

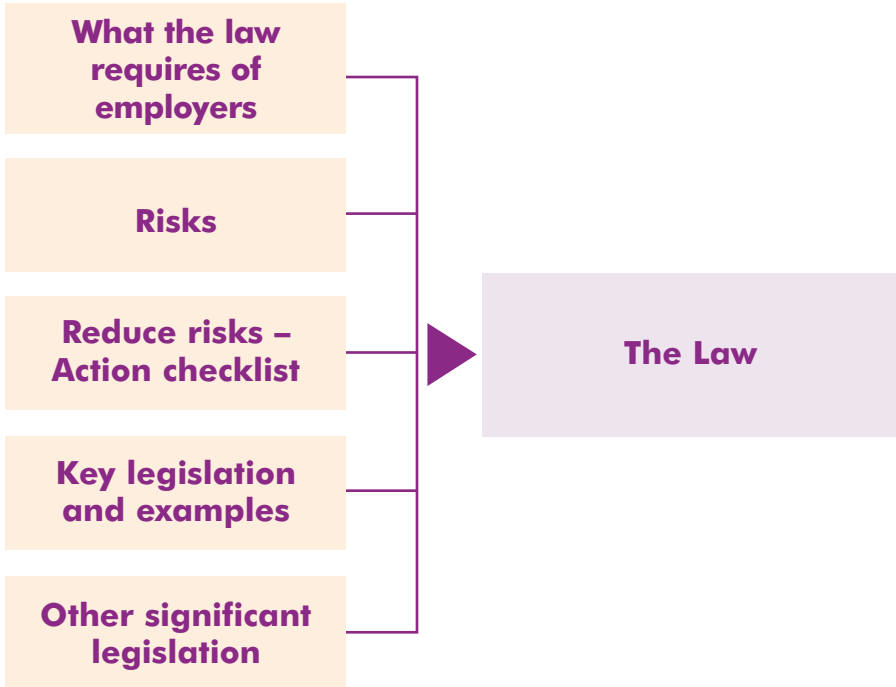
The Law



The Diversity Means Business project is co-financed by the South East England Development Agency and the European Social Fund.

The Law

This leaflet summarises the law relating to diversity.



Further help and advice is available **FREE** to eligible businesses from the Diversity Means Business project team.

Tel **023 9284 1610**

email **info@diversitymeansbusiness.org.uk**

or visit **www.diversitymeansbusiness.org.uk**

for more information.

What the law requires of employers

Prohibitive behaviour and to whom it applies

The law says that you must not discriminate against people in the work place. This means that you must not treat people worse than others because of their gender, sexual orientation, nationality, colour, race or ethnic origin, religion/belief or disability.

This applies to any employer and any employee. You have a duty to ensure that discrimination is not taking place and must ensure that employees receive adequate training and have awareness of issues around discrimination. In some instances, you can be liable for the actions of your employees. It also applies to people who are:

- Part time workers;
- Seeking employment;
- Undertaking work experience or on Government programmes;
- Doing voluntary or unpaid work;
- Casual workers;
- Self-employed contractors;
- Employed by an employment agency.

Defining Discrimination

Treating someone worse or less favourably than other people can occur in two ways:

Active or Direct Discrimination

Where words or actions in the workplace put an individual at a disadvantage because of his or her gender, sexual orientation, nationality, colour, race or ethnic origin, religion/belief or disability and cannot be justified.

Examples:

- *Failing to shortlist a job applicant because of their disability;*
- *Advertising a job which excludes anyone from an ethnic background;*
- *Failure to select job applicants on grounds of race, nationality, or colour;*
- *Failure to promote within a company;*
- *Failure to provide training opportunities to employees.*

Passive or Indirect Discrimination

Where a formal requirement, condition, provision, criterion or practice in the work place is applied to all the employees but places some of them at a disadvantage that cannot be justified.

Examples:

- *Requiring a driving licence for a job where mobility is actually what is needed, may disadvantage people who are unable to hold a licence as a result of a disability;*
- *Requiring female employees to wear a skirt may disadvantage those from muslim communities where their religion requires them to keep their legs covered;*

- *Word of mouth recruitment policy in a company dominated by a particular racial group;*
- *Filling senior management posts internally from a pool of employees most of whom are white;*
- *Physical requirements (e.g. height) which do not apply equally to all racial groups;*
- *Inappropriate language requirements;*
- *Unnecessary dress regulations.*

Positive Discrimination

Positive Discrimination is illegal under the Race Relations Act (RRA) and the Sex Discrimination Act (SDA), but the Disability Discrimination Act (DDA) does not prevent you from putting in place arrangements that provide more favourable treatment to disabled people than non-disabled people.

