Disabled Compared to Whom? An Analysis of the Current Jurisprudence on the Appropriate Comparator Under the UK Equality Act's Reasonable Adjustments Duty

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Introduction

A hot topic in disability discrimination in employment in the UK is the question of comparators. It is unlawful for employers to discriminate against employees, understood in a very broad sense, who are disabled.[2] Disability discrimination is unlawful in a variety of forms: direct discrimination where a person is treated less favourably because of their disability (Section 13 of the Equality Act 2010 (Equality Act)), discrimination arising from disability where a person is treated less favourably because of something arising from their disability (Section 15),[3] and indirect discrimination where a seemingly neutral provision, criterion or practice (PCP) is applied to everyone but puts a disabled person at a substantial disadvantage (Section 19). There are further potential claims for harassment and victimisation.[4] The focus of this article is, however, on the final strand of protection from discrimination, which arises out of the duty on an employer to make reasonable adjustments (Section 20). Reasonable adjustments can require an employer to do what is reasonable to remove a disadvantage faced by a disabled employee, perhaps because of particular physical features in the building, because of the way a particular policy impacts them or because they need some aid or equipment to enable them to work. Where an employer fails in that duty, that employer discriminates against the individual.

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2 For the definition of employee see Section 83(2) of the Equality Act 2010. Contract workers are also protected (Section 41) as are applicants for employment (Sections 39 and 40).

3 An example would be where a person is disciplined for not doing their job because they cannot lift heavy boxes. If the reason they cannot lift heavy boxes is because of their disability, the disciplinary action would be for something arising from their disability.

4 See Equality Act 2010, Sections 26 and 27.

A key issue when the duty to make reasonable adjustments arises is the question of comparators. When a claim is made that an employer should have made a reasonable adjustment, the first question that has to be determined is whether the disabled person was put at a substantial disadvantage by something as compared to a non-disabled person. Thus a comparative exercise must be undertaken to consider whether this is the case. This comparative exercise may be made by comparing the disabled person with a real employee who is not disabled, i.e. an actual comparator, or by a hypothetical individual. The issue of the characteristics that should apply to the comparator and what makes someone a "proper" comparator has proved particularly controversial in the UK. While comparators come into play in several strands of the Equality Act, this article is limited to exploring the issue as it applies to the question of reasonable adjustments. The duty to make reasonable adjustments is jurisprudentially distinct from the other forms of discrimination because it requires proactivity. Thus there are different considerations that come into play when considering the relevant legal tests. Moreover, the limited focus on comparators in reasonable adjustments claims enables proper consideration of a particular problem and provides an entry point to consider the duty to make reasonable adjustments generally. The relevant legislative provision in relation to the duty to make reasonable adjustments is Section 20 of the Equality Act, which provides:

> *(1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
> *(2) The duty comprises the following three requirements.*
> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*
> *(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.*

Thus it can be seen that there are various ways in which the duty to make reasonable adjustments arises but, in each, there is a requirement for the claimant to show that they have been put "at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled". The question in many cases is who is the appropriate comparator? What characteristics should the "persons who are not disabled" have?

Before one can determine who the appropriate comparator is, the PCP must be considered (Section 20(3)). As can be seen from Section 20 above, the question of whether there is substantial disadvantage in relation to the impact of a PCP in Section 20(3), or a physical feature or the need for an auxiliary aid in Section 20(4) and Section 20(5). The majority of cases

centre around particular PCPs and the precise definition of them will determine the scope of the comparison to be undertaken. This is contentious in and of itself. However, until the PCP is defined, self-evidently the comparative exercise cannot take place.

A further linkage that must be explored when looking at the comparative exercise relates to the definition of disability. The claimant's substantial disadvantage relative to a non- disabled person will depend on the scope and nature of their disability. Significant shifts are taking place in how disability is defined; however, this warrants a separate article so we will make only brief reference to these issues.[5]

Thus in the article, we will seek to explore these issues and highlight some key points that practitioners, whether lawyers or those working in the third sector, should be aware of. It is logically necessary to consider the PCP first, followed by the definition of disability, before returning to the crux of the article relating to comparators.

