EQUAL OPPORTUNITY TRIBUNAL
OF WESTERN AUSTRALIA

No. 18 of 1991

IN THE MATTER OF A COMPLAINT BY:

DIANE LLOYD (Representing the Members of People Living With AIDS (WA) Inc)
First Complainant

and

GARY MARTIN
Second Complainant

and

IAN WALKER
Third Complainant

and

JAMES WALLIS
Fourth Complainant

- Against -

CITY OF PERTH
First Respondent

and

DAVID COLE
Second Respondent

and

CHRISTOPHER CRANLEY
Third Respondent

and

BASILIO FRANCHINA
Fourth Respondent

and

PETER GALLAGHER
Fifth Respondent

and

JOHN LEE
Sixth Respondent

and

John MacMillan
Seventh Respondent

and

DAVID NAIRN
Eighth Respondent

and

DONALD NAIRN
Ninth Respondent

and

PETER NATTRASS
Tenth Respondent

and

BRIAN PRINCE
Eleventh Respondent

and

SALVATORE SALPIETRO
Twelfth Respondent

and

VINCENZO SCURRIA
Thirteenth Respondent

and

MARIA TORRE
Fourteenth Respondent

and

VICTOR VLAHOS
Fifteenth Respondent

No. 6 of 1992

AND IN THE MATTER OF A COMPLAINT BY:

LUKE COOMEY
Complainant

- Against -

CITY OF PERTH
First Respondent

and

DAVID COLE
Second Respondent

and

CHRISTOPHER CRANLEY
Third Respondent

and

BASILIO FRANCHINA
Fourth Respondent

and

PETER GALLAGHER
Fifth Respondent

and

JOHN LEE
Sixth Respondent

and

JOHN MACMILLAN
Seventh Respondent

and

DAVID NAIRN
Eighth Respondent

and

DONALD NAIRN
Ninth Respondent

and

PETER NATTRASS
Tenth Respondent

and

BRIAN PRINCE
Eleventh Respondent

and

SALVATORE SALPIETRO
Twelfth Respondent

and

VINCENZO SCURRIA
Thirteenth Respondent

and

MARIA TORRE
Fourteenth Respondent

and

VICTOR VLAHOS
Fifteenth Respondent

BEFORE: Mr L W Roberts-Smith, Q.C. (Deputy President)
Ms B Buick (Member)
Dr P Deschamp (Deputy Member)

Counsel for the Complainant - Ms H Andrews
Counsel for the Respondents - Mr N Douglas

HEARD: 24-26 March 1992, 23-25 February 1993,
27-28 April 1993, 6 May 1993

REASONS FOR DECISION

(Delivered: 21 July 1993)

REASONS FOR JUDGMENT

In what follows, where the Tribunal has made a determination of a matter of law or procedure, that has been done by the presidential member as required by s.105(3) of the Equal Opportunity Act 1984 ("the Act"); all findings of fact are the findings of all three members.

The Complaints

This case has had an exceptionally long and unfortunate history.

On 14 August 1990 an organization named "People living with AIDS (WA) Inc" ("PLWA") made a complaint to the Commissioner for Equal Opportunity. The complaint was that in refusing planning approval for the establishment and operation of a "drop in" centre ("the Centre") at premises within the municipality of the City of Perth, the Perth City Council unlawfully discriminated against PLWA and its members on the ground of impairment.

PLWA was joined as complainant by 3 individual members of that Association, (Mr GM, Mr IW and Mr JW) complaining in their own right. The Respondents were named as the Council and 15 individual councillors. That complaint was no. 18 of 1991.

The complaint was referred to this Tribunal by the Commissioner on 15 October 1991, pursuant to section 93 (1)(a) of the Act.

On 16 January 1992 a founding member of PLWA ("LC") made his own complaint to the Commissioner against the Council and the same 15 councillors in respect of the same decision refusing planning permission for the Centre. That complaint was referred to the Tribunal on 5 February 1992, as no. 6 of 1992.

At a preliminary hearing on 20 February 1992 an order was made under section 108 of the Act that there be a single (ie joint) inquiry into all the complaints. On the same date leave was given to the Complainants to withdraw the complaints against the fourteenth Respondent councillor. It was also ordered pursuant to section 122(1)(c) of the Act that the names of the individual Complainants or members of PLWA not be published and that there be no publication of any information which would lead to the identification of such persons.

On 24 March 1992 complaint no. 18 of 1991 was amended by leave. The name of PLWA as Complainant was deleted and the name of an individual member of that Association, one DL, acting as representative of all members of PLWA as at the time the events grounding the complaint occurred, was substituted therefor.

That complaint was also treated as being a representative complaint under section 115 of the Act. It was to be heard with the complaints made by the three individual complainants in the same matter and with that of LC.

The substantive hearing before the Tribunal commenced on 24 March 1992.

At the end of the complainants' case, counsel for the Respondents, Mr N Douglas, sought a ruling that there was "no case to answer" and an order that the complaints be dismissed under Section 125(1) of the Act. After extensive argument, a decision on that issue was reserved.

In a ruling delivered on 6 April 1992 the Deputy President ruled that there was a case to answer and refused to dismiss the complaints (*DL*

In a ruling delivered on 6 April 1992 the Deputy President ruled that there was a case to answer and refused to dismiss the complaints (*DL (Representing the Members of People Living with Aids (WA) (Inc) & Ors v Perth City Council & Ors* (1992) EOC 91 92-422).

The Respondents appealed to the Supreme Court of WA against that decision.

In September 1992, the Complainant LC died.

On 29 October 1992, Anderson J dismissed the appeals (*City of Perth & Ors v DL (Representing the Members of People Living with Aids (WA) (Inc)* (1992) EOC 91 92-466).

The complaints were subsequently relisted for further hearing before the Tribunal on 23 February 1993.

On 17 February 1993 Mr Douglas made application for an adjournment on the ground that one of the Respondents, Mr Salpietro, was overseas and would not be returning to the jurisdiction until 21 April. That application was refused and the hearing resumed on 23 February and continued to 25 February by which stage all the Respondents' witnesses except Mr Salpietro had been heard. Mr Douglas renewed his application for an adjournment and that was granted.

Mr Salpietro gave his evidence on 27 April 1993, and that completed the case for the Respondents.

Final addresses from counsel were then heard over 27 and 28 April and 6 May 1993.

The actual hearing before this Tribunal therefore occupied some 9 hearing days extending over 13 months from 24 March 1992 to 6 May 1993.

As already observed, LC died in September last year. (Although that fact was not the subject of any evidence to the Tribunal, it was accepted as such by both counsel. There should nonetheless have been evidence of the death - a certificate would have sufficed.) LC

had, of course, by then already given evidence. The first question is therefore whether the proceedings upon his complaint survive his death.

Section 4(1) *Law Reform (Miscellaneous Provisions) Act* 1941 provides that (inter alia) subject to certain limitations on the damages which may be awarded on the death of a person all causes of action vested in him shall survive against, or for the benefit of, his estate.

Both counsel accepted that LC's cause of action survived his death by virtue of section 4.

However, despite some discussion about the problem (eg at T.497), no application was made by counsel for LC to substitute the deceased Complainant's executor or other personal representative and so at the end of the hearing the matter was left in an unsatisfactory state of uncertainty.

Such substitution is a necessary step, because all that the procedural rules do in respect of the survival of causes of action is enable a court or tribunal to order the reconstitution of the action or proceedings following the death of a party in those cases in which the cause of action is one that survives. Thus, where an action is constituted by only one plaintiff or complainant who dies, as here, then the action abates unless it is reconstituted under the relevant rules by the substitution of a living representative (*Eldridge v Burgess* (1878) 7 Ch D 411 and see generally Cairns "Australian Civil Procedure" 1981, at p.262).

There having been no such application and substitution here, complaint No. 6 of 1992 must be taken to have abated - there is simply no longer any complainant.

<u>The Background</u>

The complaints in matter No. 18 of 1991 allege unlawful discrimination by the Respondents against the Complainant DL and those she represents, and the three natural complainants (to all of whom we shall for convenience refer collectively as "the

Complainants") on the ground of impairment, contrary to sections 66A and 66K of the Act.

We should emphasize at this point that it is no part of the function of this Tribunal to decide whether or not the decision of the Council was correct on town-planning grounds of amenity or otherwise. We are not concerned with the merits of the application for planning approval. The only issue we have to determine is whether or not the Complainants have established the City of Perth and individual councillors acted in a way which amounted to unlawful discrimination under the Act.

Part IVA of the Act, which deals with discrimination on the ground of impairment, was inserted by section 8 of the Equal Opportunity Amendment Act 1988 (No. 40 of 1988), which came into operation on 20 January 1989.

So far as is relevant here, section 66K provides that -

> "66K. (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's impairment -
>
> (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
>
> (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
>
> (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person."

Discrimination on the ground of impairment is defined in section 66A, of which only subsection (1) is relevant here -

> "66A. (1) For the purposes of this Act, a person (in this subsection referred to as the "discriminator") discriminates against another person (in this subsection referred to as the "aggrieved person") on the ground of impairment if, on the ground of -
>
> (a) the impairment of the aggrieved person;
>
> (b) a characteristic that appertains generally to persons having the same impairment as the aggrieved person;
>
> (c) a characteristic that is generally imputed to persons having the same impairment as the aggrieved person; or

(d) a requirement that the aggrieved person be accompanied by or in possession of any palliative device in respect of that person's impairment,

The discriminator treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the discriminator treats or would treat a person who does not have such an impairment."

The impairment which is said to be the basis of the alleged unlawful discrimination is infection with the Human Immunodeficiency Virus ("HIV") which causes AIDS.

In *Hoddy v Executive Director, Department of Corrective Services* (1992) EOC 92-397, 78,826 this Tribunal held that an HIV-positive status constitutes an impairment within the meaning of section 66A of the Act. We adopt the reasons and conclusion there expressed on that issue.

The Constitution of PLWA provides that only persons who are HIV positive may be full members.

The Complainants were at all material times members of PLWA and are HIV Positive.

On 24 January 1990 PLWA submitted to the Council an application for approval of the use of premises in Walcott Street, North Perth, as a "daytime drop-in centre" for people injected with or affected by HIV. The plans showed the centre was to be located within existing premises with a total area of 277m^2. The site adjoins a second-hand furniture shop and a video and television repairer. The rear of the site abutts Little Walcott Street and Walcott Street. The latter is a very busy main thoroughfare.

The site is in an area zoned for shopping use ("shopping S.1"), which on one side adjoins an area zoned for commercial use and on the other three sides there are areas zoned for residential use. The particular site is actually between a small shopping centre and a service station, and there is an hotel immediately behind it.

According to the Plan dated 24 January 1990 submitted with the application, rooms with a total area of 175m^2 were to be used for purposes including a "general purpose room" (for social interaction, cards, table games etc), a meditation/relaxation room, a craft room, a library, seminar workshops, an administration office and a day

nursery. It was stated that the Centre would have two part-time office/administrative staff members. It was expected there would be "up to 10 people" attending the Centre at different times during the day.

There was provision for 10 vehicles to be parked on-site.

At a meeting of the Council's Town Planning Committee on 5 February 1990 the City Planner, Mr Rod Pether, reported that the proposed uses were not considered to be of a nature which were incompatible with surrounding activities in the area nor would they adversely affect the amenity of the area. After giving details of the Applicant organization and the proposed purposes of the Centre, Mr Pether noted in his report that

> "The application complies with the requirements of the Scheme while providing an important community service. As such the proposal has the full support of the Planning Department..."

and he recommended that the application be approved.

The Town Planning Committee discussed the matter and resolved to defer further consideration of it to a special committee meeting to be held on 19 February 1990, so that residents of nearby properties could be consulted in the meantime.

Some 225 letters dated 8 February 1990 were sent to ratepayers of nearby properties and other interested persons or organizations, to which there were 42 responses. Of those, 31 opposed the application and 14 supported it.

The principal reasons advanced in opposition were -

"* fear of the spread of AIDS and the possibility of contracting it;

* the possible affect on nearby property values and business revenue;

* the attraction of 'undesirables' including homosexuals, IV drug users, ex-prisoners and child molesters;

* the close proximity of the site to the residential area;

* that the zoning was inappropriate for the use;

* that there would be insufficient car parking facilities;

* the use offered the potential for more intensive use of the premises in the future;

* the traffic generating potential of the site."

Mr Pether's report noted receipt of a petition containing 108 signatures from residents of Mount Lawley and North Perth, who objected to the proposal on three grounds, they being -

"1. Traffic Hazard:

'The location of the centre where proposed would seriously exacerbate the problem and propose a danger to road users.'

2. Possible Health Hazard:

'It is a possibility that disused syringes could be discarded in the vicinity which pose an obvious danger to infant children.'

3. Effect on Businesses - Land Values:

'Because of community attitudes to AIDS sufferers, local businesses are likely to suffer a decline in patronage to their business. Residential values on properties may also be affected.'"

He also drew attention to a petition against the proposal from residents within the City of Stirling (Walcott Street being the boundary between the two municipal areas) containing 67 signatures. That stated the petitioners' objection as being -

"this type of development is totally inappropriate in a residential and 'Village Shopping' environment."

A letter from the City of Stirling's Town Planning Committee was also received. The effect of it was set out in Mr Pether's report as follows -

"1. The use of land for a day centre within a shopping zone is considered inappropriate as it would have a deleterious effect on the character and amenity of that zone.

2. It is considered that a more appropriate location for the day centre would be adjacent to the AIDS Council Headquarters in Brisbane Street.

3. The Committee supports the views expressed by the City of Stirling ratepayers in the petition referred to above."

Mr Pether made mention of the 14 responses in favour of the application, one of which was from four general medical practitioners in the area.

The City Planner commented that the correspondence received showed that concern existed within the community regarding the problem of AIDS, but that

> "not all the arguments which have been put forward are relevant from a planning viewpoint."

He reiterated that the application complied with the requirements of the City Planning Scheme and pointed out the zoning allowed not only the proposed use but also a wide range of commercial activities of a more intensive nature. In his view

> "These alternative uses would have a greater effect on the amenity of the area than the proposed use."

He said car parking was sufficient for the number of visitors expected and that any traffic problems were minimised by the site having access from both Walcott and Little Walcott Streets.

His conclusion (which was that of the Planning Department) was that the proposed uses were not of a nature which would adversely affect the adjoining properties nor would they reduce the amenity of the area. The proposal continued to have the support of the Planning Department.

Despite this report, the Town Planning Committee resolved on 19 February 1990 to recommend to the Council that the application be refused on the grounds of -

> "(i) its close proximity to residential properties;
>
> (ii) insufficient and non-conforming car parking bays on site;
>
> (iii) the potential for the use to become more intensive;
>
> (iv) the likely increase in traffic and noise."

However, at a subsequent Council meeting that day the motion to refuse the application was put to the Council and lost. As a result, it was referred back to the Committee for further consideration.

At the Council meeting on 19 February the Town Clerk, Mr Reg Dawson, had drawn Council's attention to possible legal problems if the application were to be refused for other than proper planning reasons.

As evidenced by the Council Minutes (and reported in the "West Australian" of 21 February 1990), Mr Dawson had told councillors the City Solicitors had advised that the Equal Opportunity legislation had recently been amended to include impairment as a ground of discrimination; that AIDS "is clearly a physical impairment within the terms of that legislation"; that the Tribunal had wide powers and could "look behind" a decision - it could, for example, examine the motives of individual councillors; and that in determining a planning application the Council should have regard only to planning issues.

It is apparent on the evidence of individual Complainants and others that there was certainly a perception even at that stage, that opposition to the application had its origin substantially if not entirely (in reality) in concerns about characteristics, actual or imputed, of HIV or AIDS sufferers, and that even then, town-planning grounds being advanced were in fact "excuses" (to use the term Cr Marks was reported to have used: "West Australian" 20/2/90).

Following the meetings of 19 February, there was more media publicity. Protagonists on both sides actively sought to generate support for their own positions. Four individual responses and a petition containing 43 signatures in favour of the proposal were received by the Council, as were six responses opposing it. The petitioners asserted that

> "...the Perth City Council must support the community Centre and must not be guided by fear, prejudice and ignorance."

The six objections were on the grounds that the centre would de-value surrounding properties and create a harmful environment for young families and that

> "...it is a residential area where young families are brought up."

On 22 February 1990 there was a meeting between the City Planner, officers of the Council's Planning Department and a representative of PLWA. The latter was advised of further clarification required by the Council. A revised layout plan and submission was accordingly submitted by PLWA on 26 February 1990.

In a report to the Town Planning Committee dated the following day, the City Planner observed that in addition to other matters, the new plan showed a revised car-parking layout for ten cars and provided for improved vehicle access. He detailed the proposed activities and usage. He commented that

> "The public responses which were received highlight the continuing community debate over the proposal, however they do not raise new arguments which are relevant from a planning viewpoint."

and went on to express the Planning Department's continuing support for the proposal.

When the matter came before the Town Planning Committee on 1 March 1990 that Committee resolved to refer it directly to the Council for determination there. In that way the application again came before the Council on 19 March 1990. The Council resolved to determine it. Cr McTiernan then moved that the application be approved for a trial period of 12 months.

The debate which ensued was lengthy and no doubt at times heated. The Council Minutes do not purport to be a verbatim record of what was said. They are necessarily selective in what they contain, and we accept that insofar as they concern matters pertinent to this case they give no more than a broad indication of what was discussed. It would be unsafe to place any reliance on them as a full and accurate reflection of views or comments actually expressed.

The motion was eventually put and was lost 13 votes to 12.