Genuine Occupational Qualifications

A Genuine Occupational Qualification may allow you to restrict a job to either men or women. The following are just some of the grounds permitted:

- *physiology (which excludes strength and stamina) – a male model for men’s clothes;*
 - *privacy and decency – a female care assistant who assists women to bathe;*
 - *single sex accommodation;*
 - *certain work in private homes – live-in carer.*
-

Additionally, similar Genuine Occupational Qualifications may be used to restrict jobs to people of a particular race, ethnic or national origin:

- Authenticity in dramatic performances of a particular national or ethnic origin;
- Maintaining an image - a restaurant serving ethnic food;
- The provision of personal services - advice to people from a particular ethnic group.

Positive Action

Positive action is where action is taken to cater for a specific under-represented group. It is legally permitted in the provision of staff training and in encouraging job applications from particular groups, e.g. advertising a job in specific community centres as well as using traditional advertising routes. You will need to show under representation of the relevant group over the preceding 12 months.

Duty to Make Reasonable Adjustments

Under the Disability Discrimination Act (DDA) 1995, not only must you not discriminate against people with disabilities, but you also have a duty to make 'reasonable adjustments' in the workplace for disabled employees and make adjustments to your premises to make their services accessible to the public. Two recent cases established that the DDA is different from race and gender legislation. What is unique about the DDA is the duty to make reasonable adjustments for disabled employees which thus requires you to treat employees differently to ensure that they are treated fairly.

Victimisation

You or any of your employees must not treat less favourably or 'pick on' someone who has complained about discrimination. Nor may you, or another employee, treat less favourably someone who is supporting another's complaint – perhaps as a witness.

Harassment

The definition as applied to sexual orientation, religion or belief and race and ethnic and national origin is 'unwanted conduct that violates people's dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment'. Harassment on grounds of colour or nationality will continue to be treated as possible direct discrimination under the Race Relations Act 1976. People's view of 'unwanted conduct' may differ so what may be described as 'a harmless bit of fun' can still be harassment.

Examples:

- *Comments about the way someone looks, which they find offensive;*
- *Racist abuse;*
- *Questions about their sex life;*
- *Indecent remarks;*
- *Displaying explicit posters or calendars.*

Incidents that involve physical contact or threats can amount to criminal offences and should be reported to the police.

Defence

There are exceptions specified within legislation and you may also be able to claim that action was justifiable and reasonable. You cannot claim ignorance of the law as a defence. Nor can you rely on ignorance of the actions or words of employees as a defence. Nor can you rely on ignorance of an employees disability. Lack of intention, "I didn't mean to be racist", will not be a defence.

Risks

Litigation

You cannot afford to ignore the law. Litigation through employment tribunals, the civil court and, in exceptional cases, through criminal prosecution may result. Someone may seek redress not only for discrimination but also under breach of common law and statutory duties, under the Health and Safety at Work Act 1974, under Improvement and Prohibition notices, for constructive dismissal etc. The discrimination legislation may be just one of the areas of litigation that an employee argues during a dispute. If you are unsuccessful in defending a case, the resultant costs can be considerable. There is no limit to the compensation that can be awarded for sex, race or disability discrimination.

Other factors to consider include:

- the time, administration and management effort in handling such a dispute;
 - the damage to your business reputation with your customers, contractors and as an employer;
 - dissatisfaction amongst employees with effect on recruiting, retention and absenteeism,
 - lower morale amongst existing employees;
-

- difficulties in attracting a wide range of recruits thus restricting creativity and progress within the company;
- increased and unplanned costs due to the need for further recruitment and training, which can cause difficulty in financial planning.

Preventative steps

You must assume responsibility for the behaviour of the company and its people. The action checklist on the following page suggests some reasonable steps. “Reasonable” will include all the circumstances of the employer. Actions that may be practical and financially possible for a major national company may not be viable for a small family firm. However, not acting at all will not fulfil your legal responsibilities.