1. What Does a PCP Look Like?

The term PCP is not defined in the Equality Act. The best definition is that contained in the Code of Practice: PCP should be defined widely so as to:

> *Include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A [PCP] may also include decisions to do something in the future – such as a policy or criterion that has not yet been applied – as well as a "one-off" or discretionary decision.*[6]

Archibald v Fife[7] is the paradigm case explaining what amounts to a PCP. Mrs Archibald was employed by the council as a road sweeper. It was an implied "condition" or an "arrangement" of her employment that she should be physically fit. She became disabled as a result of surgery on her foot and was no longer able to do her job. She unsuccessfully applied for a number of alternative posts, including administrative posts that would have meant a modest promotion, and was eventually dismissed.

The House of Lords held that the circumstances where a duty to make reasonable adjustments arises include an employee becoming incapable of fulfilling their job description so as to become liable to be dismissed. Lady Hale observed:

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5 On this see further recent blog posts by the authors on Michael Rubenstein's blog, for example, Crasnow, R. and Butlin, S. F., "Obesity and Disability Following Kaltoft", Rubenstein Publishing, 19 December 2014, available at: http://blog.rubensteinpublishing.com/obesity-and-disability-following-kaltoft-by-rachel-crasnow-and-sarah-fraser-butlin.

6 Equality and Human Rights Commission, *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice,* Para 4.5.

7 *Archibald v Fife* [2004] I.C.R. 954.

> *An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being "arrangements" as are an employer's arrangements for deciding who gets what job or how much each is paid. Some employers might combine cooking and bottle-washing in one job while others might treat them quite differently. The job descriptions for all their posts are "arrangements" which they make in relation to the terms, conditions and arrangements on which they offer employment. Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.*[8]

Another difficult issue relates to whether the PCP was in fact applied to the claimant. In *Roberts v NW Ambulance Service*,[9] the Employment Appeal Tribunal (EAT) held that it is generally unhelpful for tribunals to enquire whether the PCP was actually applied to the disabled employee. The enquiry should focus on the statutory wording, namely, did the employer apply a PCP which put the disabled employee at a substantial disadvantage? In *Roberts* itself, Mr Roberts had a social anxiety disorder recognised as a psychiatric condition. He worked as an emergency medical dispatcher (EMD) in a control room with other EMDs. The EMDs "hot-desked" meaning they took any available desk when they started their shift. This was stressful for Mr Roberts who was permitted to use a designated workstation without the need to hot-desk. However on a number of occasions he arrived for work and found other persons in his seat. Eventually he resigned.

The Employment Tribunal (ET) found that the PCP of hot-desking was not applied to Mr Roberts because he had been allowed, in principle if not always in practice, to sit at a preferred workstation. The EAT reversed this, holding:

> *The key question for the Tribunal was whether this PCP placed the claimant, a disabled person, at a substantial disadvantage in comparison with persons who are not disabled. If so, the Respondent would then be under a duty to take such steps as it was reasonable for it to have to take in order to prevent the PCP having that effect. In Environmental Agency v Rowan (paragraph 27) the Appeal Tribunal emphasised the importance of following the statutory language and addressing the issues raised by the statutory language.*
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> *Neither section 4A nor section 18B required the Tribunal to ask or answer the question whether the PCP applied to the claimant. In our judgment asking or answering this question is not necessary and will tend to obscure the real issues the Tribunal has to decide – whether the PCP placed the claimant at a substantial disadvantage in comparison with persons who are not disabled.*

8 *Ibid.,* Para 62.

9 *Roberts v NW Ambulance Service* [2012] Eq. L.R. 196; [2012] I.C.R. D14.

> *The Tribunal's reasoning was that the PCP was not applied to the claimant because he was not required to sit in any place other than his preferred seat. However, he continued to be affected by "hot desking" because other people who were required to hot desk were still sitting in and intending to use his preferred seat when he arrived for work. The Tribunal ought to have assessed whether this placed the claimant at a substantial disadvantage in accordance with section 4A(1) and if so whether there were further steps which it was reasonable for the Respondent to have to take in accordance with that section read with section 18B.*
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> *We think it will generally be unhelpful for a Tribunal to ask whether a PCP was applied to the disabled person. There will, we think, sometimes be cases where PCPs which are applied to others at work place the disabled person at a substantial disadvantage even if they are not applied directly to the disabled person.*[10]

The definition of the PCP is key to determining who the appropriate comparator is. Therefore great care must be taken to ensure that the PCP encapsulates the issue that is putting the disabled person at a disadvantage. Put simply, what is the "thing" that is causing the disabled person a problem? The answer to that question will be foundational when asking whether the same "thing" would cause a problem for the comparator or not.

