SHIFTING SANDS:
DISABILITY AND REASONABLE ACCOMMODATIONS IN THE COVID/POST COVID HIGHER EDUCATION ENVIRONMENT

24th October 2022
The Forum for Disabled Staff and Postgraduate Students was established and is run by disabled staff and postgraduates to provide a platform for the voice of disability equality and also as a social group within Trinity College Dublin. It offers disabled people and allies the opportunity to meet new people, share experiences, and it acts to inform and enhance institutional policy.

The Forum has shown leadership and initiative, resulting in the establishment and embedding of a structure within Trinity College Dublin to hear the disabled voice. The Forum has increased awareness of the barriers that disabled staff and postgraduates face across higher education resulting in a national conversation. You can learn more about the Forum and our most recent publication Ableism in Academia by going to our website.

Contact us: If you have any questions about this report, the Forum, or you would like a copy of the report in Word format please email Equality@tcd.ie and you will be put in contact with a member of the group.


THANK YOU

Thank you to the conference and report organising committee, Dr Patricia McCarthy, Dr Sara Hope Kift, Dr Fiona Smyth, Mary Sharp and Dr David Loughrey. I would like to offer our heartfelt thanks to all the disabled people who shared, and continue to share, their time and experiences in order to bring about change across higher education and society. Thank you to Professor Michael Shevlin, to the team in the TCD Equality Office who supported us to prepare this report, and to all our guest speakers, especially our keynote, Gareth Noble.

Vivian Rath

Dr Vivian Rath, Chair of the Trinity College Dublin Forum for Disabled Staff & Postgraduate Students.

Legal Standing: This report or the contents therein does not constitute legal advice or guidance.
SHIFTING SANDS CONFERENCE

Many disabled staff and postgraduate students have reported that returning to employment and research in higher education (HE) post-Covid has proved to be a very anxious and challenging experience. Some may be returning to work whilst also having to manage the impact of an acquired impairment such as long-Covid. These fears may be compounded by the knowledge that Covid, as reported by the WHO, is still very much in the environment and may never go away (BBC, 2020; Nature, 2022). There is a need to consider the health and well-being of all employees as some organisations insist on an in-person move back to the office. An additional issue that has been raised is that, in the wake of the pandemic, the landscape has changed, not just in terms of the immediate risks posed by Covid, but also in terms of access and rights to reasonable accommodations in the workplace. Priorities and work modes have shifted and the issue of access has, in some respects, been glossed over or recast. As noted in the Lancet, “Further, in countries such as Canada and the UK, workers with disabilities were found to be more disadvantaged with respect to pandemic-related work accommodations—specific accommodations made by an employer for an individual with a disability or health-related work limitation to enable them to perform their work duties—than workers without a disability” (Peters et al, 2022). The reality is that the Covid pandemic - and the changes which have occurred in its aftermath - has given rise to significant risks of discrimination and the erosion of rights for persons with disabilities (IHREC, 2020) including in the workplace.

The United Nations Convention on the Rights of Persons with Disabilities (2006) describes a disability as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” (UNCRPD, 2022).

Reasonable accommodations are effective and practical changes that an employer is required to put in place to enable a disabled person to carry out their work on an equal footing with others (UNCRPD, 2022). They are a right recognised under the UNCRPD and form an essential element of some disabled peoples’ working lives. Reasonable accommodation “meaning necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms” (UNCRPD, Article 2, 2022).

Although the Covid Pandemic was undeniably challenging, it did herald the introduction of a wave of new, more inclusive, working practices such as working from home. This had a positive impact in terms of opening the door for greater opportunities for disabled people resulting in increasing employment rates (Ozimek, 2022). Historically, Ireland has had one of the lowest employment rates of disabled people in the EU (ESRI, 2021). National policy such as the Comprehensive Employment Strategy has set a 6% quota for the employment of disabled people across the public sector by 2024 (NDA, 2020). The Disability Act 2005 requires that public bodies actively promote and support the employment of disabled people. However there are now fears among disabled employees that the post-Covid environment may result in a roll back on the new inclusive practices that were implemented during the pandemic (Ryan, 2021). There is little or no information on the experiences of disabled people accessing reasonable accommodations whilst working and researching in higher education post-Covid in Ireland.
The Shifting Sands Conference was organised by the Forum in response to concerns expressed by disabled staff and postgraduate students who reported:

- Being unaware of their rights to reasonable accommodations (RAs),
- Challenges accessing RAs post-Covid,
- Having acquired a disability and not being sure of their right to RAs and to access RAs.