Evidence

Policies, practices and procedures should be well promoted throughout a company with records and data to show regular monitoring activity. This will help embed diversity, reduce the risk of discrimination and provide evidence in the event of a dispute.



How you can reduce risk – Action Checklist:

Understand your legal responsibilities	<input type="checkbox"/>
Provide diversity training for employees	<input type="checkbox"/>
Create and promote your policies to prevent discrimination	<input type="checkbox"/>
Consider reasonable adjustments in the workplace	<input type="checkbox"/>
Review and update the following to ensure that they are fair, effective and non-discriminatory: <ul style="list-style-type: none">• Grievance (complaints) procedures• Disciplinary procedures	<input type="checkbox"/> <input type="checkbox"/>
Collect and analyse data about the above by gender, race/nationality, religion/faith, disability and age etc.	<input type="checkbox"/>

Further help and advice is available **FREE** to eligible businesses from the Diversity Means Business Project Team.

Tel **023 9284 1610**

email **info@diversitymeansbusiness.org.uk**

or visit **www.diversitymeansbusiness.org.uk**

for more information.

ANNEX A – Key Legislation and Examples

Race & Religion

Race Relations Act (RRA) 1976

Protects employees against discrimination on the grounds of nationality, colour, ethnic, racial or national group. It also covers people who used to work for you, casual workers, self-employed contractors and people employed through employment agencies. Your customers and clients are similarly protected.

The Act allows “a person to provide facilities to meet the special needs of people from particular racial groups in relation to their training, education or welfare (section 35); and target job training at people from racial groups that are under-represented in a particular area of work, or encourage them to apply for such work.” (Commission for Racial Equality – (CRE)).

Race Relations (Amendment) Act 2000

All public bodies are required to eliminate unlawful racial discrimination, promote equality of opportunity and promote good relations between people of different backgrounds.

This Act applies to anyone providing goods, facilities or services to the public; for example: hotels, shops, banks, insurance companies, financial services, cinemas, theatres, bars, restaurants, pubs, places of entertainment or refreshment, transport and travel services, and services provided by any local or public authority and by any profession or trade.

It is unlawful for any such organisations to discriminate by:

- refusing their services, or
 - giving their services on less favourable terms or conditions than offered to people of other racial groups.
-

There are a number of exceptions relating to clubs, associations and charities and to services provided outside Britain.

Employment Equality (Religion or Belief) Regulations 2003

These came into effect in December 2003 and protect people from religious discrimination in employment and vocational training. These three cover all forms of discrimination in jobs, training, and a provision of goods, facilities and services.

Case Studies

A Pakistani man had worked for a Yorkshire company for twenty years and put up with occasional racial remarks and jokes. Gradually, these increased until he felt the abuse had become a regular feature. He complained to his manager and explained that his supervisor and other employees were involved and that he was happy for the issue to be resolved internally. His manager did not take the complaint seriously and dealt with it very informally, sending the wrong signals to other employees. The employee left work suffering from stress. He took the case to employment tribunal claiming that he had developed psychiatric illness as a result of the racial abuse and the employer's way of dealing with it. The Company argued that the psychiatric illness pre-existed the abuse, but the tribunal found for the employee and awarded compensation running into six figures. This included loss of earnings, future loss of earnings, pension loss, injury to feelings, and interest.

An Asian woman working for a Lancashire company on a casual basis was asked to take a written aptitude test in order to remain in employment. She failed the test but found out that a number of white employees in the same situation were given contracts without taking the test. The Asian employee made a complaint to her manager who failed to investigate fully. At the employment tribunal it was found that the manager was not racist by nature but that her failure to deal with the problem indicated a poor attitude in the organisation in dealing with legitimate complaints. The tribunal found that the employee had suffered considerable distress and were particularly concerned that the employer had refused to investigate the complaint and that no apology had been received. The employer was ordered to pay a five figure sum in damages to account for loss of earnings, injury to feelings, and interest.

Mr Z, who was employed as a part-time waiter in Glasgow, claimed that he was the victim of racial discrimination, victimisation and unfair dismissal. Mr Z is of Pakistani nationality and a Muslim. His employers at the restaurant were Indian Sikhs. Mr Z claimed he was harassed, humiliated and demeaned by his employers, on racial grounds, and that his employers also made derogatory comments about his religion. The employment tribunal upheld Mr Z's claim and awarded him a total of £33,000 in compensation. This case was heard before December 2003, when it became unlawful to treat a worker or a job applicant less favourably on grounds of religion or belief. If the case had come up after that date, Mr Z could have claimed discrimination on religious as well as racial grounds.