2. Relevance of the Nature of Disability

Once the PCP has been identified, it is vital to determine what the substantial disadvantage actually is. We recall that reasonable adjustments are not generic measures which make things easier for the disabled person, they are specific, targeted measures to deal with a particular substantial disadvantage.

Thus it is necessary to go back to the question of disability: what is it about the person's disability that gives rise to the substantial disadvantage because of the specified PCP or physical feature? The best way to consider this is to explore carefully and precisely why the PCP or physical feature causes a problem and exactly how that interrelates with the disability. Again, this goes to the core question of whether the comparator would be similarly disadvantaged or not.

The definition of disability is to be given a broad understanding.[11] Moreover, there is no requirement for an impairment to have a cause. The Statutory Guidance at paragraph A7 provides that "[i]t is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded".[12] Instead, it is important to con-

10 *Ibid.,* Paras 31–34.

11 *Aderemi v London & SE Railway Ltd* [2013] ICR 591, Para 24.

12 Office for Disability Issues, *Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability*, 2011.

sider the effect of an impairment. This has recently been reaffirmed in both the UK[13] and by the Court of Justice of the European Union (CJEU) whose focus was on the nature and extent of the impairment.[14]

3. Impact of the UN Convention on the Rights of Persons with Disabilities

In the background of these cases is a critical piece of legislation: the UN Convention on Rights of Persons with Disabilities (CRPD). The UK Government ratified it in 2009 and the European Union is also signatory to it. Importantly, in *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab*,[15] the CJEU confirmed that the CRPD is now an integral part of the European legal order and takes precedence over EU legislation itself. The CJEU said that this means that the Framework Employment Equality Directive 2000/78[16] (Framework Directive) (the basis for the Equality Act) "must, as far as possible, be interpreted in a manner consistent with that Convention."[17]

Article 1 of the CRPD provides that:

> *Persons with disabilities include 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.*

Importantly, recital (e) of the CRPD provides that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others".

This is a very different definition of disability to that in the Equality Act. Notably, it is a social model rather than a medical model, that is, one which focuses on the barriers in society rather than the medical impairments the individual suffers from.

Thus in the case of *Ring*, the CJEU emphasised that the concept of "disability" for the purposes of the Directive:

> *[M]ust be understood as referring to a limitation which results in particular from a physical, mental or psychological impairment which in interaction with various*

13 See *Walker v SITA Information Networking Computing Ltd* [2013] Eq. L.R. 476.

14 See *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* C-354/13, [2015] I.C.R. 32.

15 *HK Danmark, acting on behalf of Ring v Dansk almennyttigt Boligselskab* [2013] IRLR 571.

16 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

17 See above, note 15, Para. 29.

> *barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers.*[18]

The emphasis on professional life is the novel point and expands the definition by taking account of barriers that may exist in only one aspect of a person's life, that is their professional life.

In the recent CJEU case of *Kaltoft*, it was the Convention which, together with the reliance on the Framework Directive, enabled the Advocate General to reach the opinion that obesity was a disability; a key factor was the inability to participate fully in professional life. The Advocate General said this:

> *I am also of the opinion that, in cases where the condition of obesity has reached a degree that it, in interaction with attitudinal and environmental barriers, as mentioned in the UN Convention, plainly hinders full participation in professional life on an equal footing with other employees due to the physical and/or psychological limitations that it entails, then it can be considered to be a disability.*[19]

When the case reached the CJEU, the Court similarly referred to the CRPD, underlining its relevance to the interpretation of the Framework Directive.[20]

In our opinion, the CRPD could be used to a far greater extent especially when considering cases under the Equality Act. Tribunals generally take a medicalised approach, exploring the diagnosis, symptomatology, treatment and prognosis when determining whether someone is disabled. The CRPD turns that question on its head and focuses instead on the societal barriers, rather than the individual's medical position. The focus on professional life in *Ring* has similarly not had a significant impact on domestic case law.

Why are we discussing the broad definition of disability that is now in play in an article on comparators? Put simply, the broader the definition of disability then the broader the types of "substantial disadvantage" which will be relevant to the comparative exercise. A broad view ought to be taken and the focus should be on the barrier caused by the PCP.