On 21 March 1990 PLWA appealed to the Minister against the Council's decision.

On 6 April 1990 the Minister upheld the appeal and approved the application.

The present complaints were subsequently made to the Commission.

PLWA not "an aggrieved person"

Counsel for the Respondents submitted first that PLWA is not an "aggrieved person" within the meaning of section 66A(1) of the Act and so neither the City of Perth nor the individual respondents cannot have committed an act of discrimination against it. It was said there is no evidence before the Tribunal that PLWA was itself discriminated against on any of the grounds in section 66A(1)(a)-(d) inclusive, and that in any event, although an incorporated association has a legal persona (Section 10, Associations Incorporation Act 1987) it is incapable of having an "impairment" as defined in section 4(1) of the Act.

Although the definition of discrimination on the ground of impairment was extended by section 66A (1a) to include discrimination against "any relative or associate of the aggrieved person" (Equal Opportunity Amendment Act, no. 74 of 1992, section 17) the amendment inserting that subsection ("the 1992 amendment") did not come into operation until 8 January 1993 and the Respondents contend it has no retrospective application to the impugned decision of the Council on 19 March 1990.

For the Complainants, Ms Andrews submitted the argument was simply irrelevant, because of the amendment to the pleadings made by leave on 24 March 1992 removing the name of PLWA as Complainant and substituting for it that of DL, representing the members of PLWA at the relevant time.

The Tribunal accepts Ms Andrews' submissions on this issue.

Section 83 of the Act permits the making of a complaint to the Commissioner alleging that a person has contravened the Act by (inter alia) a person on that person's own behalf and the behalf of other persons (section 83(1)(a)). A complaint under subsection (1) of section 83 may be lodged either as a complaint other than a representative complaint or as a representative complaint. "Representative complaint" is defined in section 4(1) of the Act as meaning a complaint lodged by a person on his or her behalf and on behalf of other persons and which is treated by the Tribunal as a representative complaint. The designation of a complaint as a

representative complaint carries certain consequences as to, for example, the orders open to the Tribunal should the complaint be found to be substantiated (section 127(b)(i) and (iii) of the Act).

DL is a natural person and is and was at all material times herself a member of PLWA. The members she represents as Complainant are all natural persons. PLWA is not one of the persons she represents. She and the persons she does represent are each capable of having the relevant impairment and of being an "aggrieved person" for the purposes of section 66A(1) of the Act. PLWA itself is no longer a party to these proceedings.

Individual Members of PLWA not "aggrieved"

Mr Douglas next urged the proposition that none of the (natural) Complainants is an "aggrieved person" within section 66A(1) because the application refused by the Council was not made by them but by PLWA. Thus, in refusing approval, the Council cannot be said to have based its decision on the ground of the impairment of any one or more of the Complainants - it may not have even known of their existence as individuals. Nor could the Council (and hence the City of Perth) be said to have treated any of the named Complainants in the way proscribed by section 66A(1) of the Act. Mr Douglas argued that the Council could not be held to have discriminated against a named Complainant unless it was aware of that individual and of his or her impairment and refused approval to that person specifically. The 1992 amendment, he said, was not retrospective in its operation and the perceived need for it reinforces the Respondents' proposition.

Ms Andrews on the other hand, contended that if the Council refused the application on the ground of the impairment of the prospective users of the Centre then each of the complainants who gave evidence of being a prospective user was "an aggrieved person" within the meaning of section 66A of the Act and that it did not matter that the Councillors may not have known (or known of) the complainants personally. On this argument, as Ms Andrews said, it was unnecessary to show each complainant to be "an associate" of PLWA.

A similar question arose in *Koowarta v Bjelke-Peterson* (1982) 39 ALR 417, a case which involved the validity and interpretation of the Racial Discrimination Act 1975(Com).

The Aboriginal Land Fund Commission ("the Commission") was a Commonwealth statutory corporation. It had contracted to buy a Crown leasehold pastoral property in North Queensland. The State Minister for Lands refused approval of the transfer. He did so expressly because of a State Government policy against proposals to acquire large areas of additional land for development by Aboriginal groups.

The Plaintiff had been active in organizing the purchase and expected the land to be used by him and other members of his tribal group. He sued the Premier of Queensland and others, claiming breaches of sections 9 and 12 Racial Discrimination Act

So far as is relevant here, those sections provided that -

> "S.9(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."
>
> "s.12(1) It is unlawful for a person, whether as a principal or agent -...
>
> (d) to refuse to permit a second person to occupy any land... by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person."

Section 24(1) provided that "a person aggrieved" by an act of unlawful discrimination may institute civil proceedings in relation to it.

The High Court held that the sections were valid laws with respect to External Affairs under section 51 (xxix) Commonwealth Constitution and, more pertinently to the present case, that the Plaintiff had standing to sue. Gibbs CJ (with whom Aickin and Wilson JJ agreed) and Mason J held that "second person" in section 12 included a corporation, and the Plaintiff was "an associate" of the Commission corporation.

His Honour's observations are indicative of the approach to be adopted under legislation of this nature. For example, he noted that

> "Provisions such as those of s.12, which are intended to preserve and maintain freedom from discrimination, should be construed beneficially" (425).

As to the meaning of "person aggrieved", whilst that must ultimately depend on the context of the particular statute, generally those words should not be subject to a restrictive interpretation. They would include a person who has a genuine grievance because a decision has been made which prejudicially affects his interests. In *Koowarta* the Plaintiff had a genuine grievance because the refusal of consent prejudicially affected his interests. As Gibbs CJ put it -

> "Indeed, assuming that the Commission would have permitted him to use the land, the refusal deprived him of the possibility of obtaining a legal right to go on to the land." (428)

(a view with which Brennan J agreed at 493). The Chief Justice concluded that the Plaintiff had standing as "a person aggrieved".

Stephen J (with whom Murphy J agreed) took an even wider view, as did Brennan J, holding that the Plaintiff was himself "a second person" within s.12, since his occupation of the land was prevented - and further, that it made no difference whether the Plaintiff was personally known to the Minister or not. Stephen J said (at p.457) -

> "While it is not certain that when he refused approval of the transfer the Minister knew of the existence of Mr Koowarta, he clearly knew that the property was to be occupied by Aborigines. That was the very ground for his refusal. In my view Mr Koowarta's position as one of the Aborigines whose occupation of the land was prevented by the Minister's decision sufficiently establishes his standing to sue: he was a "second person" in the terms of s.12(1)(d) of the Act. It is not, I think, to the point that, as a matter of form, what the Minister withheld was approval of a transfer to the Aboriginal Land Fund Commission...
>
> His withholding of approval, once explained by the settled policy of his Government, amounted to a refusal to permit that to occur and accordingly constituted a refusal to permit persons, then possibly unknown to him but who in fact included Mr Koowarta, to occupy land by reason of their race." (457) (emphasis added).

In the present case, the relevant statutory provisions are similarly contained in an Act intended to preserve and maintain freedom from discrimination and so attract that beneficial construction to which Gibbs CJ referred.

Whilst as an incorporated association, PLWA could not physically occupy the premises in respect of which approval was sought, and nor could it suffer an "impairment" within the meaning of s.4(1) of the

Act, its individual members could. All members of PLWA including the Complainants, were infected with the virus and so in fact suffered a relevant impairment (*Hoddy v Executive Director, Department of Corrective Services*, supra). There is no question on the evidence but that when the Council refused approval the Councillors knew of the nature of the applicant organization, that the proposal was for a drop-in centre for the use of its members and that the members were sufferers of the AIDS virus. The Complainants were amongst those whose use of the premises for the purposes proposed was prevented by the refusal of approval. To paraphrase Stephen J in *Koowarta* (at p.457), it is not to the point that as a matter of form, what the Council withheld was approval of an application by the incorporated body of which the Complainants were members. And nor was it necessary for the Council to have known of the individual Complainants personally; it was enough that there was an awareness of the group of persons who were to benefit from the approval and that the Complainants were in fact members of that group.

Whether Town Planning Approval a "service"

We turn now to the next submission of the Respondents. It was that town planning approvals under the City of Perth Planning Scheme are not "services" or "facilities" within the meaning of s.66K of the Act.

In s.4(1) of the Act, "services" is defined as including -

> "(a) services relating to banking, insurance and the provision of grants, loans, credit or finance;
>
> (b) services relating to entertainment, recreation or refreshment;
>
> (c) services relating to transport or travel;
>
> (d) services of the kind provided by members of any profession or trade; and
>
> (e) services of the kind provided by a government, a government or public authority or a local government body;

The Respondents argue that "services of the kind provided by ... a local government body" should be construed, consistently with paragraphs (a) to (d) inclusive, as applying only to such services as library and recreational facilities, parking, entertainment and the provision of such things as water and gas.

Where there is ambiguity, the Act is to be accorded a construction that would promote its underlying purpose or object (s.18 Interpretation Act 1984).

The Act is to be regarded as one which is beneficial and remedial rather than penal: its purpose is to prevent discrimination and to provide remedies where discrimination occurs. It is compensatory rather than punitive. Any ambiguity should generally be resolved in favour of the beneficiary (see generally Pearce and Geddes "Statutory Interpretation in Australia" 3rd edition, p.164-5).

The general idea of a service is that of something which helps or benefits, or conduct which tends to the welfare or advantage of, a person or community. The Macquarie Dictionary (Second Revised Edition) defines "service" (at p.1549) as including -

> "...1. an act of helpful activity.
> 2. the supplying or supplier of any articles, commodities, activities, etc, required or demanded.
> 3. the providing or a provider of some accommodation required by the public, as messengers, telegraphs, telephones, or conveyance.
> 4. the organised system of apparatus, appliances, employees, etc, for supplying some accommodation required by the public.
> 5. the supplying or a supplier of water, gas, or the like to the public.
> 6. the performance of any duties or work for another; helpful activity."

The Oxford English Dictionary (Second Edition) includes the meaning -

> "... of work done to meet some general need."
> "the action of serving, helping or benefiting; conduct tending to the welfare or advantage of another."
> "...friendly or professional assistance."

The authorities support the view that anti-discrimination legislation of this nature should not be interpreted narrowly, but should be given a wide effect.

In *L v Registrar of Births, Deaths and Marriages* (1985) EOC 92-142 the NSW Equal Opportunity Tribunal held that the keeping of a register and recording particulars of births by the Registrar of Births, Deaths and Marriages was a service, as it helped people to obtain passports, access to inheritances etc.

Although in *Jolly v Director-General of Corrections* (1985) EOC, 92-124 a complaint of discrimination in the provision of services by

reason of the complainant's private life (a ground of discrimination under s.24 Equal Opportunity Act1984 (Vic) going to the holding of a lawful religious or political belief) was dismissed, the Equal Opportunity Board of Victoria did hold that entry to a prison came within the definition of "access to services".

The Complainant was the wife of a prison inmate. She gave a television interview which was critical of the prison and the staff. The prison officers' union told the Director-General of Corrections she would be banned from entering the prison until she apologised and that if she did enter without apologising they would go on strike. The Director-General refused to allow the complainant to visit the prison until the dispute was resolved. Her complaint to the Equal Opportunity Board was dismissed because what she had said to the media was not political but "merely human".

In the course of argument it had been submitted that the definition of "services" in s.4(a) of the Victorian Act, which referred to "access to and use of any place that members of the public are permitted to enter", did not apply there because Pentridge prison was not a place that members of the public generally were permitted to enter.

The Board disagreed. The Complainant came within the category of persons for whom the discretion would normally be exercised to permit entry. The Board applied the reasoning in its earlier decision of *Henderson v Victoria* (1984) EOC 92-027 and concluded that the Director-General provided a service to wives and members of prisoners' families as well as to prisoners by permitting their visits to Pentridge in the process of rehabilitation of prisoners or in the course of providing for their welfare.

As noted, that concept came from *Henderson* (supra). In that case, reliance was placed upon s.26(2)(f) of the Victorian Act, which was in essentially similar terms to s.4(1)(e) of the WA Act. The Board there concluded that the conduct involved in permitting and providing appropriate facilities and staff for prisoners to have their children in prison with them could be characterized as the provision of services. In that case the Board also accepted (citing the unreported decision of Marks J in *R v Joan Dwyer & Ors* delivered 25 March 1982) that s.26 predicated at the very least some actual or contemplated transaction

or dealing involving the persons to whom the section refers and a refusal or imposition amounting to discrimination.

Somewhat closer to the present case, in *Pearce v Glebe Administration Board & Anor* (1985) EOC 92-131, a complaint by the "Gay Solidarity Group" that the Council of the City of Sydney and the Anglican Church had discriminated against its members on the ground of their homosexuality, in refusing permission to use designated vacant land for a public rally, was dismissed on the basis that the term "services" in the Anti-Discrimination Act 1977 (NSW) did not extend to cover a mere licence to use private land, without more.

The definition of "services" in s.4(1) of the NSW Act was not relevantly different from that in s.4(1) of the WA Act - indeed, they are almost identical.

The Equal Opportunity Tribunal of NSW saw nothing in the various dictionary definitions of the word "services" to indicate that its ordinary meaning would extend to cover a mere licence to use land. More particularly, however, the Tribunal recognized that the intention of the legislature was to be sought from the language of the Act itself and when that was done it was clear that access to places was not covered by the sections dealing with the provision of goods and services. In the NSW Act, access to places was expressly the subject of separate treatment where it was thought appropriate to deal with it and so the Act itself manifested the clear intent that such access was not intended to be included in the term "services". (The WA Act is similar in that respect - discrimination in relation to access to places and vehicles is expressly dealt with in s.19).

But *Pearce* does not greatly assist this Tribunal in the instant case because of the quite different factual circumstances. What was refused here was planning approval for the use of premises on a long-term basis, in the context of and under the regime of a town-planning scheme. The proposed use was of an entirely different nature from, and extended far beyond, mere access to the property on a single occasion. So too, unlike "access to places" in the NSW Act, town planning approval of a discretionary use is not something which is expressly dealt with in the Act at all.

The activities of government at all levels are many and various. Some are obviously "services" by any definition (such as the provision of health clinics, electricity, water and gas etc); others are just as obviously not (such as the gathering of information to assist in the formulation of government policy or engaging in a process of consultation to that end, as in *Proudfoot v ACT Board of Health* (1992) EOC 92-417). Between those extremes there is probably a range of activities which require much closer analysis to characterize them as a service or not - and always bearing in mind we are concerned with the meaning of that word for the purposes of particular legislation.

So it was in *Kassam v Immigration Appeal Tribunal* [1980] 2 All E R 330 the Court of Appeal in England held that in exercising his statutory powers to control immigration - and in the course of which he refused the Appellant leave to remain in the United Kingdom - the Secretary of State was not concerned with the provision of "facilities". The relevant enactment referred to the provision of "... goods, facilities or services..." (s.29(1) *Sex Discrimination Act* 1975). It seems to have been assumed by all concerned that administration of the immigration scheme and the granting of approvals under it was not a "service" - the argument related only to whether or not it was a "facility".

Stephenson L J thought that read in their natural and ordinary meaning, the statutory provisions did not extend to the Secretary of State giving a person leave to enter or remain in the United Kingdom. The kind of facilities with which the Act was concerned were "of the same order as goods and services". Ackner L J agreed. The juxtaposition in the section of "facilities" with "goods" and "services" suggested the former was not to be given a wholly unrestricted meaning but had to be limited to facilities that were akin to goods and services. His Lordship added that

> "...when the Secretary of State allows an immigrant to enter and stay in this country, he is granting a permission, he is not providing a facility It could, of course, be said that he is conferring a benefit. Significantly the word benefit is used in s.34 as additional to facilities or services..." (p.335, ibid) (emphasis added)

On the other hand, in 1981 the same Court held that the Inland Revenue authorities were providing services within the meaning of the Race Relations Act 1976. Lord Denning M R put it this way in *Savjani v Inland Revenue Commissioners* [1981] 1 All E R 1121 at 1124-5:

> "Under the Taxes Management Act 1970 the Revenue are entrusted with the care and management of taxes. They provide a service to the public in collecting tax. They also provide a service to a section of the public insofar as they give relief from tax or make repayments of tax, or, I would add, give advice about tax. Those are all most valuable services which the Revenue authorities provide to the public as a whole and to sections of the public. It seems to me that the provisions for granting relief, giving advice, and the advice which is given, are the provision of services."

Templeman L J agreed, noting that the Race Relations Act was brought in to remedy a very great evil. He pointed out it was expressed in very wide terms and said he would

> "...be very slow to find that the effect of something which is humiliatingly discriminatory in racial matters falls outside the ambit of the Act." (at 1125).

As was apparent from Lord Denning's approach in *Savjani*, the characterization of a specific activity as a service (or not) may be done with a greater or lesser degree of particularity. Thus, at the broad level, his Lordship's reference to the service provided by the Revenue authorities to the public generally by the very collection of tax; and at the narrow level, the service provided to sections of the public by granting relief from taxation and the giving of taxation advice.

In *Waters v Public Transport Corporation* (1991) 173 CLR 349; (1991) 66 ALJR 47, the provision of public transport was on one view, the provision of a relevant service, whilst on another view, the service was identified with greater particularity as the provision of transport by trams. What is clear from that case, is that for the purposes of anti-discrimination legislation the relevant services must be identified with sufficient precision to relate them to the facts of the case and the issues which arise for determination (see eg McHugh J at ALR 70).