N.B. A new 'Statutory Code of Practice on Racial Equality in Employment' will replace the existing Code of Practice – probably in 2005.

Disability

Disability Discrimination Act (DDA) 1995

This Act protects people against discrimination based upon their disability. It covers all aspects of employment, from recruitment to dismissal, and provision of services to the general public. From October 2004 all employers, regardless of the number of employees, are covered. You are required to make 'reasonable adjustments' to assist the individual reduce or eliminate the effects of their impairment thus allowing them to carry out a job. The Disability Rights Commission Code of Practice provides guidance.

Employment Example:

F worked for over thirty years in a betting shop. He developed a mobility impairment due to a back injury and the side effect of a pre-existing medical condition and he subsequently used a wheelchair to aid mobility. Upon attempting to return to work after a short period of sickness absence, his employer advised that F's use of the wheelchair would present them with problems in the work premises, which were not suitably accessible for wheelchair users. The employer proceeded to terminate F's employment, only looking into the possibilities of making changes to the premises after he appealed against the decision to dismiss him. A technical access consultant working for the Employment Service prepared a report recommending various reasonable adjustments the cost of which would be in the region of £7,500. However, the employer still decided to uphold the decision to terminate F's employment and not make the recommended adjustments to their premises without consulting their landlord at all. The case settled before hearing for the sum of £100,000.

The Act defines **Disabled People** as those with a “physical or mental impairment which has a substantial and long term adverse effect on the ability to carry out normal day to day activities.”

- Physical impairment includes ME (chronic fatigue syndrome), epilepsy, diabetes, cancer, HIV, dyslexia, visual impairment etc. Mental impairment is defined as a clinically well recognised illness, for example Post Traumatic Stress Disorder, clinical depression etc.
- “Substantial” means more than minor or trivial.
- “Long term” means has lasted for 12 months, is likely to last for 12 months, or is likely to last for the rest of the person’s life.
- “Normal day to day activities” can include work activities but also other routine activities for example, putting rollers in hair and normal endeavours at fitness.

Providing services

Since 1st October 1999, under the DDA, businesses have had a duty to make ‘reasonable adjustments’ for people with disabilities, such as providing extra help or making changes to the way they provide their services. In December 1996 it was made unlawful for businesses and service providers to treat people with disabilities less favourably than non-disabled people for a reason related to their impairment/disability.

Example 1:

The customer had a skin condition which was visible as large blisters on his hands and neck. When visiting a wine bar, he was refused entry because the blisters on his hands made the manager believe other customers would not want to use the same glasses that he had used. Case settled for £2,000 to reflect the hurt caused to feelings by the conduct complained of.

Example 2:

The customer's mobility was affected to the extent that she walked with crutches and could not carry a shopping basket at the same time. When doing her shopping, she asked for and was given a plastic carrier bag instead of one of their usual wire baskets. While she was moving around the store and selecting items and putting them in the plastic bag, she was approached by a security guard who told her that she had to use a wire basket. He refused to listen to her explanation. He removed the goods from her plastic bag and returned them to the shelves. The customer was extremely embarrassed and humiliated and she left the store. Although the store was willing to make a reasonable adjustment to enable the client to shop independently, it failed to communicate the change to its usual practice to all employees. The case settled before hearing for the sum of £750.

Example 3:

The customer was visually impaired and required documents in large font size print. He contacted a charity on two occasions asking for forms to be sent to him in large print and was told this was not possible. As a result he was unable to use the services of the charity which had implications for his future career. The claim settled to customer's satisfaction on payment by the charity of £1,500, an apology and an agreement to amend its policies to improve access to its services for all disabled people.

In addition, from 1st October 2004, businesses will have to make other 'reasonable adjustments' to the physical features of their premises to overcome physical barriers to access.

Gender/Sexual Orientation

Equal Pay Act 1970

Both men and women, regardless of race or disability, are entitled to equal pay if they are employed to do work that is:

- Similar;
- Rated as equivalent, through a job evaluation;
- Of equal value in the demands that are made of them.

