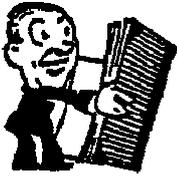


ANNEXURE 8: CODES OF GOOD PRACTISE



Additional Reading

HIV / AIDS

Introduction

The Human Immunodeficiency Virus (HIV) and the Acquired Immune Deficiency Syndrome (AIDS) are serious public health problems, which have socio-economic, employment and human rights implications.

It is recognised that the HIV/AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.

HIV knows no social, gender, age or racial boundaries, but it is accepted that socio-economic circumstances do influence disease patterns. HIV thrives in an environment of poverty, rapid urbanisation, violence and destabilisation. Transmission is exacerbated by disparities in resources and patterns of migration from rural to urban areas. Women particularly are more vulnerable to infection in cultures and economic circumstances where they have little control over their lives.

Furthermore HIV/AIDS is still a disease surrounded by ignorance, prejudice, discrimination and stigma. In the workplace unfair discrimination against people living with HIV and AIDS has been perpetuated through practices such as pre-employment HIV testing, dismissals for being HIV positive and the denial of employee benefits.

One of the most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through the implementation of an HIV/AIDS policy and programme. Addressing aspects of HIV/AIDS in the workplace will enable employers, trade unions and government to actively contribute towards local, national and international efforts to prevent and control HIV/AIDS. In light of this, the Code has been developed as a guide to employers, trade unions and employees.

Furthermore the Code seeks to assist with the attainment of the broader goals of:

- eliminating unfair discrimination in the workplace based on HIV status;
- promoting a non-discriminatory workplace in which people living with HIV or AIDS are able to be open about their HIV status without fear of stigma or rejection;
- promoting appropriate and effective ways of managing HIV in the workplace;
- creating a balance between the rights and responsibilities of all parties; and
- Giving effect to the regional obligations of the Republic as a member of the Southern African Development Community.

Objectives

The Code's primary objective is to set out guidelines for employers and trade unions to implement so as to ensure individuals with HIV infection are not unfairly discriminated against in the workplace. This includes provisions regarding:

- creating a non-discriminatory work environment;
- dealing with HIV testing, confidentiality and disclosure;
- providing equitable employee benefits;
- dealing with dismissals; and
- Managing grievance procedures.

The Code's secondary objective is to provide guidelines for employers, employees and trade unions on how to manage HIV/AIDS within the workplace. Since the HIV/AIDS epidemic impacts upon the workplace and individuals at a number of different levels, it requires a holistic response, which takes all of these factors into account. The Code therefore includes principles, which are dealt with in more detail on the following:

- creating a safe working environment for all employers and employees;
- developing procedures to manage occupational incidents and claims for compensation;
- introducing measures to prevent the spread of HIV;
- developing strategies to assess and reduce the impact of the epidemic upon the workplace; and
- Supporting those individuals who are infected or affected by HIV/AIDS so that they may continue to work productively for as long as possible.

In addition, the Code promotes the establishment of mechanisms to foster co-operation at the following levels:

- between employers, employees and trade unions in the workplace; and
- Between the workplace and other stakeholders at a sectoral, local, provincial and national level.

Policy Principles

The promotion of equality and non-discrimination between individuals with HIV infection and those without, and between HIV/AIDS and other comparable health/medical conditions.

The creation of a supportive environment so that HIV infected employees are able to continue working under normal conditions in their current employment for as long as they are medically fit to do so.

The protection of human rights and dignity of people living with HIV or AIDS is essential to the prevention and control of HIV/AIDS.

HIV/AIDS impacts disproportionately on women and this should be taken into account in the development of workplace policies and programmes.

Consultation, inclusivity and encouraging full participation of all stakeholders are key principles which should underpin every HIV/AIDS policy and programme.

Application and Scope

All employers and employees, and their respective organisations are encouraged to use this Code to develop, implement and refine their HIV/AIDS policies and programmes to suit the needs of their workplaces.