**REPORT AIMS:**

- To present a summary, outcomes and recommendations from the Shifting Sands Conference
- Raise awareness of the rights of disabled people to reasonable accommodations in the higher education workplace
- Hear the lived experiences of disabled staff and postgraduates working in HE
- Identify both the barriers and enablers to accessing reasonable accommodation whilst working in HE
- To build upon the *Ableism in Academia* Report 2021

**THE CONFERENCE**

The Conference, the Forum’s 3rd annual, took place on Zoom and was attended by 58 people from both Ireland and the UK. Nineteen HEIs were represented, with further representation from organisations including the Disability Advisors Working Network, Irish Universities Association, Quality and Qualifications Ireland, Technological Higher Education Association, Higher Education Authority, and the Department of Further and Higher Education.

The conference heard from keynote speaker Gareth Noble on the rights of disabled people to RAs, and through a panel discussion attendees learnt about the experiences of disabled staff and postgraduate students in higher education when accessing RAs. The conference came to a close after a breakout session. The breakout session gave attendees an opportunity to share their experiences and offer solutions to barriers experienced.

**KEYNOTE - GARETH NOBLE**

Gareth is a Trinity College Dublin alumnus, a Partner at KOD/Lyons Solicitors with expertise in, Disability and Carers Law, Judicial Review and Public Interest as well as Child and Disability Law.

A recording of this keynote can be found on the [TCD Equality website](https://www.tcd.ie/equality/) including section IV, VI and VII.

**INTRODUCTION**

The United Nations’ policy brief, ‘Education during Covid-19 and beyond’ states that “[t]he Covid-19 pandemic has created the largest disruption of education systems in history, affecting nearly 1.6 billion learners in more than 190 countries and all continents” (UN Sustainable Development Group, 2020). This disruption has resulted in mass disorientation across educational systems that require participants in these systems to re-orient themselves in a
world transformed by Covid-19. While there has been notable coverage on the effects of the pandemic on businesses and social care, there has been far less scrutiny of how working and school-age disabled people have been affected (Roscoe, Webb, & Nanda, 2021).

This note provides a discourse analysis on the rights of people with disabilities to access reasonable accommodations throughout Irish Higher Education in the context of equality legislation. This paper will examine the provisions of reasonable accommodations for occupational health and safety for disabled people in the higher education environment post Covid-19.

In some sectors there are clear trends indicating increased risk of transmission (Lopman et al., 2021). This is notable for service and sales workers, cleaning and domestic workers, education workers, meat-processing workers, hospitality workers, drivers and transportation workers, public safety workers, construction workers and the people in social service occupations. Workplaces with physical person-to-person contact, inadequate ventilation, common eating areas, shared work accommodations and travel are more likely to report Covid-19 outbreaks. Higher education learning environments in particular fall under a higher workplace risk level (WHO, 2021), which defines the Medium-Risk category as workplaces with jobs or tasks with frequent contact with people but does not require contact with people who are known to be infected with Covid-19. Higher educational environments have a high potential for close contact with people in the community who may be suspected of being infected with Covid-19 and contact with objects and surfaces possibly contaminated with the virus.

I. REASONABLE ACCOMMODATIONS

Under the Equal Status Acts 2000-2015 (Government of Ireland, 2000), it is prohibited to discriminate in the provision of goods and services, the provision of accommodation and that of access to education. One of the nine grounds which outlaw discrimination is ‘the disability ground’. The Employment Equality Acts 1998–2015 (Government of Ireland, 1998) oblige employers to make reasonable accommodation for people with disabilities. This includes people with physical, intellectual, learning, cognitive or emotional disabilities and a range of medical conditions. Section 16 requires an employer to take ‘appropriate measures’ to facilitate persons with disabilities in accessing and participating in employment unless those measures would impose a disproportionate burden on the employer. This means they must make arrangements that will enable a person who has a disability to:

− have equal opportunities when applying for work
− be treated the same as co-workers
− have equal opportunities for promotion
− undertake training.