The Equal Opportunity Tribunal of NSW held that the ordinary meaning of the words "services" included the type of life insurance transaction in question in *Goulden v Australian Mutual Provident Society* (1984) EOC 92-020. As in the WA Act the NSW Anti-Discrimination Act 1977 with which the Tribunal was there concerned, included in the definition of that word "services...relating to insurance". In that case the complainant sought a cognizable right or benefit even though he may not have received directly any legal right in respect of the policy itself. The service provided would have given him a right or benefit in the form of relief from the necessity to pay the premium during the period of his disability. As noted, the

Tribunal accepted that the transaction came within the ordinary meaning of the word "services", but that even if the narrower construction urged upon it were correct, the transaction would still have been one "...relating to" insurance (p.75,482, ibid).

(Although the complainant there ultimately failed in the High Court it was not on this point. That Court held that insofar as the relevant provision of the Anti-Discrimination Act purported to apply to the life insurance business of registered life insurance companies it was inconsistent with the Life Insurance Act 1945 (Com) and so invalid under s.109 Commonwealth Constitution - see *AMP Society v Goulden* (1986) 160 CLR 330; 60 ALJR 368.)

The giving of development approval by the Wollongong City Council to the developers of a proposed large retail centre was held by the Equal Opportunity Tribunal of NSW not to be the provision of a service to the Complainant within s.49K(1) Anti-Discrimination Act 1977 (NSW), in *Woods v Wollongong City Council & Ors* (1986) EOC 92-174.

Ms Woods was a paraplegic confined to a wheelchair. Her complaint was about a retail centre then under construction. It had not at that stage been opened to the public. She complained the developers had discriminated against her because of her physical impairment in the manner in which services were provided. She claimed the services were first the facility of the centre itself and secondly, the construction of the centre. As against the Council she asserted the relevant service was its consideration and approval of the development and building applications.

The complaint was dismissed. The Act required the actual provision of services at the time discrimination was alleged to have occurred. There had to be some refusal or imposition involved. There had not been there, because the centre was not yet open. So far as the complaint against the Council was concerned, there was not the necessary proximity between Ms Woods as an ultimate user of the centre and the designated approval, for there to have been a provision of services to her by the approval (p.76,677-8, ibid).

In *Woods* , the Tribunal was not concerned with the meaning of "services" (p.76,678, ibid), and it seems simply to have been assumed

that a development and building approval was capable of being properly described as a "service" for the purposes of that Act, had there been sufficient proximity between the approval and the complainant.

The issue of proximity was decisive also in *Payne v Chief Executive Officer, Department for Community Welfare* (1988) 92-242.

There the complainant had been in dispute with his de facto wife about custody of their child. He took proceedings for custody in the Supreme Court of South Australia. On advice from the Department for Community Welfare he obtained an order (or request) from that Court for provision of a welfare report on the child from the Department. Reports were accordingly provided to the Court. The complainant regarded statements made about him in the reports (which allegedly caused him consequential problems with access) as discriminating against him on grounds of sex, contrary to s.39 Equal Opportunity Act 1984 (SA).

The Tribunal was satisfied it was no part of the Department's function to provide welfare reports to the public or individual members of it. Such reports were prepared only where requested or ordered by the Supreme Court and were provided to it. On this basis, there was no service provided "to" the complainant. The Tribunal held that "services" in s.39 could include only those offered to the public or a section of the public; the section was not concerned with merely consequential effects on some other person (even though they may be beneficial to that person) where there was no direct transaction connecting the provision of services with the person alleging discrimination (77,253, ibid).

Although the South Australian Tribunal apparently did not refer to the judgment of the High Court in *Waters* (supra), the reasons for its conclusion were reminiscent of the need enunciated in that case for a complainant to identify the relevant services with sufficient precision to relate them to the facts of the case and the issues which arise for determination.

In the present case the Respondent Council is a "responsible authority" within the meaning of the Town Planning and Development Act 1928

("the TPD Act") and is responsible for the enforcement of the observance of a town planning scheme (s.2 TPD Act). Under the TPD Act, town planning schemes with respect to any land have the general object of

> ".... improving and developing such land to the best possible advantage, and of securing suitable provision for traffic, transportation, disposition of shops, residence, factory and other areas, proper sanitary conditions and conveniences, parks, gardens and reserves, and of making suitable provision for the use of land for building or other purposes and for all or any of the purposes, provisions, powers or works contained in the First Schedule."

The First Schedule to the TPD Act sets out such matters in comprehensive detail.

As a local authority the Council is also responsible for preparing and giving effect to a town planning scheme not in conflict with the Metropolitan Region Scheme (s.35 Metropolitan Regional Town Planning Scheme Act 1959).

In discharge of that responsibility the Council has adopted a scheme entitled "City of Perth City Planning Scheme" (1985), the objects of which include -

> "(a) To classify and zone land within the Scheme Area for use for the purposes described herein;
>
> (b) To set aside land for use for recreational, public and other similar purposes;
>
> (c) To promote and safeguard the health, safety, convenience and general welfare of the inhabitants of the Scheme Area;
>
> (d) To preserve, enhance and extend the amenities of the Scheme Area and to enable the use and enjoyment thereof to be intensified;...
>
> (e) ...
>
> (f) To foster and control development of land within the Scheme Area;
>
> (g) ... "
>
> (Cl.5, "City Planning Scheme", Planning Department, Perth City Council, Second Edition, December 1990.)

Taking the "broad view", there can be no doubt that in administering a town planning scheme within its municipal area, regulating the use of land to the best possible advantage, securing provision for traffic and the other factors mentioned in s.2 TPD Act and clause 5 of the City Planning Scheme, and generally implementing or enforcing measures

directed to the amenity of the area, the municipality of the City of Perth is providing a service to residents. In this context, the exercise of a discretion to give planning approval to allow the use of premises for a particular purpose in a specific locality is part of that service and is itself a "service" within the meaning of s.4(1) of the Act. The statutory definition is inclusive, not exclusive, and where it is reasonably capable of having a sufficiently wide meaning to encompass a situation which would prima facie advance the objects and purposes of the Act, that interpretation is to be preferred (see eg *N M Superannuation Pty Ltd v Young & Anor* (1993) 113 ALR 39).

The application by PLWA and its refusal by the Council was an actual transaction or dealing sufficiently proximate to the Complainants (*Henderson, Woods* and *Payne* supra) and the approval was far more than a "mere permission", of the type under consideration in *Kassam* (supra). It was first an incidental part of a town planning service provided by the municipality and the Council to and for the benefit of the residents generally. Secondly, the administrative process whereby the Council afforded PLWA (and through it, the individual Complainants) the means of applying for and obtaining the grant of a discretionary approval to enable it (and them) to use premises for a particular purpose in a specific locality which was part of a physical environment regulated by the Council, was in itself properly characterised as the provision of a service to PLWA and the Complainants.

Argument that the *Equal Opportunity Act* cannot be a fetter on democratic representation.

Counsel for the Respondents next turned to what he referred to as "the impact of the Equal Opportunity Act on the Council's statutory powers". This submission had its evidentiary foundation in the proposition that some Councillors had voted against approval of the Centre because the ratepayers opposed it. The contention was that s.66K of the Act should be construed either so as not to apply to the exercise of the powers of the Council to determine an application for planning approval under the City Planning Scheme, or at least so as not to affect the power (or duty) of councillors to decide such an application in accordance with the views of their constituents.

It is of course true that the concept of representative government

> "...denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives"
>
> (*Australian Capital Television Pty Ltd v The Commonwealth* [1992] 66 ALJR 695, per Mason C J at 703.)

and that elected representatives at any of the three tiers of government in Australia, exercise

> "powers of government [which] belong to, and are derived from, the governed"
>
> (*Nationwide News Pty Ltd v Wills* [1992] 66 ALJR 658, per Deane and Toohey JJ at 680.)

but that is not to say the elected representatives are necessarily under a duty to vote in accordance with the views of their constituents - or even a majority of their constituents.

There is no reason in principle why s.66K of the Act should not be construed to apply to the exercise of Council powers; and, indeed, the clear intention of Parliament that the prohibition of unlawful discrimination should extend to State and local government authorities (as manifested, for example, in s.4(1), definition of "services", para (e); and s.6 - the Act binds the Crown) indicates that it must be.

To construe s.66K in that way does not improperly fetter nor restrict the right of councillors to have regard to the views of their constituents when voting; it would mean no more than that when so voting they must not do so on the ground of impairment of another in circumstances which would otherwise be unlawful under the Act. A councillor may not escape liability for an unlawful act by asserting that he or she was acting in accordance with the wishes of ratepayers. Elected representatives have no mandate to breach the law merely because their constituents (or some of them) may wish them to do so.

If ratepayers wanted a councillor to act in a particular way for a reason which was uncontestably unlawfully discriminatory, and the councillor did so act solely out of deference to the ratepayers' wishes, but being aware of their reason, there can be little doubt that the councillor's own act, in those circumstances, must itself be held to be

done on that discriminatory ground. Any other conclusion would negate the clear policy, purposes and intendment of the Act.

Reasons for decision of a collegiate body.

We now turn to an argument raised on the Respondents' application to dismiss the complaints at the close of the complainants' case. It turns on how one determines the reasons for decision of a collegiate body.

The contentions of the parties on this issue are briefly outlined in the ruling of the Deputy President (*DL (representing the members of People Living With Aids (WA) Inc & Ors v Perth City Council & Ors* (supra)) at 79,014-5). The Deputy President on that occasion concluded that -

> "...in this respect all that must be shown to establish an act of unlawful discrimination under section 66K of the Act is a causal connection between the alleged discriminatory act and the impairment of the Complainant. It is not necessary to show a purpose nor intent to discriminate. It will be enough if the complainant's impairment is shown to be "the true basis" for the relevant act or decision (or at least partly so - see section 5 of the Act)."

and on that basis -

> "...the essential matters which the Complainants would have to establish to succeed, are that -
>
> (1) the giving of planning approval is a "service" of the Council;
>
> (2) the Council refused to provide that service to the Complainants;
>
> (3) there was a causal connection between the impairment of the Complainants and the refusal;
>
> (4) in making the refusal, the Council treated the Complainants less favourably than in the same circumstances (or circumstances that are not materially different) it treated (or would treat) a person who did not have such an impairment."
>
> (p.79,016, ibid).

In the Supreme Court, Anderson J held this conclusion to be correct. His Honour said -

> "Putting to one side for the moment the reference by the learned Deputy President to the effect of s.5 of the Act, I do not consider any error of law is revealed in the cited passage. The sense in which the term 'causal connection' is used is made clear, that is, that it must be shown that the true ground of the alleged discriminatory act was in fact impairment, and that in determining the existence of that as the true ground a subjective intention to discriminate on that ground need not necessarily be proved. In my opinion that is the approach that is called for by s.66A in considering whether an

act of discrimination is proscribed by s.66K. A complainant need not show that the discriminator had set out to discriminate. It is sufficient that the less favourable treatment of the aggrieved person was based on the relevant consideration - in this case, impairment. It would be sufficient in this case, therefore, if the refusal to grant planning approval for the daytime drop-in centre was because the applicant or applicants for that approval suffered from the AIDS virus. *Department of health v Arumugam* (1992) EOC 92-195; [1988] VR 319 AT 327; *Australian Iron and Steel Pty Ltd v Banovic* (1992) EOC 92-271; (1989) 168 CLR 165 at 176; *Waters v Public Transport Corporation* (1992) EOC 92-425; (1992) 173 CLR 349 at 359-360, 400, 402."

(*City of Perth & Ors v DL, Representing the People Living with AIDS (WA) Inc* (supra), at 79,336.)

Thus, it is the ground or reason for the decision, not the motive or intention of the alleged discriminator, which is the crucial issue.

However, it is still necessary to consider how the "true ground" for the decision of the Council as a collegiate body, is to be ascertained. Anderson J thought there was "much support in the cases" for the Respondents' proposition that in judging the quality of the administrative act of the Council, it is necessary to judge the conduct and motivation of the councillors whose votes gave rise to the administrative act, although his Honour added that even if that be so, it does not mean objective and circumstantial evidence of the motives etc of the individual councillors is to be disregarded (ibid, at 79,337).

Mr Douglas reiterated his argument that the true ground for the Council's decision to refuse the application can be identified only by reference to the ground(s) on which each of the thirteen individual councillors voted to refuse it.

Given that, he said it is then necessary to determine <u>how many</u> of the 13 councillors who voted to refuse the approval, must have done so on the basis of a particular (discriminatory) ground for that ground to be imputed to the Council (and hence the municipality). In essence, his contention on behalf of the Respondents was that such a ground could not be imputed to the Council in the circumstances of this case unless every one of the 13 councillors voted on that ground.

In *In re the Mayor of the City of Hawthorn ex parte The Cooperative Brick Company Limited* [1909] VLR at p.51, Cussen J thought that where bad faith in the making of a council decision was concerned (of which there was no evidence in that case), it must

> "at least be necessary to show that the improper motive was the sole or dominant one, and that but for it a majority would have voted against adopting the by law."

That statement was obiter and was followed immediately by the observation that the furthest the Court could go would be to look at the object and effect of the by-law as indicated by its terms and possibly applying that in a general way to the existing state of legislation and the condition of things existing in the locality. In the light of later authorities and the modern approach to the question of vires and bad faith, his Honour's second observation at least would seem now to be too restrictive.

In dismissing an appeal from the Supreme Court of New South Wales granting permanent injunctions against the Sydney Municipal Council preventing it resuming land to extend Martin Place, the Privy Council based its judgment not on the "purpose" disclosed by the actual administrative act (the decision to resume) considered in relation to the existing state of things in the locality, but upon the purpose which the evidence disclosed to be in the minds of the councillors who acted (*Municipal Council of Sydney v Campbell* [1925] AC 338). That case does not assist the resolution of the precise point with which we are here concerned as there was no discussion about how many councillors would have to have acted for an extraneous or wrong purpose; that was probably because it seems clear all of them had.

Similarly, in *Arthur Yates & Co Pty Ltd v The Vegetable Seeds Committee & Ors* [1946] 72 CLR 37 the essential question was whether or not the motives and purposes of the Committee could be examined at all in determining whether regulatory orders made by it were invalid as having been made in bad faith. The High Court held that they could. There was no issue as to how many Committee members had to have acted in bad faith because the allegation was that the orders had been made to preserve the financial interests of the Committee itself. There was no suggestion that any member of the Committee had acted for any other purpose.

The question whether or not a local authority has acted in good faith in exercising its statutory town planning powers is primarily one of fact. In determining that question, the motives of individual councillors are generally not material. That is because the motives

which might actuate the words or actions of the various councillors in relation to the planning scheme do not necessarily reflect the purpose of the scheme itself (per Gillard J in *Matthews & Ors v City of Ringwood & Ors* (1986) 60 LGRA 175, 182 and 183). However, it is clear from *Matthews* that the motives of individual councillors may be material depending on the circumstances, and such motives must be considered in relation to the whole of the evidence (ibid, at 183).

That approach was reflected in *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446 in which one aspect of an attack on a town planning resolution limiting residential apartment buildings to a maximum height of three storeys, was that the resolution was invalid as not having been made bona fide. Both parties apparently agreed that in relation to this issue the trial Judge (Wootten J) should have regard not only to the terms of the resolutions themselves, but also to the past history of the consideration of the matter and to the reports of council officers. Although there was argument about whether his Honour should have had regard to what was said at Council meetings, or to matters which might affect the vote of individual councillors or reflect individual states of mind, Wootten J allowed such evidence to be led.

As to that, his Honour said (at 484-5 ibid) -

> "...It is not hard to imagine situations in which the most cogent evidence could be available of blatant conspiracies to abuse the powers of collegiate bodies, yet that evidence would not be admitted under the rules as they have sometimes been stated. I was referred to *Ku-ring-gai Municipal Council v Edwards* (1957) SR (NSW) 379; 74 WN 93; *Baiada v Baulkham Hills Shire Council* (1952) 87 WN (Pt 1) (NSW) 222 (n), at p.228; *Tooth & Co Ltd v Lane Cove Municipal Council* (1967) 87 WN (Pt 1) (NSW) 361; and *KCR Pty Ltd v Orange City Council* (1968) 16 LGRA 153. Despite the criticism by Else-Mitchell J (1968) 16 LGRA 153 at p.157, in the last mentioned case of the decision of Street J, as he then was, in *Tooth's* case (1967) 87 WN (Pt 1) (NSW) 361, I respectfully agree with his Honour's decision. If, one says, as in *Baiada's* case (1952) 87 WN (Pt 1) (NSW) 222 (n) at p.228, that "the corporate mind can only be read in the corporate resolution and action", corporations would be largely immune from judicial control of administrative abuse. Corporations must be held responsible through those who act on their behalf, whether an act is performed by one person or by a number. Doubtless there may be problems of mixed motives as between individuals, as indeed there often are within an individual, but it is better for the courts to grapple with the true facts, however difficult this may be, than to shut out the realities of corporate action by arbitrary rules of evidence.
>
> This case was argued in terms of council's desires, council's intentions, council's purposes, council's motives, council's beliefs and council's mind, and I will use these terms as courts have always done; as convenient shorthand for the conclusions I draw from a consideration of the processes which led to the council's decisions. Most of the material is in the form of reports of council officers, which, in the absence of any indication to the contrary, may reasonably be inferred to have been

> the basis of council resolutions, and, therefore, supply a basis for attributing to the council the intentions, purposes, motives, beliefs and state of mind revealed therein."

Thus, even when what is in issue is whether or not the act or decision of a local authority is within power, it is clear one is not confined to an examination merely of the act itself or the terms of the decision in the context of the objective circumstances, but may examine whatever matters may evidence the purpose or motives etc of those who contributed to the doing of the act or the making of the decision. That has not been a problem in this case: no one has suggested otherwise.