4. Who is the Appropriate Comparator?

As stated above, the PCP must place the claimant at a substantial disadvantage, "in comparison with persons who are not disabled".[21] For a duty to make reasonable adjustments to

18 *Ibid.,* Para 38.

19 *FOA, acting on behalf of Karsten Kaltoft v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund,* C-354/13, Opinion of the Advocate General, 17 July 2014.

20 See above, note 14, Para 53.

21 See above, note 4, Section 20.

arise, a non-disabled person must not be at the same disadvantage. Having identified the substantial disadvantage, it should be easier to identify an appropriate comparator. However, the proper approach is contentious. The case of *Griffiths v Secretary of State for Work and Pensions*[22] provides a helpful example of the different approaches that may be taken.

In *Griffiths,* the claimant was absent and had been given a written warning under the attendance policy. Ms Griffiths relied upon "the operation of the attendance management policy" (as opposed to the terms of the policy itself, which would constitute an indirect discrimination claim) and that this "was a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal".[23] She sought two reasonable adjustments, firstly to disregard the disability absence and therefore have the warning withdrawn; and secondly for the number of days' absence that triggered the policy to be increased.

The EAT in *Griffiths* emphasised that the proper comparator is:

> *A non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness. If a claimant is treated at least as well as such comparators s/he cannot be at a disadvantage let alone a 'substantial' disadvantage.*[24]

People who are not disabled would similarly be affected by the attendance management policy if they took a similarly long period of time off work sick. Therefore, there was no duty to make reasonable adjustments. Ms Griffith's contention was that but for her disability, she would not have been off for the long periods of time and therefore this had everything to do with her disability. When the comparator was constructed, the disability had to be removed as did all the disability related absence.

The decision in *Griffiths* is being appealed to the Court of Appeal but, for now, it represents the current state of the law. In our view there is a major problem with the approach in the decision and to understand this, one must briefly consider the background to the Equality Act.

Prior to the Equality Act, disability discrimination was dealt with in the Disability Discrimination Act 1995. Section 3A(1) provided that it was unlawful for a person, for a reason which relates to the disabled person's disability, to treat him less favourably than he treats or would treat others to whom that reason does not or would not apply, unless he can show that the treatment was justified. The issue of how you defined the relevant comparator, that is, the "others to whom that reason does not apply", was raised in numerous cases. It was ultimately determined by the House of Lords in 2008 in the case of *Malcolm v Lewisham London Borough Council.*[25]

22 *Griffiths v Secretary of State for Work and Pensions* EAT/0372/13 [2014] Eq. L.R. 545.

23 *Ibid.,* Para 15.

24 *Ibid.,* Para 33.

25 *Malcolm v Lewisham London Borough Council* [2008] 1 A.C. 1399.

In that case it was held that the comparator is someone without the disability but with all the same characteristics as those of the disabled person. By way of example, Lord Scott said that where a cafe owner refused to have any dogs in his cafe, including guide dogs for the blind, then the disabled person was refused entry "not because he is blind but because he is accompanied by a dog (…) anyone, whether sighted or blind, who was accompanied by a dog would have been treated in the same way".[26] Therefore, there would be no discrimination. The decision in *Malcolm* was heavily criticised and the Lords themselves expressed their considerable unease about the case. When the Equality Act was drafted, there was great care to ensure that the new provisions of discrimination arising from disability did not give the same result.

Yet, the analysis in *Griffiths* is that which was applied in *Malcolm*, pre-Equality Act. The characteristics of the disabled person (the lengthy absence) were added to the comparator, despite them being fundamental to the disability. The resulting comparison was meaningless: the disability caused the lengthy absence and it makes little sense to say that a non-disabled person would have been treated in the same way when it was the disability that caused the absence. This is plainly circular and the *Griffiths* decision represents a serious and unwarranted regression in the law.

On reading the Equality Act itself, one can draw the conclusion that the EAT's decision in *Griffiths* was simply wrong. *Griffiths* relies on the idea that there must be no material difference between the circumstances of the comparator and that of the claimant. This comes from Section 23(1) which provides:

> *On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*

However, Section 23 is only expressly applied to direct, dual and indirect discrimination. It does not refer to reasonable adjustments. Therefore the applicable comparator is *not* one that must have "no material difference" as per Section 23. Section 23 does not apply and an analysis of a comparator that requires them to have no material difference to the claimant is erroneous. Rather, the comparator should be someone who is not disabled. Accordingly, Ms Griffiths' comparator should not have been someone who had been long term absent as this was because of her disability.