II. EMPLOYER’S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION TO A DISABLED EMPLOYEE

In 2019, the Supreme Court established certain key principles in this area of disability discrimination law in the landmark case of Daly v Nano Nagle School (Supreme Court, 2019). This case centres on Marie Daly, a Special Needs Assistant (‘SNA’), who had worked at the Nano Nagle School for children with mild to profound learning disabilities since 1998. In 2010, she had a serious accident, following which she was paralysed and in use of /using a wheelchair. After a period of extensive rehabilitation, in 2011 she sought to return to work.
Following a review, the School Board concluded that Ms Daly did not have the capacity to undertake the full set of duties associated with an SNA, and nor would she in the future, and so decided not to permit her to return to work. The key points are the following:

a. The Supreme Court has broadened the scope of an employer’s reasonable accommodation obligation by stating that there is no reason why providing reasonable accommodation should not involve a redistribution of what might be termed core “duties” as well as non-core “tasks”. The Supreme Court has made it clear that an employer must consider potential actions concerning both duties and tasks in discharging its reasonable accommodation obligations. This completely over-turns the Court of Appeal’s approach to this issue, which, in essence, held that an employer was only required to consider a distribution of non-core “tasks” and did not need to consider redistributing or eliminating any “core” duties from an employee’s role.

b. Notwithstanding that significant change, much of the reasonable accommodation test remains the same, being one that is easy to state but difficult to apply. An employer is under a mandatory duty to take all “appropriate measures” (irrespective of whether that involves core “duties” or non-core “tasks”) unless any measure would constitute a “disproportionate burden” for the employer. The employer must demonstrate that they have fully considered the reasonable accommodation question. The Supreme Court in particular noted that the test “is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee, as this would almost inevitably impose a disproportionate burden on an employer”.

c. The Supreme Court confirmed that an employer has no binding legal obligation to consult with an employee or to allow them to participate in the process of assessing what is or is not reasonable accommodation. Nonetheless, the Supreme Court commented that “a wise employer will provide meaningful participation in vindication of his or her duty under the Act”, in particular in light of the importance of fair procedures under Irish employment law.

d. The Supreme Court confirmed that an employer is under a mandatory duty to explore the possibility of obtaining public funding or other assistance when considering all reasonable accommodation which might be put in place.

e. The Supreme Court acknowledged that if an employee would not be able to fully undertake the duties of his role, even on the provision of all reasonable accommodation, then there is no discrimination at issue.

In his judgement Mr. Justice Peter Charleton states that it is not: “…particularly useful to see disability as medical in nature. A person with a disability remains a person, an individual with human dignity who is required to be treated as such.”
III. WHO IS ENTITLED TO REASONABLE ACCOMMODATION

The Draft Code of Practice published by the Irish Human Rights and Equality Commission (“IHREC”) sets out ‘the Nature and Extent of an Employer’s Obligations to Provide Reasonable Accommodation to Employees with Disabilities’. The Code sets out that, where needed in a particular case, an employer is legally obliged to provide reasonable accommodation to an employee once they are aware, or are on notice of, an employee’s disability, unless it would give rise to a disproportionate burden for the employer. Equally, an employer should increase awareness of the duty to provide reasonable accommodation among employees and foster a work environment where early disclosure of disabilities is encouraged. The Code states also that an employer should consider rolling out a programme of disability awareness training to employees.

Employers are also expected to have regard to the principles of “universal design” when considering reasonable accommodation measures: “the design and composition of an environment so that it can be accessed, understood and used to the greatest extent possible by all people regardless of their age, size, ability or disability.” (taken from www.universaldesign.ie). The Centre for Excellence in Universal Design was established on foot of the Disability Act 2005. This introduces a new concept into the consideration of reasonable accommodation measures and is not something which is considered under the Employment Equality acts.

IV. RIGHT TO REASONABLE ACCOMMODATIONS

V. BARRIERS TO ACCESSING REASONABLE ACCOMMODATIONS POST COVID

Mitigating these hazards and protecting the health, safety and well-being of staff members and students in on-campus learning environments. Emerging body of evidence of transmissions in indoor, crowded and inadequately ventilated spaces, where infected persons spend long periods of time with others.