The recognition by Wootten J that a corporate body, just as much as an individual, may act out of mixed motives, is important, particularly if s.5 of the Act has application here.

The Respondents relied upon *Jones v Swansea City Council* [1990] 3 All ER 737 to support their contention that the Complainants must prove that each and every councillor who voted to refuse the application for approval did so on a relevant discriminatory ground. But that case turned very much on its own facts. The plaintiff had sued the Swansea City Council for misfeasance in public office, claiming that all the Labour Party councillors who voted for the impugned resolution were motivated by a desire to damage her and her husband and that they all bore a grudge against him. That was the way the plaintiff had pleaded her case and the way her case was presented at trial. The evidence was deficient. The plaintiff led evidence of express malice only by the leader of the labour group and one other councillor. Since the plaintiff's pleaded case was that <u>all</u> the Labour councillors who voted for the resolution were infected by their leader's malice and that had not been proved, her case was bound to fail even if malice were proved against the leader. The House of Lords considered that conclusion to be correct and dismissed the appeal.

Speaking generally, Lord Lowry said -

> "...if a plaintiff *alleges and proves* that a majority of the councillors present, having voted for a resolution, did so with the object of damaging the plaintiff, he thereby proves *against the Council* misfeasance in a public office." (p.741, ibid)

In the circumstances, of course, that comment was obiter and was likely intended more to indicate his Lordship's view that the plaintiff had pleaded her case too high, than as a considered statement of how many councillors the plaintiff would have to show had a wrongful

purpose before that purpose could be attributed to the Council. Further, it is not clear from the comment whether Lord Lowry was suggesting that all of the councillors who voted for the resolution (and comprised the majority whereby it was passed) had to be shown to have the wrongful purpose; or whether he meant it would be sufficient to demonstrate it in a majority of those who voted for the resolution. The former is more likely. It is also consistent with the approach which has been taken in Australia towards the determination of the question whether a corporate decision made by directors of a company is vitiated by breach of their fiduciary duty. Thus, the decision of directors to make a takeover offer for another company was held to be invalid because a majority of them was activated by improper purposes and so the offer was made in breach of their fiduciary duty in *Southern Resources Ltd v Residues Treatment and Trading Co Ltd* (1990) 3 ACSR 207; and see also *The Queen v Toohey, ex parte Northern Land Council* (1981) 151 CLR 170, per Aickin J at 265.

In *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 the Council had entered into a contract with a developer for reclamation of a bay for private housing, against strong ratepayer objection. There was an election, after which a majority of the newly-elected Council were opposed to the development. The Council later revoked approval of the scheme in principle and made other decisions having a detrimental affect on it. The developer treated all that as repudiation and sued the Council for breach of contract. The trial Judge upheld the developer's claim. The Council's appeal against that decision was dismissed.

Even though in that case the resolutions of the Council spoke for themselves, Cooke and Quilliam JJ could see no reason why the Court should look at them in a vacuum, shutting its eyes to evidence of what motivated councillors. They mentioned references by Courts "of high authority" to evidence of what has been said by individual members, in order to ascertain the purposes of the body as a whole (at p.26, ibid) warning that care has to be taken in evaluating the reliability and cogency of this sort of evdience, and adding -

> "And here it has to be remembered that the question is whether a finding can fairly be made as to the purposes of the Council as a whole, or at least a majority of the Council. Obviously expressions of individual opinions may not be representative" (p.26, ibid) (emphasis added).

Again, the reference to "... a majority of the Council" was almost incidental, and obviously founded on the principle that a collegiate body can act or make decisions only through a majority vote.

Very much the same factual situation arose in *Camberwell City Council v Camberwell Shopping Centre Pty Ltd* (1992) 76 LGRA 26. Against considerable ratepayer opposition the Camberwell Council resolved to enter into a joint venture development agreement with a developer. The Council comprised 12 members; 8 voted in favour, one abstained and three voted against. The matter became a major issue at the next Council elections, after which four new members were elected. They were all members of a group opposing the development. They combined with the three who originally opposed it to form a new majority on the Council. They used their majority to cause the Council to make certain decisions evidencing an intention to renege on the contract. All this continued over a period to the next elections, when five new councillors were elected, so that all 12 were then oppositionists. The Council subsequently resolved to withdraw from the development, asserting that it was "not in the best interests of the City of Camberwell and its ratepayers". The developer succeeded in an action against the Council for breach of contract. That decision was upheld on appeal to the Supreme Court of Victoria (Appeal Division).

The appeal court found compelling, the conclusion that the Council withdrew because, since its change in composition, it no longer supported the proposal, and not because it was persuaded to do so by objections. Marks and Gobbo JJ stated -

> "The findings below... lead properly to the conclusion that after elections the Council proceeded on an opposite footing from that on which the agreement was made and after searching about, alighted upon a strategy for stopping the development to which it was contracually committed." (p.49, ibid).

It was not necessary to consider what the position might have been had less than a majority of councillors voted to withdraw (because in that event, of course, the decision of the Council would have gone the other way). Nor was it necessary to consider the situation had only some members of the majority voted for some improper purpose. The decision to withdraw, for whatever reason made, was a breach of the Council's contractual obligations. The only observation pertinent to this issue was made by Teague J at first instance, when he said -

> "I am satisfied that it would suffice for breaches of the agreement to be evidenced in the actions of the seven councillors other than those elected in February 1989, they being the majority of the decision makers at all relevant times, in all relevant contexts"
>
> (*Camberwell Shopping Centre Pty Ltd v The Major, Councillors and Citizens of the City of Camberwell* (unreported) Supreme Court of Victoria no. 9912 of 1990, 6/8/91, at p.67.)

Ms Andrews relied on *James v Eastleigh Borough Council* [1990] 2 All E R 607, although admittedly not for any purpose directed to the determination of the motive or intention of a collegiate body, but rather in support of her argument that in this case that exercise is unnecessary because a complainant does not have to prove a respondent intended to discriminate. Whilst that argument is correct as far as it goes, it does not address the problem of how to determine "the true ground" upon which the Council (and hence the municipality of the City of Perth) acted. Nor does *James v Eastleigh Borough Council* assist in that respect. There was no dispute about the Council's motive or purpose in that case: it was not to discriminate between men and women but simply to provide free swimming to pensioners. The decision had a discriminatory effect only because the pension itself was discriminatory. Women were eligible for it at age 60; men were not eligible until they attained 65 years of age. The consequence therefore was that because of the difference in pensionable age men and women were treated differently when they visited the Council's swimming pool. The House of Lords held the Council to be guilty of unlawful discrimination notwithstanding it had no intention to discriminate.

As Wootten J noted in *Dunlop v Woollahra Municipal Council* (supra), just as there may often be problems of mixed motives between individuals, so there may often be within a single individual. Where questions of mixed motives or purposes arise, the tendency has been for the Courts to consider whether the wrongful purpose was a "dominant", "substantial" or "causative" purpose.

Dealing with a case in which an allotment of shares was challenged as invalid as made for an impermissible purpose, Mason, Deane and Dawson JJ expressed the approach this way -

> "In this court, the preponderant view has tended to be that the allotment will be invalidated only if the impermissible purpose or a combination of impermissible

> purposes can be seen to have been dominant - "the substantial object" (per Williams ACJ, Fullagar and Kitto JJ, *Ngurli Ltd v McCann* at 445 quoting Dixon J in *Mills v Mills* at 186 and see *Harlowe's Nominees* at 493): "the moving cause" (per Latham CJ, *Mills v Mills* at 165). The cases in which that view has been indicated have not, however, required a determination of the question whether the impermissible purpose must be "the" substantial object or moving cause or whether it may suffice to invalidate the allotment that it be one of a number of such objects or causes. As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, "the power would not have been exercised" (per Dixon J, *Mills v Mills* at 186)."
>
> (*Whitehouse & Anor v Carlton Hotel Pty Ltd* 70 ALR 251, 257.)

Bearing in mind the nature and objects of this legislation and acknowledging the distinction between the need for a majority of votes for there to be a decision of a collegiate body on the one hand and the possibly mixed motives or purposes which may lead either an individual or a collegiate body to make a particular decision, on the other, it would seem logical and appropriate that a complaint of unlawful discrimination could be made out against a collegiate body if it were shown that the relevant discriminatory ground was a substantial ground, ie causative in the sense that but for its presence the decision would not have been made nor the act done.

Applying that to the present case, where the approval was refused by 13 votes to 12, every one of the majority votes was decisive. Thus, if even one councillor voted on the relevant unlawful discriminatory ground, his or her vote (and hence the discriminatory gound) would have been causative in the sense described above, because without it that decision would not have been made.

To attribute the unlawful discriminatory ground to the Council in these circumstances would be no more "unjust, irrational (nor) capricious" (to use Mr Douglas' words) than to attribute unlawful discrimination to an individual who acted for a number of reasons, only one of which was discriminatory, but where that reason was causative in the sense described above.

In reaching this conclusion we are mindful of the difference between participative responsibility for a collegiate decision on the one hand, and collective responsibility for a group decision on the other. As noted, the first question it is necessary for us to decide is what was the true ground for the decision of the Council. The answer to that

question turns entirely on an analysis of the grounds upon which the individual councillors acted, in the context here that those who acted on the relevant discriminatory ground bear an individual responsibility (that is, without their participation the decision would not have been the same). They may or may not bear personal legal responsibility, depending upon other considerations to which we turn later. The concept of "collective responsibility" on the other hand, is much more vague and in effect says no more than that those who are members of an executive body have a collective responsibility for the decisions of that body. It is a political concept rather than a legal one.

Section 5 and "by reason of"

That brings us to section 5 of the Act. As originally enacted in 1984, that read -

> "5. A reference in Part II, III or IV to the doing of an act by reason of a particular matter includes a reference to the doing of an act by reason of 2 or more matters that include the particular matter, whether or not the particular matter is the dominant or substantial reason for the doing of the act."

In 1988 the section was amended to include references to Parts IV (discrimination on religious or political conviction) and IVA (discrimination on the ground of impairment) (Equal Opportunity Amendment Act, no. 40 of 1988, s.7).

In 1992 references to Parts 11A (discrimination on family responsibility or family status) and IVB (discrimination on the ground of age) were added (Equal Opportunity Amendment Act no 74 of 1992, s.7).

By section 40 of no 74 of 1992, the principal Act was also amended by deleting the expression "by reason of" and substituting for it the words "on the ground of" in each of s.5, s.8(1), s.9(1), s.10(1)(a) and s.66A(4). The amendments effected by no 40 of 1992 came into operation on 8 January 1993.

Between January and March 1990 then, the statutory situation was that section 5 of the Act referred to the doing of an act "by reason of" a particular matter, whereas (with only a single exception) sections 66A and 66K referred to the doing of an act "on the ground of" the impairment of a person.

Mr Douglas therefore argued that section 5 has no application to this case.

Ms Andrews, however, urges the Tribunal to accept that the ordinary meaning of the words "by reason of" includes "on the ground of" and that meaning must have been intended because (as at 1990) the expression "by reason of" did not appear at all in Parts III and only once (in s.66A (4)) in Part IV.

Against this, Mr Douglas pointed to the fact of the 1992 amendment and contended it indicated the Legislature obviously saw a difference in meaning between the two expressions, and that the unamended s.5 had to be read and applied strictly.

Once again, taking the interpretation the Tribunal regards as both reasonable and that most likely to promote the objects of the legislation, it is the view of this Tribunal that s.5 as it stood in 1990 is to be read in the way advocated by Ms Andrews.

Having reached this conclusion though, it is necessary to appreciate that "the act" to which s.5 refers is the alleged act of unlawful discrimination - which in this case is the act of the Council in refusing planning approval to PLWA. The section has no application to the individual councillors (at least not in the context of dealing with the complaint against the City of Perth). What it does mean is that just as an individual may, so a Council may act for mixed motives or reasons, and if one of them is unlawfully discriminatory (whether or not the dominant or substantial reason) that will suffice for the purposes of the Act.

This reinforces the view already expressed as to the nature of the decision-making process. The discriminatory ground acted on by any one of the majority councillors in the circumstances of this case would be an operative ground for the purposes of the Act even if other councillors acted on quite proper grounds. It is the same as saying that an individual acted on a number of grounds, only one of which was unlawfully discriminatory - he or she would still be held to have acted "by reason of" (or "on the ground of") the discriminatory ground, by virtue of s.5.

concerns genuinely held. That is a matter of fact which first has to be determined on the evidence.

Mr Douglas though, did actually put the argument higher than being based only on matters such as traffic, extent of use and the like. His submission extended to the assertion that it would have been proper for residents (or councillors) to object because of the perception there would be an increased health risk based on "the increased number of used syringes".

To the extent the submissions on behalf of the Respondent went so far as to explicitly or by implication include within "the same characteristics", concerns about possible infection, potential use by intravenous drug users, disposal of used syringes etc, then the Tribunal would accept Ms Andrews' submission that those are the very characteristics which are said to have been imputed to the complainants as a consequence of the impairment and that to adopt such an interpretation would be to give the section too narrow a meaning.

The Evidence

We do not propose to repeat the evidence here (although we have of course had regard to all of it), but rather to set out our findings and conclusions in respect of each of the individual councillors. It is, of course, necessary to do that to determine the position of the City of Perth itself.

The complainants and their witnesses gave considerable evidence about the nature and purposes of the proposed Centre, the reactions of local residents and others, the media campaign which was obviously waged by both supporters and opponents of the proposal, and the course of events generally. There is no dispute about most of that. The crucial issue is what was the true ground for the opposition of those councillors who voted against the application. On that issue, the evidence adduced on behalf of the Complainants tended to be characterized by vagueness and generalization.

There is no doubt the Complainants perceived much (if not all) of the opposition to the PLWA application as being rooted in discriminatory

"In the same circumstances"

Counsel for the Respondents next submitted that a complainant has to establish first that an alleged discriminator "was actuated by" a discriminatory ground and secondly, that that person would not have acted the same way had the discriminatory ground not been present. The second contention was founded on the meaning of the words "in the same circumstances", in s.66A(1).

The first point has already been dealt with. What is required is proof of a causal connection in the sense that it can be said the complainant was treated less favourably because of his or her impairment; liability does not depend upon proof of an intent to discriminate (Anderson J in *City of Perth & Ors v DL, Representing the People Living with Aids (WA) Inc* , supra, at p.79,336 and the authorities there cited).

The second contention as put to this Tribunal appears to have been put somewhat differently to a "similar circumstances" argument advanced before Anderson J on the appeal from the interlocutory ruling refusing to dismiss the complaints. Referring to that, his Honour said -

> "...I do not believe it can be correct to make the comparison required by s.66A by including in the 'circumstances' the very matters alleged to ground the discrimination. That is to say I do not think it would be correct to ask whether the applicant for planning approval in this case has been treated less favourably than some other applicant would have been whose presence would excite the very same fears, prejudices or emotions. That approach would give the word "discriminates" in s.66A too narrow a meaning."
>
> (P.79,337, ibid).

Before the Tribunal the submission was that "the same circumstances" must encompass the same concerns about amenity, traffic congestion, lack of parking, potential for intensity of use and so on as were said to be matters of concern to the councillors here. So it was put that the question is whether, had an unimpaired applicant made a similar application for approval, attended by the same consequences and problems, that applicant would have received more favourable treatment than that accorded PLWA here.

But expressing it that way really begs the question, because it assumes the expressed concerns about parking and the like, were real

views about HIV and AIDS. To the extent that was a perception of the reason for the opposition of the natural Respondents, it is a relevant consideration, although certainly in no way decisive of itself.

The only councillor called by the Complainants was Mr Keith Hayes. He was a councillor of the City of Perth from 1981 to 1990 and for almost all of that time was a deputy member of the Town Planning Committee. His evidence was essentially impressionistic. He was one who had a very definite and emotional belief that opposition to the proposal was based on the potential users of the Centre rather than the uses of it. Mr Hayes was a strong, indeed fervent, supporter of the application throughout and that was apparent from the way in which he gave his testimony. For that reason, we have felt it necessary to approach his evidence with caution and to rely upon it in the main only where it is sufficiently specific and where there is some support for it elsewhere.

Ms Katherine Nemer's involvement with PLWA began in Christmas 1985 when her then 25 year old son was diagnosed HIV positive. He died in about May 1988. In August of that year Ms Nemer went to a conference in Hobart, at which PLWA was organized at a national level. She subsequently went with some of the Complainants to meetings in Melbourne and Adelaide and then returned to Perth to help start PLWA in Western Australia. She was a member of the Steering Committee and later became Treasurer.

Ms Nemer was active in canvassing support for the Centre and was obviously very closely involved with it. She had discussions about it with Cr Scurria and Cr Salpietro, and attended the Council meetings as an observer.

Ms Nemer and the Complainant IW visited shops and businesses in the area to try to explain to people about the proposed Centre and to allay their fears and misapprehensions about AIDS.

She said they were devastated by the reactions they encountered - Mr W as an infected person and she as a mother who had just lost a son with the virus. They became distressed

> "... that people obviously thought we were so undesirable."

Ms Nemer was present at the Council meeting at which Cr. Salpietro spoke. She had previously thought he seemed sympathetic to them but she regarded what he said at the meeting, opposing the application, as a complete misrepresentation of the proposal. She felt so strongly about it that she approached him after the meeting and remonstrated with him for misrepresenting everything they had talked about.