Sex Discrimination Act 1975

Makes it unlawful to discriminate against a person because of their sex or marital status. The Act covers employees regardless of the length of service or the number of hours worked.

Sex Discrimination Act Amendment 1999 – Gender Reassignment

Prevents discrimination against someone who is undergoing a gender re-assignment in terms of employment or training.

Employment Equality (Sexual Orientation) Regulations

These came into force 1 December 2003. The Regulations apply to all workers and anyone who applies for work. They cover those employed directly and those covered by some other form of contract and agency workers. They cover membership of trade organisations, the award of qualifications, the services of careers guidance organisations, employment agencies and vocational training organisations. The Regulations make it unlawful, on the grounds of sexual orientation, in employment or vocational training, to:

- discriminate against someone directly, e.g. job applicant says she has a same sex partner, but despite having the skills and competences is not appointed to job because she is a lesbian.
-

- discriminate indirectly, e.g. company gives pension rights to unmarried opposite sex partners but not to same sex partners;
- subject someone to harassment;
- victimise someone because they have made or intend to make a complaint or allegation or have or intend to give evidence.

The law allows positive action where you can demonstrate that employees of particular sexual orientation are at a career disadvantage.

Whilst some religions do hold strong views about sexual orientation this does not over-ride this legislation. You should expect workers with such views to treat each other professionally.

Age

Age Discrimination legislation is anticipated in 2006, as a result of the EU Employment Directive. This will make it unlawful to discriminate against a person because of their age – a Code of Practice on Age Diversity in Employment has been published by the Department for Education and Employment. Further information is available at www.agepositive.gov.uk

ANNEX B – Other Significant Legislation and Regulations

Rehabilitation of Offenders Act 1974

Under this law any conviction for a criminal offence can be regarded as spent provided:

- the conviction did not carry a sentence excluded from the Act, such as a custodial sentence of over two and a half years
- no further convictions occurred within the rehabilitation period.

Once a conviction is regarded as 'spent', the rehabilitated person does not have to reveal its existence in most circumstances and can answer 'no' to the question "do you have a criminal record?"

Certain occupations are exceptions and are listed in ROA (Exceptions) Order 1975.

Companies should develop policies on employing people with criminal records; and consider the nature of the conviction and its relevance to the job in question.

Working Time Regulations 1998 amended 2001, 2002

Under the Working Time Regulations, qualifying workers should not work more than an average of 48 hours per week over a 17 week period (this period can be extended in certain circumstances). However, workers can choose to agree to work more than the 48 hour average weekly limit. If they do so, the agreement must be in writing.

Workers are entitled to four weeks paid leave each year (pro-rata for part-time workers). The Regulations allow you to introduce an accrual system if you wish, for workers starting employment on or after 25 October 2001, but only during the first year of employment. Under such a system, leave is accrued monthly in advance from

the first day of employment at the rate of one-twelfth of the annual entitlement.

You can require a worker to take all or any of the leave entitlement on specified dates provided the worker is given notice before the leave is due to start. The period of notice must be at least twice as long as the leave period, for example, three weeks leave would require a minimum of six weeks notice. Otherwise, workers are entitled to choose their leave dates subject to giving notice in the same way as employers are required to do and any other company rules. Such rules should be notified to workers in company documentation, e.g. written statement.

Parental leave

The right of employees to take parental leave is contained in:

- the Employment Rights Act 1996;
- the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312) which came into force on 15 December 1999;
- the Maternity and Parental Leave (Amendment) Regulations 2001 (SI 2001/4010) which came into force on 10 January 2002.

To qualify for parental leave, an employee will have been continuously employed for a year or more, and: is the parent (named on the birth certificate) of a child born on or after 15 December 1999 who is under five years old or; has adopted, on or after 15 December 1999, a child under the age of 18 (the right lasts for five years from the date on which the child is placed for adoption, or until the child's 18th birthday, whichever is the sooner) or; has acquired formal parental responsibility for a child born on or after 15 December 1999 who is under five years old.

A step parent will have to apply to the court to acquire formal parental responsibility if they wish to take parental leave in respect of their spouse's children. Parental leave applies to

both parents. From 10 January 2002 the right to parental leave was extended to children born or adopted on or after 15 December 1994. Parents can take the back leave any time from that date to 31 March 2005, or for adoptive parents, up to the child's 18th birthday.