VI. ACQUIRING DISABILITY IN THE WORKPLACE: WHAT ARE YOUR RIGHTS?

VII. LONG COVID DEFINED

VIII. DENIED REASONABLE ACCOMMODATION: WHAT ARE MY RIGHTS?

CONCLUSION

This paper establishes the need for adopting an inclusive learning model throughout Irish Higher Education. The Association for Higher Education Access and Disability (AHEAD), in collaboration with the Disability Advisers Working Network (DAWN) have published the Inclusive Education Road Map, ‘Inclusive Learning and the Provision of Reasonable Accommodations to Students with Disabilities in Higher Education in Ireland’ (AHEAD & DAWN, 2018). The collaboration has brought together years of research on the inclusion of students with disabilities in higher education and concludes that an inclusive approach based on Universal Design for Learning (UDL) principles would provide an effective framework to include and improve the retention of, not only students with disabilities, but a diverse range of students including migrants, mature students, international students, and students from different socio-economic backgrounds.

Principally, this is in response to a continuing increase in the number of students with disabilities entering Higher Education in Ireland, juxtaposed with a decrease in available funding to support such transitions.

PANEL DISCUSSION AND BREAKOUT SESSION FEEDBACK

Hearing the voices of those who attended was central to the conference. A panel discussion and breakout session discussed their views: on the keynote presentation, the barriers and enablers to accessing reasonable accommodations in a Covid/post Covid-19 work environment and, on the progress there should be in the future.

PANELLISTS

- Dr Deirdre O’Connor - Chair of the Staff Disability Committee, University College Dublin
- Dr Rebecca Maguire - Department of Psychology, Maynooth University
- James Hill - Communication Manager and Chair of the Cranfield Disability Network, Cranfield University, UK
- Gerard Gallagher - Deputy Director of Trinity College Dublin’s Disability Service’ and TCD Forum Member

MAIN THEMES ARISING:

The following is a summary of the main themes and feedback from the panel discussion and breakout session.

**Shifting expectations and culture:** It was pointed out that increased flexibility in the workplace and the shifts in culture occasioned by the lockdowns during the Covid-19 pandemic have resulted in greater parity for disabled people. Hybrid working and learning have been part of this shift. However, institutional pressure to return to a ‘normal’ work culture of full-time working in the office undermines and potentially rolls back these gains.

It was recognised that, in recent years, there has been an increased focus on creating visibility for disability on college campuses and providing accessible spaces and greater access to supports. The college culture should continue in this trend of including disability as a key
part of its ethos by recognising the rights of access of disabled people to education and to an equitable status in the HE workplace. There have been legal supports for disabled people but there is now more emphasis on changing the social and cultural environment.

Most breakout groups acknowledged the importance of building empathy within HE institutions. There was an agreement that this requires improving communication at all levels of the system, and fostering a greater understanding of disability to result in a more positive attitude towards disability. Management was seen as playing a significant role in developing a more positive culture around disability.

Disability awareness of management: The panel discussed the importance of awareness and communication of information regarding disability across HE. It was pointed out that a top-down bottom-up approach by management to addressing barriers and an understanding of the role that staff disability networks play in the impact of barriers on disability is important. Different contexts can impose a different impact on those with disabilities so a more nuanced and intersectional understanding of the complexities of disabilities is necessary. It was agreed that an important step to facilitating a culture of understanding is a greater representation of disabled people at senior levels. It was acknowledged in the breakout groups that management requires greater awareness of the impact of disability and increased knowledge about existing supports to put in place. It was recognised that effective communication between management and staff is essential. Lack of suitable disability awareness training can result in systemic barriers. It was agreed that disability awareness training should be embedded into the induction process for all staff.

The process of obtaining reasonable accommodations: Many participants discussed the burden of proof as well as the administrative effort required to obtain reasonable accommodations. The process of obtaining RAs is difficult and very medicalised which often results in increased feelings of stigma around disability. There also seems to be a misconception that all reasonable accommodations are cost-prohibitive. There was consensus that there should be a focus on how to reduce this burden by reviewing the process to accessible accommodations with consideration for the impact it may have for disabled people. There was agreement that taking a more Universal Design approach across campus would be beneficial to all, and would reduce the need for disclosure of disability in some instances by ensuring a universally inclusive workplace.