When asked about the effect these events had on the Complainants, she replied, visibly upset -

> "It had a very detrimental effect on all of us, because right from the start - - first of all, having a landlord that would actually let us have the centre after so many let-downs from other applicants once they found what we wanted the centre for, to actually think that we would get something together because those of us, like myself, who supports other family and friends and knows the terrible fear there is for people and their lack of support because they've got - - they can't get support because of the fear. If there was somewhere they knew could go, it would make everyone's life so much easier and - - you know, after the first council meeting we - - before, you know, we sort of - - we'd really be high and happy and then we'd all be in tears and miserable, and this is what those meetings did to us. Yes, it had a very detrimental effect on all of us, and as the mother of a very beautiful young man, to have people talking about them as if they're the lowest form on earth and shouldn't have anything..."

Ms Nemer had an obvious and deep commitment to PLWA and the establishment of the Centre. She had good reason to register and remember the reactions of those with whom she dealt. We accept her evidence.

Mr Rod Pether is the City Planner for the City of Perth, a position he has held since 1983. He had been a planning officer in the Town Planning Department of the Perth City Council since 1970. He provided three separate reports on behalf of the Council's Planning Department advising the Council on the PLWA application. Each one recommended the application be approved.

When the Council considers an application such as that from PLWA, it is required to have regard to two broad questions - first, whether or not it complies with the City Planning Scheme; and secondly, whether or not in the view of the Council it should be approved having regard to the orderly planning, development and amenity of the particular area. Specifically, clause 40(1) City of Perth Planning Scheme states that -

> "The Council, having regard to any matter which it is required by the Scheme to consider, to the purpose for which the land is zoned or approved for use under the Scheme, to the purpose for which land in the locality is used, zoned or may be approved for use under the Scheme, to the orderly and proper planning of the locality and the preservation of the amenities of the locality, may refuse to approve any application for town planning approval or may grant its approval unconditionally or subject to such conditions as it may deem fit."

In this case, the major uses proposed by PLWA required the exercise of a discretion by the Council to approve them. There were a number of ancillary uses which were "as of right", but as they were incidental to the major uses they did not obviate the need for discretionary approval.

Mr Pether's first report concluded that

> "The application complies with the requirements of the Scheme, while providing an important community service. As such, the proposal has the full support of the Planning Department and approval is recommended."

In his evidence, Mr Pether explained that the requirements to which he had there referred were to do with parking. There was no specific formula for car-parking bays; all that involved was that the car-parking facilities had to be satisfactory to accommodate the proposed use. In similar vein, it was necessary to have regard to the proper planning and amenity of the area,

> "And in this instance the applicant had indicated that there would be a maximum of ten people on site, and that there would be restricted hours of operation. And on that basis, we came to the conclusion that that number of people, that number of cars, the sorts of uses that were proposed, were such that the proposal would be unlikely to have a detrimental effect on the surrounding properties."

They also took into account such factors as potential noise, traffic, proximity to residential premises and so on.

Mr Pether said a number of times that his recommendations (and those of the Planning Department) were predicated on the information contained in the applications and the assumption that was accurate. It was not for him to question that information. Councillors, on the other hand, suffered from no such inhibition. Indeed, he saw it as quite within their role and function to form a view on a particular application based on not only the information provided but also on their own knowledge, experience and expectations as to potential use of premises, traffic problems and other factors going especially to the concept of "amenity". And as he pointed out, town planning is not an

exact science, it is largely a matter of opinion - particularly about "amenity".

The Tribunal certainly accepts the very important role of councillors to question the accuracy of information put to them and to form their own individual views on matters requiring discretionary approval. In addition, the views of local residents are properly a relevant consideration, both generally and as to the perception of amenity. Nonetheless, although the discretion in any case may reasonably lend itself to be exercised in different ways and in reliance upon a range of factors, as with all statutory or administrative discretions it must still be exercised on relevant grounds and for purposes which are both lawful and within the scope and for the purposes of the particular grant of power.

Mr Pether acknowledged that councillors put many questions to him about whether there would be more than ten people on site; as he put it, a number of them were sceptical about that.

As events transpired, once the Minister had overruled the Council's decision and granted the approval, there were subsequently two further submissions from PLWA seeking an increase in the number of permitted users on site at any one time, from 10 to 25 to 35 people - and a request for an extension of the hours of operation.

He said the questionnaire which was sent out to local residents was probably initiated by the Committee. It was not a survey conducted on the AIDS issue - nor any other specific issue. Standard form letters were sent out advising of the proposal and seeking an indication whether the recipient supported or opposed it. There was a space for comments or reasons.

It is true, as Mr Douglas submitted, that the 31 negative responses to the questionnaire were divided by the City Planner into eight categories, five of which expressed parking, traffic, intensity of use and other "traditional" planning grounds, and only three of which related to concerns about AIDS. However (and excluding those in which the reasons given were ambiguous), those three "AIDS"-related categories actually comprised at least 16 of the individual responses.

The grounds of objection stated in these included reasons such as -

* "Two sons 6 and 4 - quiet and safe environment in jeopardy.
Centre attracts homosexuals, prostitutes, IV drug users - undesirables."

* "I have two small children. Would you live next door to positive AIDS patients within metres of them. What guarantee have we that we will not contract the disease."

* "No parking facilities. Children in immediate area and worry of syringes being discarded."

* "If this drop in centre was established it would be visited by drug addicts and ex-prisoners."

* "I was molested by a homosexual at the age of 12. I would not want the same thing to happen to a local child including my own. AIDS being a killer, homosexuals should be discouraged not encouraged."

* "I personally and my family will abandon the nearby Walcott Street Shopping Centre as I don't wish to purchase any items possibly prehandled by AIDS patients."

Most others were not so explicit, but were clearly referable to actual or imputed characteristics of people suffering from HIV.

There was nothing in the response to the survey (nor the petition nor the letter from the City of Stirling) which caused Mr Pether to alter his recommendation that the application be approved.

So far as the provision for parking was concerned, it was Mr Pether's view that the proportion of bays allowed for in this application (one for each proposed user of the premises at any one time) was "exceptionally high". It would be unusual for the Council to require one car-parking space for every person expected to be on site. That was not any requirement of his, although he accepted that one of his officers may have advised the applicants to provide as many parking places as they could. In his view, ten parking bays would have been adequate to cater for 25 users.

In re-examination on this issue it was his recollection that in the first application particularly there were a number of bays which did not comply with the Council's normal standards, and which would have been awkward or difficult to access.

More generally, Mr Pether adhered to the statement in his report to the Town Planning Committee meeting on 19 February 1990 that -

> "The zoning of the site allows not only the proposed use, but a wide range of commercial activities of an intensive nature. These alternative uses would have a greater effect on the amenity of the area than the proposed use."

and noted that some of the alternative uses were "as of right", that is, they did not require the exercise of the Council's discretion to approve them.

We accept it was open to the Council not to adopt the City Planner's recommendation. The decision was for the Council to make. His recommendation was no more than that - although it was a factor which one would expect would ordinarily be given some weight. Even so, there was certainly nothing wrong in principle with councillors forming a different view and acting on that. And so too, it would have been open in principle for councillors to form such a different view in this case entirely on the basis of proper town planning considerations. The Tribunal has no difficulty with any of this; but the issues here are, what in fact was the true ground of the objections of those councillors who opposed the application, and what in fact was the true ground of the Council in refusing it.

To return to Mr Pether's evidence, it is noteworthy that each of the three written reports he presented to the Council recommended approval.

Although in evidence he said several times that the fact the application stated a maximum of ten people would be using the premises at any one time and the hours would be restricted (8.00 am to 5.00 pm) were two considerations that were uppermost in his mind, we thought he was attributing much more importance to them by the date of hearing than he had done at the time. We were left with the strong view that his recommendations and support for the application in early 1990 had not in fact been as qualified by those considerations as he now, in retrospect, seemed to believe.

The concerns expressed by Cr. Scurria and others about potential use, traffic, parking facilities and the like had been advanced virtually continually from the time of or shortly after the first Town Planning Committee meeting. Mr Pether was well aware of them prior to the presentation of his second and third reports, yet they did not cause

him to change his opinion as there set out, nor even to express any reservation at all about the approval. (In this context, we should mention that we consider the recommendation in his second and third reports that approval be given initially for a 12-month period was no more than a tactic to overcome opposition to the proposal rather than as in any way indicating he personally shared the conerns being voiced.)

Overall, we thought that although Mr Pether gave his evidence honestly and carefully, he felt himself to be in a difficult situation. He was doing his best to be loyal to the Council whose officer he is, in circumstances in which he fully appreciated the sensitivity of his evidence and the issues involved. At the same time he was obviously endeavouring to respond objectively and fairly to the questions asked of him. There were occasions on which we thought he was experiencing some difficulty in accommodating each of those considerations.

The evidence he gave tended to suggest his position before the Council was less positive than his reports would indicate. In our view, the impression conveyed by those reports and the repeated recommendations for approval, despite the criticisms and concerns being then expressed by councillors and others is a more accurate reflection of his views and those of the Planning Department at the time, than might be gained from an uncritical acceptance of his testimony.

The location of the proposed Centre was in the Council's North Ward. The three councillors then representing that Ward were Councillors Scurria, Vlahos and Salpietro.

Cr Vincenzo Scurria

Cr. Scurria was first elected to the Perth City Council in 1983 and has been a councillor ever since. He was a member of the Town Planning Committee in February and March 1990 and was present at the Committee and Council meetings which considered the PLWA application. He said the first he knew of that application was when it came up for discussion at the Town Planning Committee meeting on 5 February 1990. He immediately asked questions about it. In

particular, the first application (exhibit 6) showed no provision for parking at all. Cr. Scurria said the location was a busy one and he was concerned from the outset about potential parking and traffic problems.

After the Town Planning Committee meeting on 5 February 1990, Cr. Scurria quickly set about obtaining more information about the proposal. He requested more detail. He went to the Town Planning Department. He obtained a photocopy of the plan. He discussed it with the Town Clerk.

Some time later PLWA presented a revised application which was received by the Council on 26 February 1990. This did show ten proposed parking bays.

Cr. Scurria obtained a copy of the second PLWA application a few days after it was received by the Council. He went to the premises and made a physical inspection. He measured the area.

He testified that two bays were marked on the plan in an area in which there were in fact steps and a barbecue and which sloped so steeply it would have been necessary to put in a retaining wall and landfill. Two bays were shown as being in a lock-up garage. An area at the rear of the premises designated to accommodate two bays would have been too small for the purpose. According to Cr. Scurria, of the ten designated parking bays, he considered only three to be proper or practical.

He was also concerned about possible intensity of use. The actual premises were about 352m^2 and he thought could have allowed use by 30 to 40 people at once. The first application had mentioned a barbecue facility in the backyard. Cr. Scurria thought that if a barbecue function were held there could be 150 people on the premises.

Cr. Scurria presented a list of questions to the Town Clerk and they, with the answers, were recorded in the minutes of the Council meeting of 19 March 1990, as answers to questions on notice.

Rather than attempt to merely summarize or state the effect of them, we think the real flavour of the situation as it then was can best be conveyed by setting the questions and answers out as they appear in the minutes.

"Questions of which due notice has been given without discussion

Cr. Scurria - Aids Drop In Centre, 257 Walcott Street, North Perth.

Q1. Why has Town Planning Department refused to give me information on the plan for the Centre before the last Full Council meeting?

A1. It has been the Town Planning Department's policy not to copy plans submitted with development applications. It was on the City Planner's instruction that the officer advised Councillor Scurria that a copy of the plan could not be provided. Following a discussion in the Town Planning Committee this policy has been amended to enable Councillors to be provided with copies of applications and attached plans. Any inconvenience caused to Councillor Scurria is regretted.

Q2. Why was I refused to take notes from this plan after I eventually got permission to see the plan?

A2. At no time was Councillor Scurria refused permission to see the plan. The officer, who is a junior member of staff, was being cautious when he denied Councillor Scurria permission to take copies of details of the plan - this was an unnecessary precaution. Any inconvenience caused to Councillor Scurria is regretted.

Q3. With this proposal, the applicant was told to keep a low profile, information about the proposal is either refused or reluctantly given, whereas before full cooperation existed with all departments. Why?

A3. The Planning Department did not advise the applicant to keep a low profile. Information about the proposal was never refused but the answers to questions 1 and 2 explain the Department's position. The Planning Department always attempts to give full cooperation to Councillors.

Q4. At the lst Full Council meeting a statement was made that the proposal complied with the City Planning Scheme. Does it or does it not?

Q5. I believe it does not, but it may be possible that this proposal can be passed at the Council's discretion. So it seems that the statement that was made is incorrect. Why was this incorrect statement made?

A4&5 The City Planning Scheme does not specify parking requirements for uses such as this and therefore the use of the word "complies" in the City Planner's report was not entirely correct. The setbacks, plot ratio and other normal development requirements comply with the City Planning Scheme; the proposed uses can be approved under the Scheme and as no parking standard is specified approval of the proposal requires a Council discretion. In the City Planner's opinion, the proposal satisfied the Scheme's requirements and it was on this basis that the statement was made.

Q6. If this application is approved at the Council discretion, the usage of the Centre is not only for daytime, Monday to Friday, but as envisaged by the applicant for extended night time hours, including weekends. Why was this not included in the Town Planning report at the last Council's meeting?

A6. The submission accompanying the application stated the hours of operation to be "Monday to Friday 8.30 am to 5.00 pm with a view to extending services to cover weekends and evening'. This document contained six typed pages and was available to the Town Planning Committee. It was not considered appropriate to repeat the text of the document in the Department's report.

Q7. What is the clear definition of usage for the proposed Aids Drop In Centre?

A7. The City Planning Scheme does not specifically define an Aids Drop In Centre. The Scheme does, however, define most of the separate uses proposed in the application, for example, recreation, office, day nursery.

Q8. In the submission for this application space and resources are required for approximately 300 m^2. Do you agree with me that with that sort of space and the amount of resources needed, it is possible to accommodate about 150 to 200 persons?

A8. Depending upon the nature of the uses proposed it is agreed that the total floor space included in this proposal could accommodate a considerable number of people. It could conceivably accommodate the 150 to 200 people suggested.

Q9. What guideline or policy has been used to provide parking?

A9. As noted in the answers to questions 4 and 5, the City Planning Scheme does not contain specific parking requirements for this use. On the basis of the information contained in the application that a maximum of ten people would be on the site at any one time the Planning Department believes that ten parking spaces is adequate.

Q10. By normal standards any venue anticipating an attendance of between 150 to 200 persons is required to have between 50 to 70 car bays. Is this correct?

A10. The City Planning Scheme requirements for places of Public Assembly varies from one space for every 2.0 square metres to one space per six seats. On that basis this statement has some validity.

Q11. Do you agree with me that it is impossible to create 50 to 70 car bays on the proposed property?

A11. Yes. Without extensive and expensive construction works.

Q12. As I understand with the proposed usage of the Centre, the Health Department has to be consulted. Has this been done? If not, why not?

A12. The Health Department is represented at the Development Control Group Meeting which views all planning applications. This application was discussed by the Development Control Group and was specifically referred to the Health Department. Plans were signed by Acting City Health Survey on 15.2.90 - Cr. Scurria was informed at the time that the Health Department had not been consulted. In fact, this was not correct.

Q13. The application has been misrepresented to the Council and contained many errors and had omissions. Is it fair to say, that this is very peculiar?

A 13. As noted in the answers of questions 4 and 5 above, the City Planner's report on the original submission was not entirely accurate. It cannot, however, be accepted that there were many errors and omissions. The Planning

Department always attempts to present matters to the Council accurately and fairly.

Q14. Do you agree with me that the ratepayers in the affected area have a right to know the full and concise details about this proposal?

A14. The ratepayers in the affected area do not have a statutory right but it is agreed that it is reasonable that they should be fully informed and be given an opportunity to comment. This consultation has of course taken place."

Cr. Scurria said he discussed the application with Crs. Salpietro and Vlahos. He thought it was he who requested there be a survey of ratepayers. When asked what reasons were given by those ratepayers who objected to the Centre, he recalled mention of parking, noise, traffic and property values. He gave no regard to that last consideration, he said, because he was not qualified to comment on that. Likewise he thought himself not qualified to comment on the objection that syringes might be left lying around. He expressed it this way -

"I'm not going to comment because I'm not qualified for that either. I never comment that, I never mentioned to full Council, I never debate that, I never discussed that."

He insisted the AIDS factor had not influenced him at all. He would have supported the application had it complied with the Town Planning Scheme and the Public Health Department, but it did not comply and so he did not support it.

He said he had told that to representatives of PLWA when he was approached by them after the first application had been received by the Council. His particular concern was the parking. If premises with an area of 352m^2 were to be approved, there would be far more users than could be satisfactorily catered for by 10 parking bays.

Cr. Scurria prepared notes for his speech to the full Council meeting on 19 March 1990 (exhibit 9). That was his usual practice. He gave copies to the City Planner, the Town Clerk and the media. What he actually said at the Council meeting came from those notes. There was no mention of AIDS nor any AIDS-related considerations.

He emphatically denied that the town planning reasons he had consistently advanced as the basis for his opposition to the Centre were in any way a "cloak" for reasons to do with AIDS, and insisted

that his attitude towards it would have been exactly the same had the application been made by any other group.

Cr. Scurria agreed that he may have spoken to Cr. Hayes about this application, but did not tell the latter that he would oppose it on the AIDS issue.

He concluded his evidence in chief with the answer that nothing said by either Cr. Nattrass or Nairn in the course of the debate on 19 March 1990 affected his vote in any way.

It is quite apparent from the evidence as a whole that certainly from about early February 1990 the PLWA application generated considerable public interest and media attention. Most of that had to do with AIDS-related issues (from both supporters of and those opposed to the Centre). It is inconceivable that councillors were not aware of the level of media and public interest, and we have no doubt the three Ward Councillors were particularly influenced by it.