For the purposes of this code, the term “workplace” should be interpreted more broadly than the definition given in the Labour Relations Act, Act 66 of 1995, Section 213, to include the working environment of, amongst others, persons not necessarily in an employer-employee relationship, those working in the informal sector and the self-employed.

This Code however does not impose any legal obligation in addition to those in the Employment Equity Act and Labour Relations Act, or in any other legislation referred to in the Code. Failure to observe it does not, by itself, render an employer liable in any proceedings, except where the Code refers to obligations set out in law.

The Code should be read in conjunction with other codes of good practice that may be issued by the Minister of Labour.

Legal Framework

The Code should be read in conjunction with the Constitution of South Africa Act, No. 108 of 1996, and all relevant Legislation which includes the following:

- Employment Equity Act, No. 55 of 1998;
- Labour Relations Act, No. 66 of 1995;
- Occupational Health and Safety Act, No. 85 of 1993;
- Mine Health and Safety Act, No. 29 of 1996;
- Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993;
- Basic Conditions of Employment Act, No. 75 of 1997;
- Medical Schemes Act No. 131 of 1998; and
- Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000.

The contents of this code should be taken into account when developing, implementing or reviewing any workplace policies or programmes in terms of the statutes listed above.

The following are selected, relevant sections contained in certain of the above-mentioned legislation. These should be read in conjunction with other legislative provisions.

The Code is issued in terms of Section 54 (1) (a) of the Employment Equity Act, No. 55 of 1998 and is based on the principle that no person may be unfairly discriminated against on the basis of their HIV status. In order to assist employers and employees to apply this principle consistently in the workplace, the Code makes reference to other pieces of legislation.

Section 6 (1) of the Employment Equity Act provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of his or her HIV status. In any legal proceedings in which it is alleged that any employer has discriminated unfairly, the employer must prove that any discrimination or differentiation was fair.

No employee, or applicant for employment, may be required by their employer to undergo an HIV test in order to ascertain their HIV status. HIV testing by or on behalf of an employer may only take place

where the Labour Court has declared such testing to be justifiable in accordance with Section 7 (2) of the Employment Equity Act.

In accordance with Section 187 (1) (f) of the Labour Relations Act, No. 66 of 1995, an employee with HIV/AIDS may not be dismissed simply because he or she is HIV positive or has AIDS. However where there are valid reasons related to their capacity to continue working and fair procedures have been followed, their services may be terminated in accordance with Section 188 (1) (a) (i)

In terms of Section 8 (1) of the Occupational Health and Safety Act, No. 85 of 1993; an employer is obliged to provide, as far as is reasonably practicable, a safe workplace. This may include ensuring that the risk of occupational exposure to HIV is minimised.

Section 2 (1) and Section 5 (1) of the Mine Health and Safety Act, No. 29 of 1996 provides that an employer is required to create, as far as is reasonably practicable, a safe workplace. This may include ensuring that the risk of occupational exposure to HIV is minimised.

An employee who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids, may apply for benefits in terms of Section 22 (1) of the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.

In accordance with the Basic Conditions of Employment Act, No. 75 of 1997, every employer is obliged to ensure that all employees receive certain basic standards of employment, including a minimum number of day's sick leave [Section 22 (2)].

In accordance with Section 24 (2) (e) of the Medical Schemes Act, No. 131 of 1998, a registered medical aid scheme may not unfairly discriminate directly or indirectly against its members on the basis of their "state of health". Further in terms of s 67 (1) (9) regulations may be drafted stipulating that all schemes must offer a minimum level of benefits to their members.

In accordance with both the common law and Section 14 of the Constitution of South Africa Act, No. 108 of 1996, all persons with HIV or AIDS have a right to privacy, including privacy concerning their HIV or AIDS status. Accordingly there is no general legal duty on an employee to disclose his or her HIV status to their employer or to other employees.

Promoting a Non-Discriminatory Work Environment

No person with HIV or AIDS shall be unfairly discriminated against within the employment relationship or within any employment policies or practices, including with regard to:

- recruitment procedures, advertising and selection criteria;
- appointments, and the appointment process, including job placement;
- job classification or grading;
- remuneration, employment benefits and terms and conditions of employment;
- employee assistance programmes;
- job assignments;
- the workplace and facilities;
- occupational health and safety;
- training and development;
- performance evaluation systems;
- promotion, transfer and demotion;
- disciplinary measures short of dismissal; and
- termination of services.