Language of disclosure: It was reiterated that it is hugely important to create a culture in which disabled people feel comfortable disclosing. How disability is framed plays an important role in how comfortable people are with sharing information about their impairment. It was pointed out that the absence of disabled people in formulating the language that is used in disability policy can lead to an overall lack of awareness of the appropriate language surrounding disability. For example, language that supports a normalised understanding of disability is infinitely preferable to a narrative of ‘deficit’ and ‘weakness’. This use of language is far more conducive to an environment that supports disclosure.
Representations of disabled people: There was an acknowledgement that a greater representation of disabled people across the HE system was essential. This requires employing more disabled people at all levels, and ensuring that disabled people are represented at management level. It was felt that disabled staff would benefit from the establishment of a national representative group such as the established National Disabled Postgraduate Advisory Committee (NDPAC). It was also highlighted that HE representative unions and bodies could do more to support disabled staff.

REPORT RECOMMENDATIONS

Across the keynote, panel discussion and breakout session there was general agreement on barriers and enablers across a wide range of issues, and how we can move forward. The following recommendations arose from a review of this data.

The recommendations in this report are intended to act as a follow on from the recommendations made in our Forum Ableism in Academia Report (Rath and McCarthy, 2021). We have combined the many themes from the Shifting Sands Conference under three main overarching themes.

1. REASONABLE ACCOMMODATION IN THE EMPLOYMENT LIFE-CYCLE

The conference found that there was a general lack of awareness of the rights of disabled people to reasonable accommodations and a failure to consider RA provision across the entire employment life-cycle in HE. Going forward this can be addressed by:

- Developing and implementing, in consultation with disabled people, reasonable accommodations policies, procedures and recording mechanisms, ensuring consistency across institutions. This would enable greater cross-institutional mobility both nationally and at an EU level, something that traditionally created significant hurdles for disabled people.
- Creating a clear and coherent pathway to enable disabled people to request and obtain reasonable accommodation without undue burden and stigmatisation.
- Ensuring awareness of reasonable accommodation provision is an integrated part of the on-boarding process for all staff.
- A Continuous Professional Development (CPD) on disability and reasonable accommodations implemented for managers at all levels of the system. This should occur through engagement and partnerships with Disabled People’s Organisation and institutional advocacy groups.
- A process to allow for a review of evolving reasonable accommodations needs during the working career.

2. REPRESENTATION OF DISABLED PEOPLE & THE MANAGEMENT OF THE EQUALITY AGENDA

Disabled staff and postgraduates report being underrepresented in employment and decision-making across higher education (Rath & McCarthy, 2021). The Shifting Sands Conference highlighted the need for increased representation of disabled people in decision-making and at senior levels of HE. Increased representation would enable more effective collaboration and
networking and ensure a more inclusive HE environment. There was also a recognition that there was a significant need to develop, implement and support advocacy strategies. To enable this we recommend:

- The creation of effective governance structures to respond effectively to stakeholder input.
- Disability policies need to be recognised as a priority under the EDI agenda and endorsed and promoted by senior management.
- The development and support of HE disabled employee networks that advocate for and support employees with various questions and institutional community development. Representative bodies including employee unions, HE representative organisations, and student bodies need to recognise their obligations under the UNCRPD to include the voices of disabled people and ensure that their individual structures have representation from disabled people.

To align with the UN’s Sustainable Development Goal 8, to promote inclusive economic growth and full and productive employment, HE institutions should:

- Create flexible employment pathways for disabled people that offer opportunities for career progression, tailored continuous professional development and gateways into management roles. Thus promoting greater “disability visibility” across the system.