The evidence also establishes that Cr. Scurria was personally particularly active in relation to this matter.

When the application first came before the Full Council on 15 February 1990 the Town Clerk formally pointed out that legal advice had been received drawing Council's attention to amendments to the Act making it unlawful to discriminate on the ground of impairment and that the PLWA application could well raise that issue. He added that the legislation enabled reasons for decision to be examined and if they were in fact unlawfully discriminatory, a claim of discrimination could be made. (According to Mr Prince, a similar warning had previously been given by Cr. MacTiernan at the Town Planning Committee meeting, and Cr. Watters also mentioned she had obtained legal advice to the same effect.)

It was after this meeting on 15 February that Cr. Scurria went to the premises to inspect and measure them.

Cr. Scurria's evidence - and his cross-examination in particular - was notable for his absolute insistence that throughout his involvement in this matter he entirely disregarded the AIDS issue and did not allow it

to affect nor influence him in any way at all. He was extremely quick to detect any line of questioning which might have led to some suggestion that he personally was influenced by the HIV or AIDS status of the members of PLWA or that he was influenced by the objections of ratepayers founded on such concerns, and just as quick to reiterate what he said were problems of parking, noise, number of potential users and other considerations going to the amenity of the area.

We formed an unfavourable view of Cr. Scurria as a witness. It was our impression that he had an acute perception of the need to avoid saying anything which could have indicated that AIDS was a factor in his response to the application and that he consciously and deliberately tailored his evidence with that in mind. We are unable to place any reliance upon the accuracy of his testimony, and indeed, we positively disbelieved him.

We are mindful, however, that if a witness is disbelieved about a particular matter, that does not necessarily mean the opposite is true. Nonetheless, it may be open in an appropriate case to have regard to such a view, in combination with other evidence, when determining what inference (if any) can or should be drawn. In other words, one might well ask why a witness would deliberately maintain something which was not true and that may lead to, or support, an inference that his or her reason was a consciousness that the true explanation was unlawful.

The Tribunal is satisfied that such is the case here. In our view, Cr. Scurria opposed the application because he believed there was a strong body of North Ward ratepayers who did not want an AIDS Centre in the area. He was responding to the wishes of North Ward ratepayers to the extent to which they (to his knowledge) were grounded on (stereotypical) perceptions and concerns about HIV and AIDS sufferers. We accept Mr Hayes' evidence that Cr. Scurria told him he would oppose the application because of the ratepayers' views, and we are satisfied that in a practical sense he was there referring to those people who were opposed to a Centre for HIV or AIDS sufferers specifically. The evidence of the Complainants also supports this conclusion, as does that of Ms Nemer.

She testified that she and Dr J Jenkins (who was a member of the PLWA Steering Committee) went to see Cr Scurria between the Council meetings of 15 February and 19 March 1990, to give him more information about the Centre and the type of people who would be there. She told the Tribunal he made it clear then that he would do whatever his voters wanted. According to Ms Nemer, he described the ratepayers beliefs to which he was referring as being that

> "...having the Centre there would devalue their properties, and they were afraid of people using the bus stop opposite; that people with AIDS would be touching the bus stop."

She said

> "Apparently that's what his electorate, you know, thought might happen - you know, that they could catch it from people actually sitting in the bus stop."

Cr. Scurria was astute to appreciate the force of the legal advice given to the Council on 15 February 1990 and the need to enunciate only proper town planning considerations if the application was to be successfully refused. We are satisfied on the balance of probabilities (applying that test in the manner explained by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 354 as approved by the High Court in *Rejfek v McElroy* (1965) 112 CLR 517) that he then immediately deliberately cast about for a means of refusing the application on town planning grounds and portrayed his opposition on that basis. We are satisfied that despite what he said at the time and in evidence, Cr. Scurria's opposition to the application, and his reason for voting against its approval, was because of the HIV or AIDS status of the members of PLWA.

It is convenient now to turn to Cr. Vlahos.

Cr Vlahos

Victor Vlahos has been a councillor of the City of Perth continuously since 1982. Although he has been a member of the Town Planning Committee he was not a member in February or March 1990. Cr. Vlahos is an accountant, a licensed real estate agent, business broker, settlement agent and company auditor. It was in his capacity of real estate agent that LC visited him first to rent a house in which to live and secondly to ask him if he had any properties which might be available for the proposed drop-in Centre. He said he did not initially

know LC had AIDS but learned that fact when he rented a house to him. This was not a property owned by Cr. Vlahos, but one being managed by him. He said the fact that LC had AIDS did not influence him at all.

The general tenor of his evidence was that he had now no specific recollection of particular events but he was aware of the application and the considerable public and media attention it attracted, he knew of the concerns expressed by ratepayers (especially those in his own Ward) and because he believed a majority of ratepayers opposed the application he voted against it.

He said that another member of PLWA, Mr I W came to his office before the February Council meeting to seek his support. He could not recall what was said, but the Tribunal accepts the evidence of Mr W that Cr. Vlahos did generally express support for the proposal, with the qualification that he was an elected representative and would have to vote in accordance with the views of the ratepayers.

Cr. Vlahos acknowledged that there was a lot of publicity, as well as petitions, letters and telephone calls from ratepayers. He personally received many telephone calls and letters. His impression was that the majority of North Ward residents and ratepayers were against the application.

He was quite clear about why he voted against the application. He said -

> "Well, I voted against the application because the majority of ratepayers in my Ward were against it, so basically I was following instructions from my ratepayers."

He explained that he always adopted that approach. This application was no different.

> "If it's in my ward I always vote with the majority, doesn't matter what it is. If 51 per cent want it, it's "yes" in my ward. There's no - - I don't - - even if I personally don't like the idea, whatever the ratepayers and residents want if it's a majority I always support it, the reason being is that if I want to stay on council I've got to support my ratepayers. They vote me in and if I don't support them they'll vote me out, so it's been always my belief - I've got no vested interest in the area, I don't live in the area, so as far as I'm concerned if they want it, it's "yes"; if they don't want it, it's "no"."

Although many issues were raised in the public discussion, the petitions and letters and the Council debate, Cr. Vlahos said none of them influenced him. That applied as much to ordinary town-planning issues as much as it did to those related to AIDS - although possible traffic problems "was in the back of (his) mind a little bit."

But overall,

> "I wasn't concerned with the issues. If the ratepayers didn't want something I supported them. Personally - that's irrelevant in my decision for that Ward."

When asked whether anything Cr. Nattrass or Cr. Nairn had said influenced his decision in any way, Cr. Vlahos replied -

> "No. I'd already made up my mind and I'm the sort of person that debate normally doesn't sway me. I get annoyed sometimes at council because you sit there three or four hours listening to debate and I've already made up my mind so I can't see how people can change my mind, so if this case and in lots of other cases - - well, let's refer to this case; I'd already made up my mind before I went to the meeting. I was voting against the centre because the majority of ratepayers didn't want it there."

We accept Cr. Vlahos' expressed reason for voting against the Centre. The question then is, what is the effect of that in the circumstances of this case? There is no doubt Cr. Vlahos was well aware of the HIV status of the members of PLWA. Nor that he well knew the reasons being advanced by those ratepayers who opposed it. It is true that some of those reasons related to ordinary town-planning matters; it is also true that a significant number of them were expressly founded on the HIV status of PLWA members and on characteristics imputed to them because of that status.

In our view an application for a drop-in Centre at the Walcott Street premises would not have attracted anything like the ratepayer opposition the PLWA application attracted, had it been made by a different organization where AIDS was not a factor.

In acting in accordance with what he perceived to be the wishes of the majority of ratepayers, and despite his disavowal of any personal view, Cr. Vlahos must be taken to have acted on the grounds upon which those ratepayer wishes were founded. In such circumstances, the "true ground" for his decision must be the ground upon which the ratepayers objected. There is a clear causative connection. And we are satisfied that the ratepayers' objections were in the main based

essentially on HIV or AIDS-related factors. We therefore find that the true ground for Cr Vlahos voting against the application was the HIV status of the Complainants.

Mr Salvatore Salpietro

The other North Ward Councillor was Salvatore Salpietro. He was a councillor of the City of Perth for three years from May 1987 and was a member of the Town Planning Committee during February and March 1990. Mr Salpietro described himself as a Consultant. When he stood for election as a councillor he had a building development and real estate business.

The PLWA application initially came to Mr Salpietro's attention a few days before it came before the Town Planning Committee for the first time. He received a number of telephone calls from ratepayers around the area. He was not aware of the application before that. He explained -

> "...these people asked me what I was going to do about the application to establish an AIDS referral centre in the area."

He said he must have received between four and six calls over about three or four days. He told them he would check up on the application and find out what it was all about. He did make enquiries of the Town Planning Department and obtained the papers and then went to the area to talk to residents. He wrote out a short questionnaire to carry out a survey of what people felt about the site and the proposed use. He thought he probably spoke to between 30 to 40 people from all of the commercial premises adjoining the site and from surrounding residences. He said he just asked one question, basically -

> "That there was going to be an AIDS referral centre established at that address: what were their feelings towards it, and how would it affect them? What I was implying by saying "how would it affect them" was the potential increase in traffic, in other words, and cars and people. What sort of effect would it have on their businesses or residences."

From this informal survey Mr Salpietro concluded that 80% of the people he spoke to were against the Centre. The reasons varied. Most of the responses suggested concern about the number of people who would be using the Centre, traffic congestion and parking. He said "a very small percentage" were "probably a little bit illogical and

subjective". These were responses that people did not want an AIDS group in the area because they feared there might be needles or drug addicts around it.

Mr Salpietro had made his initial investigations prior to the Town Planning Committee meeting on 5 February 1990 and based on the information he then had he stated it was his view the application should be refused because the number of different possible uses to which the premises would be put made the proposal quite inappropriate for the area.

In his evidence Mr Salpietro went into lengthy detail about this. As expressed, his concerns ranged from an impression from the description of a kitchen for the preparation of "environmentally friendly meals" that this meant it would operate as a restaurant, to an apprehension that sessional consulting rooms indicated medical consulting rooms for a general practitioner, therapists, or psychologist and naturopath etc. He said he wanted more information about all of these possible uses because they indicated a potential use far greater than that acknowledged or provided for in the detail of the application.

It was Mr Salpietro's position in evidence that the AIDS issue played no part in the formation of his attitude of opposition to the application. On the other hand, he thought those councillors who supported it tended to do so principally on that ground - namely because of compassion and sympathy for the plight of AIDS sufferers. He said he regarded it as important to divorce this application from the particular organization behind it and to look at it exactly the same way as "if it was the West Perth Football Club or something".

He agreed it was possible that he mentioned to Cr. Hayes that he was very conscious he was coming up for re-election only two months later, but was adamant that did not influence him against the application. Indeed, he expressed the view before the Tribunal that he would have been more likely to lose votes than to gain them by adopting that stance. Of the approximately 9000 ratepayers in North Ward, only between 40 to 60 would have been directly affected - the majority of the remainder would have supported the proposal out of sympathy.

Similarly, when cross-examined whether ratepayer reaction had played any part in the formation of his own attitude to the proposal, Mr Salpietro allowed that it was a factor for him insofar as it derived from proper town-planning concerns, but not to the extent it related to concerns about AIDS. He totally rejected the suggestion that he did not distinguish between the two but voted the way he did largely (albeit not entirely) simply because of ratepayer opposition.

When giving his evidence Mr Salpietro was at times nervous and hesitant and at others, almost loquacious. Like Cr. Scurria, he seemed very much alive to the possible implications of being seen to have allowed the AIDS factor to have influenced him in any way at all. The explanations he gave for the concerns he said he had at the time impressed us as unconvincing and contrived. The objections he expressed at the time were, in our view, deliberately exaggerated, unrealistic and no doubt did misrepresent the explanations given to him by the PLWA representatives, as Ms Nemer said.

We are satisfied that like Cr. Scurria, Mr Salpietro voted as he did because of the HIV status of the members of PLWA. In this, he was acting principally out of a desire to accommodate the opposition of the ratepayers - and principally that which had its genesis in concerns about AIDS-related issues. He was conscious from an early stage of the importance of presenting his position as one founded exclusively on legitimate town-planning considerations and was generally careful to do so, although well aware at all times that the real basis of his opposition was the AIDS issue.

Mr David Cole

We move now to deal with the other personal respondents in the order in which they are listed on the pleadings. Mr David Cole is a retired dentist who was a councillor of the City of Perth for three years from 1989. Although he has been a member of the Town Planning Committee he was not in February/March 1990. He voted to refuse the application. Mr Cole was a relatively newly-elected councillor at the time and was still "feeling his way". He spoke to other councillors about the application, particularly Cr. Scurria. This witness explained that although the idea that the proposal was for "a

sort of community meeting centre for the AIDS (victims)" did not worry him at all, Cr. Scurria persuaded him that it should be refused because of parking problems and potential usage.

Mr Cole spoke against the proposal during debate in the Council, but in so doing he said he

> "...talked purely and simply on the evidence that Mr Scurria had given me, so I was talking very much against the parking problem, or against their parking area there, because it just didn't come up to the standard required."

and he added Cr. Scurria

> "...proved to me that that parking that they wanted of 10 places there was just not obtainable under the standards that the Perth City Council gave us."

He stated quite plainly that he took no account of the other issues that were being discussed at the time; the only issue which influenced him was the parking.

Even the debate at the Council meeting had no effect on his position because he had spoken to Cr. Scurria the week before the March meeting and had made his mind up as a result of that discussion.

He did concede in cross-examination that this particular application had attracted much public and media attention and it was a very important subject for people to talk about. The community debate did not influence his position but the fact (as he understood it) that the greater part of ratepayer opinion in the local area was against the application, definitely would have been something he would have taken into account.

In our view the evidence does not establish that the AIDS issue was a factor in this Respondent's decision to vote against the application. Nor does it go so far as to lead to the conclusion (as the most probable inference) that insofar as he was influenced by ratepayer objection Mr Cole was advertent to that being based upon AIDS-related issues rather than proper town planning considerations.

Mr Christopher Cranley.

At the time of the hearing Mr Christopher Cranley was a TAB operator. He had been a councillor of the City of Perth for two years

from 1989. He was a member of the Town Planning Committee in February and March 1990. Although he could recall the PLWA application coming before the Committee and Council, he had very little recollection of having himself had any particular discussions about it. The proposed Centre was not in his Ward and so really did not affect him one way or the other. He thought the points raised by Cr. Scurria were quite reasonable planning points and he described the Town Planner's response as "pretty weak".

On the basis of what Cr. Scurria said, Mr Cranley thought there were reasonable grounds upon which to refuse the application. The major consideration he recalled was that the application claimed only ten people would be using the Centre at one time, yet the size of the proposed premises suggested there would be many more users, with consequential traffic and related problems. He thought the Town Planner was being "a bit charitable" on this issue and commented -

> "I think if it had been the Chris Cranley Social Club meeting there, I don't think it would have met with ... Planner's approval."

Like Cr. Vlahos, Mr Cranley seemed to think most councillors had usually made up their minds how they were going to vote about a particular matter before they got to the Council meeting.

In this instance, he could not recall specifically what people said. There were quite a few councillors who did participate in the debate

> "...but I honestly can say that half the time I wasn't listening, and the other half the time (sic) I didn't care what they said. My mind was made up."

And later he added,

> "I'd be surprised if there was any councillor that hadn't made up his mind before he went into full Council."

He said he was not influenced by anything Cr. Nattrass had said, nor was he influenced by who the applicants were in this case.

When asked in cross-examination about the ratepayer opposition to the application, Mr Cranley explained that from his point of view he would expect nearby residents to oppose any proposal and he therefore never really took much notice of that sort of opposition.

He acknowledged that all three of the North Ward councillors were against this application, and said that where that occurred he would find it very hard not to agree with them. Again, his main concerns were the potential level of usage and what seemed to be inadequate provision for parking.

In our view, the evidence does not establish on the balance of probabilities nor at all that Mr Cranley voted against the application for any reason grounded on the HIV or AIDS status of the members of PLWA.

Cr. Basilio Franchina

Cr. Franchina is a tailor and has been a councillor of the City of Perth continuously since 1988. He has been a member of the Town Planning Committee for the last three years but was not a member in February or March 1990.

He said that he did not discuss this application with any other councillor, nor did he speak during the Council debate. He voted against the application because in his opinion it did not comply with the requirements of the Council. The problems he said he saw with the proposal at the time and which he recounted in evidence reflected very closely the points made by Cr. Scurria, which he said he recalled from the meeting. As Cr. Franchina put it -

> "...they say that there are 10 people using the centre, okay? Now, I don't believe that the 350 square metres of floor space is used by 10 people only. Then the 10 bays that they show on the plan they're all over the place. Three are in a garage, two are on a hill which is very, very hard to - - the access to those car bays is almost impossible. And for that reason I just decided to refuse the application. The other thing is that I think in my opinion I done a good thing for the People Living With AIDS because really they are not going to benefit on my in (sic) approving something where they go in with a car, they try to park their car, they can't find a car-park. So really I can't see how I can be discriminating against anything when really I tried to help them."

He said he would have dealt with any other application the same way.

As to what effect the speeches of other councillors may have had on him, he said -

> "...I recall that a few of them spoke but I never take any notice of what they say. I mean, I form my own opinion and my own beliefs and they wouldn't change my

mind one way or the other. They can joke with one another but it doesn't affect me whatsoever."

and that although some of them did speak about AIDS, three years later he now really had no recollection of what was said. Even so, he was adamant that nothing Councillors Nattrass or (Donald) Nairn might have said had any effect on his decision.