An employee is entitled to 13 weeks unpaid leave in respect of each child. Where an employee takes parental leave of four weeks or less they are entitled to return to the job in which they were employed before the absence.

Maternity leave

All pregnant employees, regardless of their length of service, are entitled to a period of 26 weeks ordinary maternity leave. To take advantage of ordinary maternity leave the pregnant employee must inform you no later than the end of the 15th week before the week her baby is due:

- that she is pregnant;
- the expected week of childbirth - by means of a medical certificate if you request it;
- the date she intends to start her leave (in writing if you request it).

All pregnant employees who have 26 weeks continuous service by the beginning of the 14th week before the expected week of childbirth, have the right to an additional period of maternity leave. This additional period of leave begins at the end of ordinary maternity leave, for 26 weeks totalling 52 weeks maternity leave.

All pregnant employees, regardless of their length of service with the company, are entitled to reasonable time off to keep appointments for antenatal care made on the advice of a doctor, midwife or health visitor. Except in the case of a first appointment to obtain a certificate, the woman must be prepared to show on request from you, a certificate from a doctor, midwife or health visitor confirming that she is pregnant and also an appointment card or some other document showing that an appointment has been made.

Paternity leave

An employee who has responsibility for bringing up the child, and is the biological father, the mother's husband or partner (includes same sex couples) or is one member of a couple who have jointly adopted a child, may be entitled to paternity leave. To qualify the employee must have at least 26 weeks continuous service by the end of the 15th week before the week the baby is due (or the week in which a match is made with a child for adoption) and continue to work for you until the baby's birth. A qualifying employee can take up to two weeks leave in either a single block of two weeks or two blocks of one week. This is in addition to 13 weeks unpaid parental leave. Statutory paternity pay may be available at £100 per week for a maximum of two weeks.

Flexible working

Is based upon:

- The Flexible Working (Procedural Requirements) Regulations 2002;
- The Flexible Working (Equality, Complaints and Remedies) Regulations 2002, effective 6 April 2003;
- ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003.

Parents of children aged under six or disabled children aged under 18 have the right to apply to work flexibly and you will have a duty to consider these requests seriously. There is no automatic right to change in hours. The right enables mothers and fathers to request to work flexibly. It does not provide an automatic right to work flexibly as there will always be circumstances when you are unable to accommodate the employee's desired work pattern. The right is designed to meet the needs of both parents and employers, especially small employers and aims to facilitate discussion and encourage both the employee and you to consider flexible working patterns and to find a solution that suits them both. The

employee has a responsibility to think carefully about their desired working pattern when making an application, and you are required to follow a specific procedure to ensure requests are considered seriously.

National Minimum Wage

The rules apply to nearly all workers and sets hourly rates below which pay must not be allowed to fall. The rates set are based on the recommendations of the independent Low Pay Commission. Rates cover the following groups:

- Main (adult) rate for workers aged 22 and over;
- Development rate for workers aged 18-21 inclusive – the development rate can also apply to workers aged 22 and above during their first 6 months in a new job with a new employer and who are receiving accredited training;
- Young Workers - 16 and 17 year olds (from October 2004) – apprentices will be exempt.

Fair Piece Rates – From October 2004, the Government is proposing that employers will have to pay their workers the minimum wage for every hour they work or a fair piece rate initially set at 100% of the minimum wage. The rate will increase to 120% of the minimum wage in April 2005 at which point most homeworkers will receive the minimum wage. The Government has produced draft guidance on proposals to introduce fair piece rates for output workers, including homeworkers.

Codes of practice

Much key legislation is amplified in supplementary Codes of Practice. While you are not bound to comply with the Codes of Practice, the ability to demonstrate compliance will be helpful in the event of a dispute.



Tel **023 9284 1610**

email **info@diversitymeansbusiness.org.uk**

www.diversitymeansbusiness.org.uk

**Please contact us if you require
alternative versions of this leaflet.**

Please note: The information provided in this handbook is not legal advice but is for general information only. If you require advice upon the law we strongly recommend that you speak to a legal professional to obtain legal advice.

To the extent permitted by law, Portsmouth City Council or its servant or agents will not be liable by reason of breach of contract, negligence or otherwise for any loss or damage whatsoever occasioned by any person acting omitting to act or refraining to act in reliance upon this handbook arising from any error or omission or otherwise in the handbook.

© Portsmouth City Council 2004