To promote a non-discriminatory work environment based on the principle of equality, employers and trade unions should adopt appropriate measures to ensure that employees with HIV and AIDS are not unfairly discriminated against and are protected from victimisation through positive measures such as:

- preventing unfair discrimination and stigmatisation of people living with HIV or AIDS through the development of HIV/AIDS policies and programmes for the workplace;
- awareness, education and training on the rights of all persons with regard to HIV and AIDS;
- mechanisms to promote acceptance and openness around HIV/AIDS in the workplace;
- providing support for all employees infected or affected by HIV and AIDS; and
- grievance procedures and disciplinary measures to deal with HIV related complaints in the workplace.

HIV Testing, Confidentiality and Disclosure

HIV Testing

No employer may require an employee, or an applicant for employment, to undertake an HIV test in order to ascertain that employee's HIV status. As provided for in the Employment Equity Act, employers may approach the Labour Court to obtain authorisation for testing.

Whether s 7 (2) of the Employment Equity Act prevents an employer-provided health service supplying a test to an employee who requests a test, depends on whether the Labour Courts would accept that an employee can knowingly agree to waive the protection in the section. This issue has not yet been decided by the courts.²

In implementing the sections below, it is recommended that parties take note of the position set out in item 7.1.2.

Authorised Testing

Employers must approach the Labour Court for authorisation in, amongst others, the following circumstances:

- during an application for employment;
- as a condition of employment;
- during procedures related to termination of employment;
- as an eligibility requirement for training or staff development programmes; and
- as an access requirement to obtain employee benefits.

Permissible Testing

An employer may provide testing to an employee who has requested a test in the following circumstances:

- As part of a health care service provided in the workplace;
- In the event of an occupational accident carrying a risk of exposure to blood or other body fluids;
- For the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.

Furthermore, such testing may only take place within the following defined conditions:

- At the initiative of an employee;
- Within a health care worker and employee-patient relationship;
- With informed consent and pre- and post-test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and
- With strict procedures relating to confidentiality of an employee's HIV status as described in this Code.

Testing, including both authorised and permissible testing, should be conducted in accordance with the Department of Health's National Policy on Testing for HIV issued in terms of the National Policy for Health Act, No. 116 of 1990.

Informed consent means that the individual has been provided with information, understands it and based on this has agreed to undertake the HIV test. It implies that the individual understands what the test is, why it is necessary, the benefits, risks, alternatives and any possible social implications of the outcome.

Anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research.³ Where such research is done, the information obtained may not be used to unfairly discriminate against individuals or groups of persons. Testing will not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results.

Confidentiality and Disclosure

All persons with HIV or AIDS have the legal right to privacy. An employee is therefore not legally required to disclose his or her HIV status to their employer or to other employees.

Where an employee chooses to voluntarily disclose his or her HIV status to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is not possible, steps must be taken to confirm that the employee wishes to disclose his or her status.

Mechanisms should be created to encourage openness, acceptance and support for those employers and employees who voluntarily disclose their HIV status within the workplace, including:

- encouraging persons openly living with HIV or AIDS to conduct or participate in education, prevention and awareness programmes;
- encouraging the development of support groups for employees living with HIV or AIDS; and
- ensuring that persons who are open about their HIV or AIDS status are not unfairly discriminated against or stigmatised.

Promoting a Safe Workplace

An employer is obliged to provide and maintain, as far as is reasonably practicable, a workplace that is safe and without risk to the health of its employees.

The risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every workplace should ensure that it complies with the provisions of the Occupational Health and Safety Act, including the Regulations on Hazardous Biological Agents, and the Mine Health and Safety Act, and that its policy deals with, amongst others:

- the risk, if any, of occupational transmission within the particular workplace;
- appropriate training, awareness, education on the use of universal infection control measures so as to identify, deal with and reduce the risk of HIV transmission in the workplace;
- providing appropriate equipment and materials to protect employees from the risk of exposure to HIV;
- the steps that must be taken following an occupational accident including the appropriate management of occupational exposure to HIV and other blood borne pathogens, including access to post exposure prophylaxis;
- the procedures to be followed in applying for compensation for occupational infection;
- the reporting of all occupational accidents; and
- adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.