Cr. Franchina did not impress us as a particularly credible witness. His demeanour detracted appreciably from his credibility. Despite what he actually said about his reasons for voting against this application, we would have little confidence that it was true unless it was supported or confirmed by other evidence. But there is no onus of proof on him (nor upon any of the Respondents). Whilst we do not accept his testimony, there is no evidence which would lead us to positively disbelieve it. And (as we have observed above) even were we to positively disbelieve him, that would not necessarily mean the truth is the opposite of what he has said. In short, in relation to Cr. Franchina, the Complainants have not satisfied the Tribunal that he voted as he did for any reason grounded on the HIV status of the members of PLWA.

Mr Peter Gallagher

Mr Peter Gallagher is the fifth Respondent. He is an Insurance Broker. He was a councillor of the City of Perth continuously between 1979 and 1991. He had been a member of the Town Planning Committee in his early years on the Council, but was not in February or March 1990. He represented the Coast Ward, which includes Floreat Park and City Beach.

He recalled there had been a lot of publicity and discussion about this application. He said he had a quite clear recollection of why he voted against it. He had gone into the meeting without having made up his mind about it, but when he heard the questions asked by Cr. Scurria and the answers given to them he thought they raised matters of real concern. The impression he gained was that the Centre could conceivably be used for between 150 and 200 people and in those circumstances it would need between 50 and 70 car-parking bays. He thought that was central to the whole issue; so much so that he took the opportunity afforded by the debate in Council to ask the City

Planner to come forward and answer questions. Mr Gallagher said that in response to questions asked by him the City Planner explained there was no specific parking requirement applicable to this application; it was a matter of discretion for the Council. From the answers to his questions he gathered that the City Planner's recommendation for approval was based on an acceptance of the assertion in the application that the Centre would be used by only 10 people at any time, although the Planner's personal view was that the real figure could well be higher.

Mr Gallagher then went on -

> "And I said to him, 'Well, in those circumstances, presumably there would be a need for more car bays?' and he said, 'Yes', and I said, 'In that case the application would not comply with the city planning scheme, or your requirements at that stage.' He said, 'No it wouldn't', and I said, 'Well, in that case, why are you recommending approval?', and he said - I can remember this quite distinctly - that all he could do was take what was written on the application form as a fact. So my conclusion to that was that he was putting to the Council what his views were based on what the application said, not necessarily what his personal opinion was. So that was enough for me, as far as I was concerned, all of the evidence was such that it was quite likely, in fact probable, that the centre would be used by more than 10 people, particularly for social occasions, and that the vehicle parking therefore was totally inadequate."

In general terms, he conveyed the impression in his evidence that he thought the people who supported the application largely did so on compassionate grounds out of sympathy for the plight of AIDS sufferers. One of those was Cr. Marks, whose comments Mr Gallagher thought were wrong. He said he thought it was 'outrageous' that Cr. Marks held himself out to be an expert on AIDS, and he obviously saw Cr. Nattrass' speech as being entirely responsive to that. He said that Cr. Marks

> "...holds himself out to be the expert on absolutely everything. When I say absolutely everything, on a lot of things. And he got up and carried on at great length about the contamination through the spread of AIDS and syringes and all this sort of thing, and said that there was absolutely no doubt that there could be no risk on the spread of AIDS. Now, I just knew from my own reading that that had to be very suspect.
>
> Do you recall anyone speaking against that proposition put by Councillor Marks?--- Yes, and that's probably one of the reasons I remember it so well, that Councillor Nattrass responded immediately and spoke in very strong terms straight from the heart, because he had no preparation of course. But he just made it clear that around the world this matter still hadn't been resolved and it was still undecided as to how and whether and to what extent AIDS can be spread, so he said the matter hadn't been resolved, and that was my understanding of the position as well. And he spoke quite strongly and firmly about that. I remember him saying something like, 'How can Councillor Marks have the audacity to stand up and hold himself out as an expert

> when specialists and professional people around the world still haven't resolved the matter.' I just remember that. But I don't - - I think that all that Councillor Nattrass did was respond to these outrageous remarks of Councillor Marks, to set the record straight. From my memory, I don't think he spoke at that point on other aspects of the application, he just responded to these - - this false representation from Councillor Marks."

According to Mr Gallagher the problem really was one that should have been handled by the State Government. He believed there was a compassionate argument in favour of the proposal but he also felt sorry for the residents who lived in the area. He also noted that the three Ward councillors were against the application - and their views could not just be discarded.

He maintained that what he described as the "emotional" arguments either for or against the application had no influence upon him, but what did, was the potential use -

> "I was concerned about what I felt was a distinct possibility of Saturday or Friday night social gatherings when there could be up to 150 people in attendance. I felt that was a real possibility."

There was nothing in Mr Gallagher's cross-examination which appreciably altered his position as expressed in his evidence in chief. Having regard to all of his testimony and to the evidence as a whole, we are not satisfied that he has been shown to have voted as he did on the ground of the relevant impairment of the members of PLWA.

Cr. John Lee

Cr. Lee is a retired businessman who was first elected a councillor in 1964 and has been a councillor for about 26 years, albeit not continuously. He served some 5 years on the Town Planning Committee and was a member of it in February and March 1990. He told the Tribunal he voted against the application "certainly on town planning grounds": there was insuficient parking; there would have been a traffic problem; there would have been a noise problem and the potential users would have been much too many for that actual site. In addition, he was influenced by the fact the three North Ward councillors were unanimous in their opposition to the Centre being put there.

He estimated, ("knowing a little bit about it"), that there were about 700 potential users in the State generally, and he thought the size of

the premises was an indication probably a hundred or more people would be using the Centre.

It was his experience over a long period on the Council that people would seek town-planning approval predicated on a low rate of use, and yet once approval was given, the actual use would be much greater.

In his view use of bylaws or conditions of approval to overcome this problem was not practicable.

Cr. Lee said he had not allowed the "emotional" arguments about fear of AIDS to influence him at all. Also, the views of the City Planner had to be listened to, but he was not always right. So too, one would listen more closely to what the Ward Councillors said if all three from the Ward affected were unanimous in their view; that would carry a lot more weight.

This particular application was the subject of a lot of discussion because it was a major issue at the time. He said he certainly discussed it with the North Ward councillors.

Again, the effect of Cr. Lee's evidence was that it was mainly those councillors who supported the application who raised or relied upon AIDS-related issues. So far as he was concerned the application would have been dealt with the same way irrespective of who the applicants had been.

Cr. Lee denied telling Cr. Hayes he was opposed to the Centre because of who the proposed users were, and was quite sure nothing said by either Cr. Nattrass or Cr. (Donald) Nairn had influenced his vote.

Although pressed about these matters in cross-examination, Cr. Lee did not resile at all from what he had said in evidence in chief.

The evidence does not establish that Cr. Lee voted as he did on any ground related to the impairment of the members of PLWA.

Cr. John McMillan

Cr. McMillan is a horse-trainer who has been a councillor continuously since 1965. He has served between 12 and 14 years on the Town Planning Committee and was a member of it in February and March 1990.

Prior to the council meeting on 19 March 1990 - at which he voted against the application - he discussed it with the three North Ward councillors. He listened to their reasons and made up his mind to vote the way they were going to. He said the reasons they gave him were lack of parking, increased traffic movement and

"..just generally more movements around the area which would upset the residential status."

He could not recall the details of the application. He insisted the fact that it had been lodged by a group whose members were HIV positive had nothing to do with his decision whatsoever.

His own experience as a councillor had led him to realize that there could be no guarantee there would only be a certain level of usage once premises were approved. The imposition of conditions was certainly not a practicable way to do it.

Cr. MacMillan said that had the application been made by some other group unrelated to the issue of AIDS, he would still have opposed it for the reasons he did then.

He denied speaking to Cr. Hayes about the matter and said he had not been influenced in any way by anything said by Cr. Nattrass or Cr. Nairn; indeed, in re-examination he said he had made up his mind which way he was going to vote before he entered the Council chamber that night.

In cross-examination Cr MacMillan agreed his reasons for opposing the application were based on ratepayer objection. However, we take the view that when that answer is considered in the context of his evidence as a whole it was intended to convey no more than that he knew that ratepayers were objecting and they had proper town-planning (ie traffic etc) reasons for so doing. Certainly he was aware that some ratepayers were more concerned, or concerned exclusively, about AIDS-related issues, but we are not satisfied that his answer indicated he acted on the basis of that type of ratepayer objection.

The evidence does not establish that Cr. MacMillan voted against the PLWA application on the ground of the impairment of the members of that organization.

Cr. David Nairn

Cr. Nairn is a signwriter. He has been a councillor of the City of Perth since 1988. He has not been a member of the Town Planning committee.

He said he had little recollection of this application. Many hundreds of applications for town-planning approval go before Council. He would concentrate mainly on those relating to his own ward. According to Cr. Nairn, about the only aspect of this application which he did remember was his belief that initially there were supposed to be only five people using the Centre and that was later changed to ten

> "...and that didn't amuse me a great deal because there -obviously is parking problems there, and also if you're going to have more than 10 people there, there was something...some mention about barbecues, and you're going to have noise problems then too."

He said those were the reasons he voted against the application. He recalled AIDS issues being discussed, but said they had no bearing on his decision. He recalled that his brother, Cr. Donald Nairn, had been on television or radio to talk about the application, but said he could not remember what his brother said.

Cross-examined by Ms Andrews, Cr. Nairn mentioned having received telephone calls at the time from people who did not want the Centre there. The reason they gave was that they did not want people with AIDS in the area.

As to the debate in Council, he said he had very little recollection of it. He did not remember what his brother said and he did not recall what Cr. Nattrass said.

Our overall impression of Cr. David Nairn was that he was an unsatisfactory witness. He was not at all concerned to make any real effort to assist the Tribunal and seemed to resent the fact that the inquiry was being conducted at all. Taking his testimony as a whole

in the context of the evidence generally, we think it more likely than not that he voted as he did because of the HIV or AIDS factor. His brother's opposition was founded on stereotypical assumptions and imputed characteristics of AIDS sufferers. We have no doubt that in the circumstances in which the Council was dealing with that application David Nairn would have known perfectly well that his brother opposed the Centre and why he did so. We are satisfied that Cr. David Nairn followed his brother's lead on this matter and his purported lack of recollection now is no more than obfuscation designed to conceal his real reasons for voting against the application. His explanations were offhand and unconvincing. We think too that his friendship with Mr Salpietro would likely also have influenced him to oppose the application for similar reasons to those which motivated the former. We are satisfied on the balance of probabilities that Cr. David Nairn's vote against the application was grounded upon the HIV or AIDS status of the members of PLWA.

Cr. Donald Nairn

The Ninth Respondent is a Pharmacist who has been a councillor of the City of Perth for the last $5\frac{1}{2}$ years. He has never been a member of the Town Planning Committee. He told the Tribunal his reasons for voting against the application were "many and varied". They included the petition and the large number of people who were against the Centre; the premises were large and there were going to be many activities; and there was going to be a parking problem.

He acknowledged that the possibility of used syringes being discarded around the premises was a particular concern of his. This was derived from his long experience as a pharmacist and especially from his own involvement in the methadone programme. In the course of that, drug addicts had to attend his pharmacy and ingest the methadone in his presence. That was intended to wean them off "harder" drugs. He explained that it was not unusual for him to find needles lying around in the parking area behind the pharmacy, and described the use of "Thickpacks" which were needle containers used to prevent people being injured by discarded needles. He then went on to say -

> "I think we all know that as an established fact, that some AIDS sufferers are drug addicts and just because you are an AIDS sufferer doesn't mean you stop taking drugs. It doesn't work that way. Invariably if - there was a percentage - - well, there was thought to be a high percentage, a reasonably high percentage, of drug

addicts who had AIDS. I remember three years ago, or just before that, they had the grim reaper spreading all that bad news; you know, the doom and gloom that if you - -

MR DOUGLAS: The advertisement?---The advertisement on the television and other versions of that later. Virtually there was a fear campaign going and particularly aimed at drug users. You must use clean needles at all times. My belief was that if you had a fair percentage - I'm not saying all of them ..... in the world I'd say that - of them who were drug addicts and they had AIDS and they came to a cenre on a continuing basis there could be - - I didn't say would be. There could be an opportunity for them to start to congregate. If they are hooked they're hooked forever. They just don't stop because they are at an AIDS centre. They don't stop because they are walking down the side lane somewhere. That was a phone call I received quite often from - - about five or six phone calls from surrounding people who were more worried, far more worried, about drug users being there."

And a little later he mentioned one of those calls -

"One lady particularly was very upset as she had young children who lived opposite or around that area. She was very worried for her children but she was talking about drug users dropping needles. That's what she was talking about - used syringes."

He took account of the residents' views, including those based on concerns about used needles and syringes. He also had concerns about parking and traffic.

Cr. Donald Nairn could not recall whether or not he had spoken to Cr. Hayes about the application prior to the meeting, but he did recall that Cr. Nattrass, being a doctor, had attempted to "put the record straight" by responding to comments made by Cr. Marks about the cause and effect of AIDS.

In cross-examination, he said it is "a known fact" that some people who are HIV positive are also drug users. Referred to an article which appeared in the "Daily News' of 19 March 1990 (exhibit #1, tab 9) in which he was quoted as opposing the Centre not only because of ratepayer objection but because

"From my experience of drug addicts it would be a perfect place for them to meet and whether they have AIDS or not, they would sell, swap and use drugs".

he agreed that although those may not have been his precise words he would have said something to that effect.

When Ms Andrews suggested to him that the main thrust of the opposition to the application in the Council debate on 19 March 1990 addressed the issue that persons who were HIV positive, or had AIDS, would be using the Centre, Cr. Nairn said he did not get that feeling at

all. He thought it became more of a debate about homosexuals. In his view the debate concentrated partly on homosexuals and partly on parking, the size of the premises and traffic. He maintained the fear of AIDS infection was not a concern of his; his concerns were the drug addict factor together with parking, the size of the building and the traffic problem. He had never visited the premises himself, had not inspected the parking situation and did not see the building plan.

Finally, he told the Tribunal that the Centre has now been operating for several years, "very successfully", he thought, with no problems. He said he was very pleased about that. He did not know if there had been any evidence of drug use at the Centre, he had not inquired; but he would suggest that since there had been no complaints he thought not - which he said was "wonderful".

On his own evidence, one of the grounds (and we think the principal one) upon which Cr. Donald Nairn spoke and voted against the application was a characteristic that is generally imputed to persons having the relevant impairment (ie being HIV positive), namely that they are drug addicts. We think it more likely than not that had it not been for the AIDS factor (in this sense), Cr. Nairn would not have opposed the application.

Cr. Peter Nattrass

Cr. Nattrass is the Tenth Respondent. He is a Medical Practitioner specialising in Gynaecology and he has been a councillor of the City of Perth continuously since 1977. He thought he may have been a member of the Town Planning Committee at some stage, but was not in February or March 1990. He recalled being present at the Council meeting on 19 March 1990. He did speak during the debate, but did not vote. He had made a deliberate decision before the meeting, to neither speak nor vote. That was because the issue was medically very delicate and controversial and as a doctor he saw it as being inappropriate for him to seek to influence other councillors. What caused him to change his mind, he said, was Cr. Marks putting himself forward "as a self-proclaimed authority" and speaking very forcefully on the transmission of the AIDS virus.

Cr. Nattrass thought Cr. Marks' knowledge of the matter was "somewhat deficient" and that he was giving the councillors a completely erroneous viewpoint on how the AIDS virus was spread. He described it this way -

> "I felt that he was explaining that AIDS could only be spread by the most mundane and basic and elementary ways, the theory of which had long since been discarded, and I thought it would be a dereliction of my duty and my responsibility if I sat there and listened to Councillor Marks give this erroneous information, and it was for that reason that reluctantly I stood up, purely to correct what I thought were factually incorrect statements."

The content of the speech he then made, said Cr. Nattrass, was limited solely to refuting the incorrect information given by Cr. Marks.

Mr Douglas asked Cr. Nattrass whether he was seeking to suggest to councillors that medical opinion was agreed on how the AIDS virus could be spread. We think we should set out the answer he then gave, in full -

> "---I think there was then and there still is considerable lack of understanding about how AIDS is spread, and if I go back to when we all first heard of AIDS, the understanding of how AIDS is spread now compared to the understanding of how AIDS was spread then is considerably more advanced, and I have not got sufficient faith in the medical profession to believe that the understanding on the issue of spread of the virus is not (sic) complete. If I could cite three or four examples, when we all first heard about AIDS the only means of getting AIDS, we were all led to believe, was through anal intercourse amongst homosexuals. Well, as we all know, that's completely erroneous. More recent times we have been all informed of other more remote ways of getting AIDS, and those were the issues that I directly addressed. We are all aware now that there have been cases where surgeons have contracted the AIDS virus by droplet infection on the cornea of the eye; we are aware of cases - - let me correct that. It is believed now, contrary to some years ago, that AIDS can be contracted by kissing. If I go back to the days when anal intercourse was the only means of getting AIDS that was the days when I believe that people used to say you'd have to swallow a cup and a half-full of saliva to get AIDS, because the concentration of the AIDS virus in saliva was so low. Well, that's now been disproved and it is certainly believed that you can get AIDS by kissing. Oral sex is another matter - that if you'd asked people six years ago whether you could get AIDS by oral sex the answer would have been 'no', and I think that has since been disproved.
>
> It was always stated some years ago that the AIDS virus lasted only for two or three minutes outside the human body. That's been since discounted, and the question of course arises is "outside the human body", does that mean that if the AIDS virus is in a drop of body fluids is it two or three minutes beyond the time that that body fluid dries up or is it two or three minutes after the body fluid exits from the body?
>
> So, those are all the issues that in latter years have been questioned far more deeply, and those were not the issues that Councillor Marks addressed. Councillor Marks talked purely about anal intercourse and I felt it was my duty and responsibility to stand up and correct that."