3. FEAR OF DISCLOSURE

It was acknowledged that Covid-19 had resulted in a more inclusive and empathetic culture and working practices in HE. This has led to some disabled staff no longer feeling the same need to disclose a disability. However, despite this the Conference highlighted significant concerns among disabled staff and postgraduates that these inclusive working practices might not be maintained. The Ableism in Academia Report 2021 recommended creating an environment for disclosure (Rath and McCarthy, 2021). The Shifting Sands Conference identified that a fear of disclosure very often prevents disabled people from accessing essential reasonable accommodations in HE. The implications of this can have a significant negative impact on career progression. The following recommendations would support disabled people:

- Implementing a Universal Design approach across the institution resulting in a move towards an inclusive working environment, thus reducing the need for disclosure of disability in some instances.
- Reviewing disclosure protocols to identify how to reduce the burden on disabled staff associated with disclosure by revising the process of accessing RAs.
- Creating an environment of trust through providing clear information on why it is necessary to disclose, where the information is going to and what it is being used for.
- Undertaking a review, in consultation with disabled people, of the language used around the ‘disclosure of a disability’. Moving towards a more inclusive approach and a move away from the deficit-laden word, ‘disclosure’.
REPORT CONCLUSION

This report, of the 3rd Forum Conference, has demonstrated that disabled staff and postgraduates face significant barriers accessing reasonable accommodations within higher education. It highlights the need to recognise the impact those barriers to accessibility, and the failures to provide reasonable accommodations have on staff and postgraduates’ progression. These failures occur in an environment where there is a reported lack of awareness and understanding about disabled people’s rights to reasonable accommodation and a deficit of research on the experiences of disabled staff in higher education.

The report outlines a set of recommendations under three main headings,

1. Representation of Disabled People and the Management of the Equality Agenda,
2. Reasonable Accommodation in the Employment Life-Cycle,
3. Fear of Disclosure.

These recommendations should be implemented in the spirit of partnership with disabled people. The concepts of fairness, equity and equality are important when making decisions on reasonable accommodations in all areas (Ahead, 2022). This report shows the need to be more explicit about responsibilities towards disabled staff when planning employment of disabled people, awareness training, continuing professional development (CPD), career progression and leadership opportunities. HEI’s need to take a rights based intersectional approach to the employment life-cycle for disabled staff where the lived experiences form a part of the decision making process. With all decisions having due regard for HEI’s Irish legal duties, and responsibilities under the UNCRPD and SDGs.

These recommendations should not be taken in isolation but should be implemented alongside the recommendations around combatting institutional ableism made in the Forum Ableism in Academia in Ireland Report. This report recognises that there is a need for wider, more in-depth study on the employment experiences of disabled staff and postgraduates within HE but it is hoped that the report will stimulate further debate and discussion.
STATEMENT OF SUPPORT AND FEEDBACK

It was a pleasure to attend the Shifting Sands conference, which combined with the conference report, I am sure will contribute greatly to advancing the understanding and practice of reasonable accommodations across the HEI sector. All of our IUA member universities are committed to promoting an inclusive environment, as places of study and places of work, so in this regard it is essential that we identify and tackle any barriers to participation, not least in relation to the employment of persons with disabilities.

Our universities also see themselves as having a societal leadership role, as role models of best practice, so it is hugely beneficial for the sector to be able to draw on the collective experience and expertise that underpins this report. I offer my congratulations and thanks to everyone involved.

Tony McMahon, IUA, Associate Director of HR and EDI.

“Thank you so much everyone, this has been very empowering and informative.”

“This was such a professionally run and accessible event, well done to the organising committee.”

THIS REPORT WAS PREPARED BY FORUM MEMBERS:

Dr Vivian Rath is the Convenor of the Forum. He is an Adjunct Teaching Fellow in the School of Education.

Dr Patricia McCarthy is Vice-Convenor of the Forum and is a Research Fellow in the School of Education.

Dr Sara Hope Kift is a PhD researcher at Trinity College Dublin in Neonatal Occupational Therapy. She is also the Disability Officer for the Graduate Student Union.

Dr David Loughrey graduated with a PhD from the School of Medicine, TCD in 2018. He is a researcher in hearing and cognitive function.

Dr Fiona Smyth has recently moved from TCD to UCD where she is Associate Professor in the School of Art History and Cultural Policy.

Mary Sharp is a Research Fellow in the School of Computer Science and Statistics and a retired member of the academic staff.

Conference opened and Chaired by Dr Vivian Rath, founder and Convenor of the Trinity College Dublin Forum for Disabled Staff and Postgraduate Students.
REFERENCES