Compensation for Occupationally Acquired HIV

An employee may be compensated if he or she becomes infected with HIV as a result of an occupational accident, in terms of the Compensation for Occupational Injuries and Diseases Act.

Employers should take reasonable steps to assist employees with the application for benefits including:

- providing information to affected employees on the procedures that will need to be followed in order to qualify for a compensation claim; and
- assisting with the collection of information which will assist with proving that the employees were occupationally exposed to HIV infected blood;
- Occupational exposure should be dealt with in terms of the Compensation for Occupational Injuries and Diseases Act. Employers should ensure that they comply with the provisions of this Act and any procedure or guideline issued in terms thereof.

Employee Benefits

Employees with HIV or AIDS may not be unfairly discriminated against in the allocation of employee benefits.

Employees who become ill with AIDS should be treated like any other employee with a comparable life threatening illness with regard to access to employee benefits.

Information from benefit schemes on the medical status of an employee should be kept confidential and should not be used to unfairly discriminate.

Where an employer offers a medical scheme as part of the employee benefit package it must ensure that this scheme does not unfairly discriminate, directly or indirectly, against any person on the basis of his or her HIV status.

Dismissal

Employees with HIV/AIDS may not be dismissed solely on the basis of their HIV/AIDS status.

Where an employee has become too ill to perform their current work, an employer is obliged to follow accepted guidelines regarding dismissal for incapacity before terminating an employee's services, as set out in the Code of Good Practice on Dismissal contained in Schedule 8 of the Labour Relations Act.

The employer should ensure that as far as possible, the employee's right to confidentiality regarding his or her HIV status is maintained during any incapacity proceedings. An employee cannot be compelled to undergo an HIV test or to disclose his or her HIV status as part of such proceedings unless the Labour Court authorised such a test.

Grievance Procedures

Employers should ensure that the rights of employees with regard to HIV/AIDS, and the remedies available to them in the event of a breach of such rights, become integrated into existing grievance procedures.

Employers should create an awareness and understanding of the grievance procedures and how employees can utilise them.

Employers should develop special measures to ensure the confidentiality of the complainant during such proceedings, including ensuring that such proceedings are held in private.

Management of HIV in the Workplace

The effective management of HIV/AIDS in the workplace requires an integrated strategy that includes, amongst others, the following elements:

- An understanding and assessment of the impact of HIV/AIDS on the workplace; and
- Long and short term measures to deal with and reduce this impact, including:
 - An HIV/AIDS Policy for the workplace;
 - HIV/AIDS Programmes, which would incorporate:
 - Ongoing sustained prevention of the spread of HIV among employees and their communities;
 - Management of employees with HIV so that they are able to work productively for as long as possible; and
 - Strategies to deal with the direct and indirect costs of HIV/AIDS in the workplace.

Assessing the Impact of HIV/AIDS on the Workplace

Employers and trade unions should develop appropriate strategies to understand, assess and respond to the impact of HIV/AIDS in their particular workplace and sector. This should be done in co-operation with sectoral, local, provincial and national initiatives by government, civil society and non-governmental organisations.

Broadly, impact assessments should include:

- Risk profiles; and
- Assessment of the direct and indirect costs of HIV/AIDS;

Risk profiles may include an assessment of the following:

- The vulnerability of individual employees or categories of employees to HIV infection;
- The nature and operations of the organisation and how these may increase susceptibility to HIV infection (eg migrancy or hostel dwellings);
- A profile of the communities from which the organisation draws its employees;
- A profile of the communities surrounding the organisation's place of operation; and
- An assessment of the impact of HIV/AIDS upon their target markets and client base.

