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2<sup>nd</sup> June 2016

Our ref: 357890  
CAN/Moore

Dear Ms Moore

## EQUALITY ACT 2010 COMPLAINT

Thank you for your letter dated 14 May 2016, which you have explained is a formal letter of complaint under the Equality Act 2010 ("**the Equality Act**"). Given the formal nature of your letter it has been passed to the Legal Team of Marks and Spencer plc ("**M&S**"). Consequently, you will appreciate that our response is necessarily somewhat formal and legalistic. This is because we are taking your complaint seriously, and because you raise legal issues, and it is not intended to appear insensitive or unsympathetic.

At the outset, please be assured that M&S is keen to welcome everybody to its stores and great effort is made throughout the business to make our stores accessible and comfortable for all. We hope that you can see from our response below that we have taken the time to consider your concerns carefully, and we will continue to listen to our customers' feedback.

### Summary

We fully accept that your son's incontinence and disability means that it is difficult for him to use the toilets in M&S stores. We appreciate that this is challenging for you and your son, and we sympathise with both of you.

However, after carefully considering the issues raised in your letter, our view is that it is not reasonable to expect M&S to provide adult sized changing beds/tables and hoisting equipment (the "**Additional Changing Facilities**") in the disabled toilets within our stores. In addition, we do not believe that M&S is:-

- under a legal obligation to introduce Additional Changing Facilities into our stores; or
- engaging in unlawful discrimination against your son by reason of its failure operate Additional Changing Facilities.



## Legal duties

M&S is aware of its legal obligations under the Equality Act and we constantly review our operations to ensure we are compliant with these. We understand that people who have a disability are rightly protected against harassment and discrimination and we are aware that the Equality Act imposes obligations on M&S, as a service provider.

### Discrimination arising from disability

You have complained that M&S discriminates against your son based on his disability insofar as customers with certain disabilities are being treated less favourably than those without disability or with other disabilities. Specifically, you consider the lack of Additional Changing Facilities to constitute unlawful discrimination against your son. This amounts to a claim of “direct discrimination” (see sections 13 and 15 of the Equality Act).

In order to establish direct discrimination you must demonstrate that M&S has treated your son less favourably than it treats non-disabled persons, because of your son’s disability.

Our view is that there is no possibility of direct discrimination arising because we are providing exactly the same toilet facilities for all our customers, irrespective of disability. In respect of toilet facilities, all customers are treated the same, so we do not accept that your son, or those with a similar disability, are being treated less favourably.

We would point out that the Equality Act (see section 19) also prohibits “indirect discrimination”. In summary, indirect discrimination occurs where a service provider applies a “provision” or “practice” which is discriminatory because it applies to customers with or without a particular protected characteristic, and it puts a disabled person at a particular disadvantage when compared with a non-disabled person. We do not accept that the toilet facilities currently provided for customers in M&S stores indirectly discriminate against your son (or others with a similar disability). This is because provision of our existing toilet facilities represents a proportionate means of achieving a legitimate aim.

In this case the legitimate aim is providing customers with toilet facilities which they can use. In our view the current facilities provided represent a proportionate means of achieving that aim, even though we appreciate that it may be difficult for some customers to use them. Please see below our comments in relation to reasonable adjustments for further detail on why we believe our existing provision of toilet facilities to be proportionate and reasonable.

### Failure to make a reasonable adjustments

You have suggested that M&S has failed to make reasonable adjustments, in breach of the Equality Act, in that we failed to introduce Additional Changing Facilities within our stores.

### The duty

At M&S, we understand that the purpose of the duty to make reasonable adjustments is to provide access to a service as close as it is reasonably possible to get to the standard normally offered to the public at large.



The obligation to make reasonable adjustments arises in circumstances where a failure to do so would cause a disabled person to be at a substantial disadvantage in comparison with others. In particular section 20(5) of the Equality Act provides that there is a “*requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage ... 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*”.

The duty to make reasonable adjustments, and provide any auxiliary aid, is owed to disabled people generally. However, as we know you will appreciate, disabled people are a diverse group with different requirements and the duty to make reasonable adjustments is not specific to each individual disabled person who wants to access an M&S store.

M&S has given, and continues to give, considerable thought to the barriers that impede people with one or more kinds of disability. As your letter acknowledges, M&S provides ambulant disabled toilets and large disabled toilets to accommodate the needs of as many of its customers as possible. Customers are at the heart of our business and we invest considerable time and resource to meet the needs of as many of our customers as we can. It is important to us that the customer journey is as comfortable and convenient as it can be.

### Reasonable adjustments

We have considered your letter, alongside the Equality Act and the accompanying Code of Practice, and we do not share your view that M&S has failed to make reasonable adjustment. Essentially, this is because we do not believe that the provision of Additional Changing Facilities in some or all of our stores is a ‘reasonable adjustment’.

In reaching our decision, we have revisited the Equality Act’s Code of Practice which includes factors which might be taken into account when considering what is reasonable.

To install Additional Changing Facilities in our stores would be unworkable. There are over 850 M&S stores in the UK, of which over 500 are wholly owned<sup>1</sup>. In many of our stores it would simply not be possible to install Additional Changing Facilities because of a variety of factors, for example space restrictions and building constraints. Even if we sought to introduce Additional Changing Facilities only to our larger stores this would be extremely impracticable in view of the required structural changes, impact on available space and access, and requirements relating to maintenance and security.

In addition, significant health and safety considerations and risks arise from the introduction of Additional Changing Facilities. These considerations include the risk of harm to our employees and customers, particularly disabled customers and their carers.

As you will be aware, the overwhelming majority of Additional Changing Facilities in the UK are located within public services locations, sports centres, large shopping centres and large visitor attractions. As an individual retailer, it is not reasonable for M&S to introduce Additional Changing Facilities. It is notable that very few other large retailers provide Additional Changing Facilities.



Installing Additional Changing Facilities would involve considerable disruption, increased risks and significant financial investment, and could have a negative impact on other services and facilities offered to customers.

M&S has invested significant sums towards disabled facilities throughout its stores and will continue to do so. We allocate considerable resources to making all reasonable adjustments to assist disabled customers. In this case, however, we do not believe it is appropriate to make the change you are asking for.

I appreciate that this was not the response you will have been hoping for but we hope that this letter helps you to better understand the position of M&S.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Notley', written over the printed name.

**Claire Notley**

Solicitor

Legal Department

Marks and Spencer plc