agus Scileanna

Office of the Secretary General
Department of Education and Skills

Ms Margaret Falsey
Committee Secretariat
Committee of Public Accounts
Leinster House
Dublin 2

Your ref: PAC32-I-1123

12th November 2018

Dear Ms Falsey,

I refer to the request of the Public Accounts Committee dated 24th October 2018 seeking details in relation to –

- the powers of the Minister and the HEA to carry out different types of investigations
- details of the expected timeline for the review of the HEA legislation and the results of the public consultation on the issue

The position in relation to these matters is set out below.

(i) Minister's Review Powers

Under the Technological Universities Act 2018, the Minister currently has the authority to appoint an 'Investigator' to examine issues in Technological Universities, Institutes of Technology (IOTs), the National College of Art and Design and the Dublin Institute of Advanced Studies.

Previously, under the Regional Technology Colleges Act 1992 (as amended by the Institutes of Technology Act 2006), the Minister had the authority to appoint an 'Inspector' to IOTs to examine issues regarding the operation of the Institute. However, a new Investigator power was introduced through section 26 of the Technological Universities Act 2018, and applies to Technological Universities, IOTs as well as the Dublin Institute of Advanced Studies and the National College of Art and Design where no such provision previously existed.

Section 26 of the Technological Universities Act 2018 provides that –

“The Minister, following consultation with An tÚdarás, may authorise any person or persons as the Minister may deem appropriate to report to the Minister on any matters regarding the operation of a college and such person or persons shall be entitled at all reasonable times to enter the college concerned and shall be afforded every facility by that college, including access to all records, to perform their functions.”

With regard to the university sector, the Minister for Education and Skills has the authority to appoint a ‘Visitor’ to examine issues in Universities under Sections 19 and 20 of the Universities Act, 1997. An appointment can be made in instances where *“the Minister is of the opinion that there are reasonable grounds for contending that the functions of a university are being performed in a manner which prima facie constitutes a breach of the laws, statutes or ordinances applicable to the university”*.

To appoint a ‘Visitor’ to a university, the Minister for Education and Skills must first advise the Government of the intention to make such an appointment and is then also required to consult with the President of the High Court to identify a current or retired judge to fulfil the role of Visitor. This is provided for in Section 19 of the Universities Act, 1997:

19.—(1) Where a university does not have a Visitor, the Government shall from time to time as the occasion requires, following consultation with the President of the High Court, appoint a Judge of the High Court, or a retired Judge of the High Court or the Supreme Court, to be the Visitor for the purposes of this Act.

The nature of the Visitor provision and the process by which the appointment is made is such that it would only be deployed in cases of extraordinary governance failure.

The Department of Education and Skills is currently considering whether the existing Visitor provision in the university sector should be complemented with a similar investigator power to that introduced through the Technological Universities Act for the Technological Universities, IoTs etc. However, there are a number of important issues to be considered before an investigator power can be introduced into the university sector. Particularly important among these issues is the potential for the investigator power to impact on the classification of universities in terms of wider national fiscal policy. This issue will be considered in the context of the legislative proposals to replace the Higher Education Authority Act of 1971.

(ii) HEA Review Powers

Under the Higher Education Authority Act, 1971, the HEA has the power to set conditions attaching to the funding it disburses and to ensure accountability for that funding. This power is set out in Section 12(2) of the Higher Education Authority Act, 1971 which states -

12 - (2) Any payment to an institution which An tÚdarás makes out of the amounts that it receives under the foregoing subsection shall be made in such manner and subject to such conditions as An tÚdarás thinks fit.

The Department's assessment is that power implies the existence of a power to review compliance with these conditions which is necessary and consequential to setting conditions of funding.

In addition, the HEA also has the power to conduct studies on problems of higher education and research and to publish reports of those studies. This is set out in section 13 of the Act –

13. - An tÚdarás may institute and conduct studies on such problems of higher education and research as it considers appropriate and may publish reports of such studies.

The HEA communicated detailed legal advice to the Department of Education and Skills in July last regarding its powers to carry out reviews and investigations. As advised to the Committee members during my appearance before them on the 18th October last, on the basis of the HEA's legal advice the Department sought the advice of the Office of the Attorney General on the legal powers available to the HEA in relation to this issue under the statutory framework currently in place.

The Attorney General's advice has recently been received and is currently being assessed by Department officials. A further update will be provided to the Committee members as soon as possible once the Department has finalised its assessment of the legal advice with regard to the legal *vires* of the HEA to conduct specific type of reviews.

(iii) Timeline for the review of HEA legislation and the results of the public consultation

The Higher Education Authority Act 1971 has been updated on a number of occasions. However, the Department's assessment is that the current legislative framework needs to be comprehensively update to ensure it provides a robust legal basis for the wide range of functions and responsibilities of a modern oversight/regulatory body for the higher education sector.

Work has now commenced on updating the Higher Education Act, 1971. It is proposed to revoke the existing Act and put in place a new Act. The updated legislation is intended to provide the HEA with any necessary authority in relation to revised functions, governance and other related matters which more fully reflect its current role and responsibilities in relation to higher education.

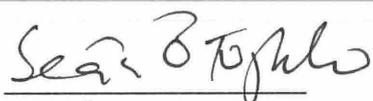
In that context, the Minister of State for Higher Education launched a public consultation seeking views on updating the Higher Education Authority Act, 1971 on 19th July 2018. The closing date for receipt of submissions was 28th September 2018. A total of 14 submissions were received.

A consultation forum on the updating of the HEA legislation will take place on 23rd November, 2018 in the Department of Education and Skills. All of those who participated in the consultation process are invited to attend together with representatives from universities, institutes of technology and other relevant bodies.

It is intended that, all submissions received under the public consultation will be published on the Department of Education and Skills website in advance of the consultation forum.

The feedback from the consultation process will inform the Heads of Bill that are currently being developed. It is intended to submit draft Heads of a Bill for Government approval in Quarter 1 2019.

Yours sincerely



Seán Ó Foghlú

Secretary General

Department of Education and Skills