The assessments should also consider the impact that the HIV/AIDS epidemic may have on:

- Direct costs such as costs to employee benefits, medical costs and increased costs related to staff turnover such as training and recruitment costs and the costs of implementing an HIV/AIDS programme;
- Indirect costs such as costs incurred as a result of increased absenteeism, employee morbidity, loss of productivity, a general decline in workplace morale and possible workplace disruption;

The cost effectiveness of any HIV/AIDS interventions should also be measured as part of an impact assessment.

Measures to Deal with HIV/AIDS within the Workplace

A Workplace HIV/AIDS Policy

Every workplace should develop an HIV/AIDS policy, in order to ensure that employees affected by HIV/AIDS are not unfairly discriminated against in employment policies and practices. This policy should cover:

- the organisation's position on HIV/AIDS;
- an outline of the HIV/AIDS programme;
- details on employment policies (e.g. position regarding HIV testing, employee benefits, performance management and procedures to be followed to determine medical incapacity and dismissal);
- express standards of behaviour expected of employers and employees and appropriate measures to deal with deviations from these standards;
- grievance procedures in line with this Code;
- set out the means of communication within the organisation on HIV/AIDS issues;
- details of employee assistance available to persons affected by HIV/AIDS;
- details of implementation and co-ordination responsibilities; and
- monitoring and evaluation mechanisms.

All policies should be developed in consultation with key stakeholders within the workplace including trade unions, employee representatives, occupational health staff and the human resources department.

The policy should reflect the nature and needs of the particular workplace.

Policy development and implementation is a dynamic process, so the workplace policy should be:

- communicated to all concerned;
- routinely reviewed in light of epidemiological and scientific information; and
- monitored for its successful implementation and evaluated for its effectiveness.

Developing Workplace HIV/AIDS Programmes

It is recommended that every workplace works towards developing and implementing a workplace HIV/AIDS programme aimed at preventing new infections, providing care and support for employees who are infected or affected, and managing the impact of the epidemic in the organisation.

The nature and extent of a workplace programme should be guided by the needs and capacity of each individual workplace. However, it is recommended that every workplace programme should attempt to address the following in co-operation with the sectoral, local, provincial and national initiatives:

- hold regular HIV/AIDS awareness programmes;
- encourage voluntary testing;
- conduct education and training on HIV/AIDS;
- promote condom distribution and use;
- encourage health seeking behaviour for STD's;
- enforce the use of universal infection control measures;
- create an environment that is conducive to openness, disclosure and acceptance amongst all staff;
- endeavour to establish a wellness programme for employees affected by HIV/AIDS;
- provide access to counselling and other forms of social support for people affected by HIV/AIDS;
- maximise the performance of affected employees through reasonable accommodation, such as investigations into alternative sick leave allocation;
- develop strategies to address direct and indirect costs associated with HIV/AIDS in the workplace, as outlined above;
- regularly monitor, evaluate and review the programme.

Employers should take all reasonable steps to assist employees with referrals to appropriate health, welfare and psycho-social facilities within the community, if such services are not provided at the workplace.

Information and Education

The Department of Labour should ensure that copies of this code are available and accessible.

Employers and employer organisations should include the Code in their orientation, education and training programmes of employees.

Trade unions should include the Code in their education and training programmes of shop stewards and employees.

EMPLOYMENT OF PEOPLE WITH DISABILITIES

The EEA defines people with disabilities as ‘people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment’ [s 1]. The Code of Good Practice: Key Aspects on the Employment of People with Disabilities relies on this definition in providing guidelines for employers on the protection and advancement of disabled persons.

An impairment may be either physical or mental, or both ‘Physical impairment’ means a partial or total loss of a bodily function or part of the body; while ‘mental impairment’ means a clinically recognised condition or illness that affects a person’s thought processes, judgment or emotions

‘Long-term’ refers to impairment lasting or likely to last for at least 12 months.

‘Recurring impairment’ is one that is likely to happen again and is substantially limiting, including a constant chronic condition, even if its effects fluctuate.

‘Progressive conditions’ are those that are likely to develop or change or recur. People who have a progressive condition are considered to suffer disability once the impairment becomes substantially limiting.