Thus it appears that the EAT has imported a direct discrimination approach to comparators (a requirement for the claimant and the comparator to be in not materially different circumstances) to the reasonable adjustments context where this is not the appropriate approach.

When one looks more broadly, the Framework Directive also indicates that the interpretation in *Griffiths* is plainly wrong. Article 5 of the Directive concerns reasonable accommodation for disabled persons and provides:

26 *Ibid.,* Para 35.

> *In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.*

The reference to "appropriate measures" is clearly broader than a direct discrimination context. In *Foster v Cardiff University,* it was argued that that because the CRPD does not require there to be a comparison between disabled and non-disabled people, then no comparison should be applied under domestic law.[27] This argument failed for a number of reasons but this does not mean that it could not and should not be argued that a direct discrimination type comparison is wrong. The language of the Framework Directive provides a further opportunity to challenge the EAT's approach in *Griffiths* of applying this limited comparison, albeit that the court held in *Foster* that some form of comparison was permissible.

In summary, it is our view that at a domestic level, with reference to the Framework Directive, the proper comparator is someone who is not disabled and where the characteristics arising from that disability are also discounted. Thus where an individual is off sick because of their disability, the proper comparator is someone who is not disabled and who has not been off sick. Where some of the sickness is disability related and some is not, then the comparator would be "given" the non-disability sickness absence but not the disability related absence. Such a comparison is then meaningful and useful to the judge in determining whether there is a substantial disadvantage or not.

5. Broader Thinking on Comparators

When one considers the CRPD, it is clear that a narrow approach to a comparator is wrong. There are several facets to the issue.

Firstly, as we have noted above, the CRPD emphasises a social model of disability. The focus is on barriers in society to those who are disabled, be they physical, environmental or attitudinal, and not on the person's disability. The medical aspects of disability are very clearly subordinate to the social model. Importantly, this also requires pro-activity: the focus on barriers in society shifts the emphasis from an individual to society itself. "Acculturation" is not enough, rather the social model requires pro-activity in resolving and removing the barriers.[28]

27 *Foster v Cardiff University* [2013] Eq. L.R. 718.

28 See Quinn, G. "*Resisting the 'Temptation of Elegance'*", in Arnardottir, O.M and Quinn, G. (eds), *The UN Convention on the Rights of Persons with Disabilities: European and Scandinavian Perspectives*, Nijhoff, 2009, pp. 224–9, 245–6.

Secondly, the whole Convention is premised upon the idea of accessibility. Article 9(1) provides:

> *To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.*

Accordingly, it is quite clear that an effective means of enforcing the protection laid down in the Directive must be provided for under UK law.

Thirdly, and most importantly, Article 2 of the CRPD provides:

> *"Reasonable accommodation" means 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.*

Arguably the *Griffiths* line of reasoning fails to ensure such outcomes.

In relation to the workplace, Article 27(1)(i) provides:

> *States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:*
> *(…)*
> *Ensure that reasonable accommodation is provided to persons with disabilities in the workplace.*

There is no requirement under the CRPD for substantial disadvantage to be established before persons with disabilities must be provided with "reasonable accommodation". Instead Article 27(1)(i) requires that reasonable accommodation is provided to persons with disabilities. It is perhaps arguable that the reference in Article 2 of the CRPD to "an equal basis with others" does import the comparative perspective. However, this must be understood against the background of the social model and accessibility requirements. We would suggest that although a comparison may be valid – to understand what the barrier is, if nothing else – the threshold is low. Ensuring "an equal basis with others" is very different to having to prove substantial disadvantage and then making an adjustment to remove that particular disadvantage. The requirements of the CRPD, we would suggest, go much further than that.

Conclusion

The comparator question is fundamental to establishing that a breach of the duty to make reasonable adjustments has occurred. While *Griffiths* is being challenged in the Court of Appeal and so the situation may change, the position of comparators provides a clear indicator of how serious the courts are about challenging disability discrimination. By importing a narrow comparator, the courts are not taking the opportunities available to them to challenge discrimination in the way that they might. Further, little real progress will be made while they adopt this approach. In our view, there needs to be a greater focus on the CRPD and the very different perspective that it brings. In particular, the focus should be on accessibility and the removal of societal barriers. Given this expansive interpretation, the application of the CRPD holds great potential to bring true equality.