Persons with recurring conditions, which have no overt symptoms or do not substantially limit them, are not considered to be suffering a disability.

An impairment is considered ‘substantially limiting’ if its nature, duration or effects substantially limit a person’s ability to perform the essential functions of the job for which he or she is being considered.

Employers must reasonably accommodate the needs of persons with disabilities, including applicants for jobs, during recruitment and selection processes; in the working environment; in the way work is done, evaluated and rewarded; and in the benefits and privileges of employment.

‘Reasonable accommodation’ includes:

- adapting existing facilities or equipment or acquiring new equipment;
- reorganising work stations;
- changing training and assessment materials;
- restructuring jobs so that non-essential functions are reassigned;
- adjusting working time and leave; and
- providing special supervision, training and support in the workplace.

Work performance of persons with disabilities may be measured against the same standards as that of other employees. The nature of the disability, however, may require an employer to adapt the way in which performance is measured.

An employer need not accommodate applicants or employees with disabilities if doing so would impose an ‘unjustifiable hardship’ on the business of the employer.

‘Unjustifiable hardship’ is defined as ‘action that requires significant or considerable difficulty or expense’ and ‘involves considering, among other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.’

Whether hardship is justifiable will differ according to the circumstances of each case.

Employers, when recruiting, should identify the 'inherent requirements of the job', defined as 'those requirements which the employer stipulates as necessary for a person to be appointed to the job, and are necessary in order to enable an employee to perform the essential functions of the job'.

Advertisements should include sufficient detail about such requirements to enable applicants with disabilities to make an informed decision. Non-essential criteria should be excluded as they may unfairly exclude people with disabilities.

In selecting candidates the employer should *inter alia* assess whether the candidate is 'suitably qualified' for the job. This requires a two-stage enquiry into whether (i) the candidate is in fact suitably qualified and (ii) there is a need to accommodate the candidate so that he or she can perform the essential functions of the job.

Employers should monitor their selection criteria to ensure that they do not discriminate against persons with disabilities and, if necessary, adapt their criteria.

An employer may make a job offer to an applicant with disabilities conditional on medical or functional testing to determine his or her actual or potential ability to perform the essential functions of the job, with or without reasonable accommodation. The employer may withdraw the job offer if the test shows that:

- the accommodation requirements would create unjustifiable hardship; or
- there is an objective justification for withdrawing it that relates to the inherent requirements of the job or to health and safety.

As employers are under a general duty to maintain reasonably safe working conditions, they should not employ a person with disabilities if an objective assessment shows that other persons, or the person concerned, would be exposed to an actual health or safety risk and there is no possibility of eliminating or reducing the risk through reasonable accommodation. Under these circumstances, similarly, a conditional job offer may be withdrawn.

An employer may not employ persons with disabilities on less favourable terms and conditions than other employees doing the same work.

The code reiterates the prohibition of harassment of an employee on the ground of disability.

If an employee becomes disabled the employer should, where 'reasonable', reintegrate him or her into work after consulting with him or her to assess whether the disability can reasonably be accommodated. Vocational rehabilitation, transitional work programmes and other measures may be used to encourage an early return to work. If an employee is frequently absent for reasons of illness or injury, the employer should consult the employee to assess if the reason for the absence is a disability, which requires reasonable accommodation. If reasonable, the employer should explore the possibility of offering alternative work, reduced work or flexible work placement.

If an employee with disabilities cannot reasonably be accommodated, the employer may terminate the employment relationship on grounds of incapacity. If employees with disabilities face dismissal due to operational requirements, the employer may not use selection criteria that discriminate unfairly against them, either directly or indirectly.

Medical testing of job applicants or employees is governed by section 7 and section 8 of the EEA. In relation to applicants or employees with disabilities, the code states that such tests must be relevant and appropriate to the kind of work for which the person is being tested and free of bias.

Medical examinations or tests for membership of employee benefit schemes should be limited to assessing a person's suitability for membership and not related to a person's capability to perform the job in question. An employer may not refuse to recruit, train, promote or otherwise prejudice a person only because he or she has been refused membership of a benefit scheme.