Cr. Nattrass had no doubt that he would not have spoken at all that night had it not been for what Cr. Marks said. He maintained he had no intention of influencing the outcome, as was demonstrated by the fact that although it was obvious the vote would be close he nonetheless left the Council Chamber after he had spoken and did not vote himself.

In cross-examination he agreed that when addressing the Council meeting he had said it was inappropriate for a large number of AIDS sufferers to gather in one area. However, he explained that was because he has always had a philosophy that no disadvantaged people, whether they be AIDS sufferers, "intellectually handicapped" or cancer sufferers, should be isolated in one institution. In his view they should as much as possible be spread amongst the community and mix with other members of it.

In response to further questions from Ms Andrews he said it is "an established fact" that a large percentage of those with the HIV virus have been homosexual or intravenous drug users.

Ms Andrews then referred this witness to an article apparently published in the "Sunday Times" of 21 February 1993, a few days before he gave evidence. He categorically denied that the article was the result of any interview given by him. He acknowledged that the article attributed certain remarks to him and conceded that he would not dissociate himself from some of them. Ms Andrews then asked:

> "Is the remark, 'I have disgust and revulsion for homosexuals and I totally disapprove of intravenous drug users', a remark that is yours, that you would accept as your viewpoint?---I do disapprove of homosexual behaviour. I wouldn't dissociate myself from that. I could go on further to say that I have never been in a situation to be in front of or to observe two consenting homosexual males participating in a homosexual act. But I think it would be correct for me - - I'm sure it would be correct if I said if I were in that situation I would be totally repulsed."

However, when he was then asked whether it was correct he had said he would vote against the Centre because many people were opposed to it, there was a fear of AIDS being spread in the area and property values would drop, he emphatically denied that.

The tenor of his evidence about that was that he had made a statement concerning this matter to the City of Perth's lawyers about a year earlier. In the course of so doing he had explained that if he

had voted at all it would probably have been against the proposal. He would have done so because he nearly always did vote against proposals for institutions in residential areas (and he explained that by "institutions" in this context he included doctors' surgeries, schools and so on). The lawyers had then asked him whether he had been contacted by any people from the area concerned, to which he said he had, and explained there were a lot of people against the proposal, many of whom were fearful of the effect that AIDS might have in the area and many who were apprehensive that their property values might decline. It seems that although the two questions had been quite separate and distinct, the answers had in some way been linked together in his statement so as to convey that Cr. Nattrass himself would have voted against the proposal for the reasons expressed by those residents.

Thus, according to Cr. Nattrass, when the lawyers sent them what they had typed up, he was "horrified" and refused to sign it.

It was that (unsigned) statement, however, which was apparently the source of the article in the "Sunday Times". Cr. Nattrass was at pains to point out that there was no prior discussion with him by the journalist before that article was published, and he had in fact written both to the journalist and the editor complaining about it.

We pause here to observe that the actual text of the article is not before the Tribunal, as it was never tendered in evidence.

Cr. Nattrass was then asked if he had any idea how the journalist had obtained his unsigned statement, to which he replied -

> "I believe that that statement was faxed inadvertently to him informing him of this impending hearing, to see whether he was interested in the hearing.
>
> By whom?---I believe it was faxed by us at the surgery and I believe that inadvertently with the covering letter from the lawyer, inadvertently was faxed this resurrected statement that had long since been, I thought, disposed of."

Other witnesses seemed to think that what Cr. Nattrass said at the Council meeting was rather more forceful and emotive than he was prepared to allow in his own evidence. A number of them recalled him referring to a fisherman pulling AIDS-infected faeces out of the River Thames in a fishing net, and references to the possibility of infected tissues blowing over fences. The general impression a

number of them got from what he said (although at least a couple now seemed to recall a contrary view) was that AIDS was readily infectious. Cr. Nattrass was one of those who Cr. Torre said spoke emotively about the issue (the other being Cr. Donald Nairn). Cr. Lee said

> "...I thought that Cr. Nattrass said he didn't know how AIDS was transmitted. He in fact had grave doubts about whether it could be passed all sorts of ways, even by shaking hands if I remember correctly..."

Although taken in isolation that statement could be interpreted to mean Cr. Nattrass had said he doubted whether AIDS could be transmitted by eg shaking hands, we understood it in the context of Cr. Lee's evidence as meaning Cr. Nattrass had said it was possible AIDS might be transmitted even in that way. That is consistent with Mr Hayes understanding of the effect of what Cr. Nattrass said, namely that having the Centre in the proposed location would increase the threat to the community of spreading the disease. The Complainant IW said Cr. Nattrass implied that HIV was more infectious than it was. Whatever Cr. Nattrass said conveyed to the Complainant LC that the former was against the Centre and his argument was that because there was very little known about the AIDS virus, having it there could possibly be putting people at risk of infection. Ms Nemer said he made it sound as if the AIDS virus is very easily caught. We accept their evidence on this aspect, which we are satisfied is an accurate reflection of the purport of Cr Nattrass' remarks to the Council meeting.

Cr. Nattrass was the only medical practitioner on the Council. It would have been quite remarkable if other councillors had not given considerable weight to his remarks about a medical matter such as the transmission of AIDS. Furthermore, that natural tendency would no doubt have been given added force by the personality of the man himself.

Cr. Nattrass is a dominating and assertive figure. Those traits were well demonstrated by his demeanour before the Tribunal. He sought to take charge of events and to exercise control over the proceedings from the moment he took the stand. It was patently obvious he had come before the Tribunal with every intention of getting a particular message across and he was determined to deliver it no matter what. He presented as a clever, intelligent and astute man quite prepared to

use these proceedings for his own purposes. His attempt to manipulate the media by causing a copy of his statement to be faxed to a newspaper in advance of his testimony being given (as we are satisfied he did), is an illustration of that (even though the particular exercise apparently worked out somewhat contrary to his expectations).

Overall, we are satisfied that whatever may have been his intention to begin with and whether or not he was prompted to speak only because of what Cr. Marks said in the debate, when he did address the meeting he did so in a manner which did instil fear and apprehension in other councillors about the spread of AIDS from the Centre should the application be approved. In part, his comments were motivated by his antipathy towards homosexuals and his perception that many AIDS victims are homosexuals. He must have been aware that what he said during the debate would have been likely to cause or at least encourage other councillors to refuse the application because of the AIDS factor. At the same time, he sought to portray his own position as one of professional detachment and objectivity and to protect himself from any possibility of adverse consequences, by not being present when the vote was actually taken.

Mr Brian Prince

Mr Prince is a retired Engineer who was a City of Perth councillor from 1980 to 1992. He was a member of the Town Planning Committee during those 12 years and was a member in February and March 1990. He said he was not contacted by anyone about the application and nor did he discuss it with other councillors. He spoke (briefly, he thought) in the Council debate. It was his belief the proposed Centre envisaged 10 persons using it at one time. He did not think that would be so. It was with that concern in mind that in the course of the debate he made reference to the number of people suffering from AIDS in the metropolitan area and as he anticipated this would be the first of a number of similar applications the Council would have to consider councillors would have to be quite judicious in their treatment, of it. He drew to councillors' attention the fact that the three North Ward councillors opposed the application and observed that their views should be taken into account. In his

evidence Mr Prince said the matter of AIDS did not come into his consideration at all -

> "...it could have been the Boy Scouts or anybody else."

In cross-examination he acknowledged there was a ground-swell of opposition to the application although that came not from the public at large but from people in the immediate area.

It was Mr Prince who recalled Cr. McTiernan pointing out at the Committee stage, prior to the application going before the Council, that there was an Act of Parliament which applied to this situation and councillors had to be very careful not to act, or to be seen to act, on what he described as "bias". It was made very clear that they had to vote on planning grounds and none other. The same point was made by another councillor - he thought it was Cr. Joan Watters - and so councillors were "well alerted" to their obligations in that regard.

We accept Mr Prince's evidence that in voting against the application he acted solely on the basis of concerns about the potential degree of usage of the premises and the consequential traffic and related "amenity" considerations he thought likely to flow from that. We accept that for him, AIDS was not a factor.

Mrs Maria Torre

Mrs Torre has family and home responsibilities and is a director of a family business. She was a City of Perth Councillor from 1987 to 1992. She was a member of the Town Planning Committee for the five years she was on the Council. Her own ward was the Perth Central Business District. That is a very large and diverse ward and Mrs Torre learned early in her term of office that if she was to cope with her family, her business and her Council responsibilities she would have to concentrate on her own ward.

She could remember the PLWA application but the only thing that she particularly recalled was that it did not seem she should take it at face value. The application referred to 10-12 people but the area of the proposed premises was quite large. She thought it required more investigation.

Mrs Torre had a recollection of Cr. Scurria pointing out to her that the outdoor area and the internal floor space were very large compared to the proposed use.

When asked why she voted against the application Mrs Torre said -

> "...it was first of all not my ward. The ward councillors were unanimous in their objections to this application, and as far as possible I supported the ward councillors if they were unanimous. I didn't do the research. I didn't represent directly their ratepayers. They were elected to represent them..."

It made absolutely no difference to her, she said, who the applicants were in this case. She resented very strongly any suggestion that she had discriminated against anybody.

In cross-examination she agreed that ratepayer objection would always be an important factor. Speaking of that, she said -

> "...I think that that was a very, very important thing because I believed we were elected to represent views of the ratepayers, not necessarily our own, and where there was a great deal of objection, I felt that they had a right to be heard."

She could not now recall what the ratepayer objections actually were in this case, other than that some mentioned property values and others referred to vehicles and traffic.

Mrs Torre impressed as a frank and honest witness who was genuinely upset at any suggestion she may have been knowingly involved in discrimination in any form. We accept her evidence and we find that when she voted against the application she did so because she had legitimate concerns about the potential use of the proposed premises and because the three North Ward councillors were opposed to it. Cr. Scurria had persuaded her that there were sound town-planning objections to the application and she had no reason to think the North Ward councillors were acting for other than proper reasons. The fact that (as we have found) their opposition was in reality grounded on the AIDS or HIV status of the members of PLWA was not something they conveyed to her and she not unnaturally took what Cr. Scurria told her at face value.

On the findings set out above, there were thus five councillors whose vote against the application was grounded on the AIDS factor, they being Councillors Scurria, Vlahos, Salpietro, David Nairn and Donald

Nairn. In addition, although he did not vote, Cr. Nattrass did advertently in fact encourage councillors to vote against it because of the AIDS factor.

The "true ground" of the Council's decision

The votes of the five councillors referred to were causative in terms of the decision of the Council (and hence the City of Perth whose executive decision-making body the Council was), in that but for them that decision would not have been made.

Mr Douglas contended that could not be said, because the Tribunal could not be satisfied that had the circumstances been relevantly different (applying s.66A of the Act) those councillors who voted for the application out of compassion or sympathy for the members of PLWA, may well have voted against it if that factor were absent. We do not accept that argument. To the extent town planning arguments were advanced in the course of the debate on 19 March 1990 they obviously did not operate so as to prevent those councillors who voted to approve the application from so doing. There is no reason to infer that in that circumstance, they would have (or even may have) voted the other way if AIDS had not been an issue.

We are accordingly satisfied to the necessary degree, and we find, that the impairment of the members of PLWA was a causative factor in the decision of the municipality of the City of Perth made on 19 March 1990 to refusal town-planning approval to the PLWA application.

We find further that in so refusing approval, the first Respondent treated the Complainants less favourably than, in the same circumstances or circumstances that were not materially different, that Respondent would have treated a person who did not have such an impairment.

The complaint against the City of Perth is accordingly substantiated.

It is now necessary to consider the position of the natural Respondents.

The natural Respondents

The case against them is put in reliance on s.160 of the Act -

> "160. A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act."

The first question is whether this provision requires proof of any mental element, and if so, what that is. In approaching the proper construction of s.160 the Tribunal is mindful that although it is not a penal provision and the Act is not a penal statute (in the sense of creating any criminal liability), it is concerned with civil liability for unlawful acts. Next, the words "causes, instructs, induces, aids or permits..." do all require at least an intent that the second person actually perform the relevant act. But do they require more? Specifically, do they require an awareness that the relevant act is unlawfully discriminatory?

Certainly there is a presumption that intent forms part of a statutory offence (a presumption which Dawson J noted in *Chew v R* (1992) 173 CLR 626; 66 ALJR 383; 60 A Crim R 82, "seems presently to be undergoing a resurgence"), but as just observed, this Act does not create statutory offences. Even where the criminal law does require proof of an intent, that does not extend to proof of knowledge that the act done is unlawful. It is enough to show that the defendant knew the essential facts constituting the offence (see eg *Giorgianni v R* (1985) 156 CLR 473; 58 ALR 641 and *Yorke v Lucas* (1985) 158 CLR 661; 61 ALR 307).

Having regard to the purpose and objects of the Act and the words used in s.160 itself, the Tribunal is of the view that what the section requires is proof that

(a) a person caused, instructed, induced, aided or permitted another person

(b) to do an act which was in fact unlawful under the Act

(c) with knowledge of the circumstances which made the act unlawful, ie "advertently".

(And see also *Chew v R*, supra and *Edwards v R* (1992) 173 CLR 653; 66 ALJR 394; 60 A Crim R 100.) This approach is consistent with that taken to liability as a principal for unlawful discrimination under the Act, which has been discussed above, namely that the act be objectively discriminatory and done with advertence to the relevant ground. It is not necessary that there be an intent to discriminate. In similar vein, then, nor is it necessary to establish liability under s.160 that the person intended to cause (etc) another to discriminate unlawfully.

We have no doubt whatsoever that Cr. Scurria caused and induced the First Respondent to unlawfully discriminate against the Complainants contrary to s.66A and s.66K of the Act, and that he did so advertently, with knowledge of the circumstances which made that act unlawful. He played a (if not the) major role in causing other councillors to vote against the approval. Although he was generally careful to present his arguments and opposition on legitimate town-planning objections, he was in actuality driven by ratepayer reaction to the AIDS factor and he was well aware that was his real motivation. He caused the First Respondent to make the unlawfully discriminatory decision both by his vote and by causing other councillors to vote the same way; in the latter respect he also induced the other councillors (and hence the First Respondent) to make that decision.

The complaint is therefore substantiated as against Cr. Scurria.

Cr. Vlahos' true ground for voting against the application was the impairment of those who would be using the Centre, who included the Complainants. Given that without his vote the numbers for and against the approval would have been evenly balanced, he thereby "caused" the First Respondent to do an act which was one of unlawful discrimination contrary to s.66A and s.66K of the Act. Alternatively, by his vote he "aided" the First Respondent to do that act. At all relevant times, Cr. Vlahos was aware of the circumstances which made the Council decision one of unlawful discrimination and voting as he did he acted with the intention of causing or aiding the relevant act to be done. By virtue of s.160 of the Act he must also be taken to have done the act which constituted the unlawful discrimination. On this basis we therefore find the complaint against him substantiated.

The same considerations and findings apply in relation to Mr Salpietro and we find the complaint against him substantiated on the same basis.

We have already found that the evidence does not establish that Mr David Cole voted either on any AIDS-related ground or because of ratepayer objection founded to his knowledge on any such ground. Although it could be said that without his vote the Council would not have done the unlawfully discriminatory act, he did not "cause" nor "aid" it with knowledge of the circumstances which rendered that act unlawful; specifically, with knowledge that the impairment of the members of PLWA was a causative factor in the decision. He therefore does not come within the scope of s.160 of the Act and there being no other basis upon which he could be liable, we find the complaint against him has not been substantiated and we dismiss it.

Similar considerations and findings apply in respect of each of Messrs Cranley, Gallagher, and Prince; Councillors Franchina, Lee and MacMillan, and Mrs Torre, and for the same reasons we find the complaints against them not substantiated and dismiss them.

Crs. David and Donald Nairn respectively voted as they did on the "true ground" of the impairment of the members of PLWA. Each of them advertently "caused" or "aided" the First Respondent to do the unlawfully discriminatory act (fully so intending that the application be refused), and so each is liable under s.160 and we accordingly find the complaint against each of them substantiated.

Cr. Nattrass did not vote. It therefore cannot be said he "caused" the unlawful act of the Council in that sense. There is no evidence that he "instructed" any councillor to vote against the approval. Nor, we think, could he properly be said in any real sense to have "permitted" the act of unlawful discrimination. None of the councillors who voted against the application - and certainly none who did so on the ground of the impairment of the members of PLWA - admitted to having been influenced to do so by what Cr. Nattrass had said. Even so, we are satisfied to the requisite degree that what he did say at the meeting on 19 March 1990 must have in fact afforded comfort, encouragement and support to those who were minded to refuse the application on the ground of the HIV or AIDS issue. We are satisfied

that in that manner he advertently "aided" the First Respondent to commit the act of unlawful discrimination the subject of the complaint. Accordingly, by virtue of s.160, Cr. Nattrass must also be taken to have done that act, and we find the complaint against him substantiated.

Relief

Upon the conclusion of the evidence we indicated to Counsel that we would defer the question of relief for further submissions, should we reach that point. We have now reached it. The fact is, however, that the complaint of DL representing the members of PLWA (No 18 of 1991) is a representative complaint and so the only orders which may be made in relation to it are those provided in s.127(b)(ii), (iv) or (v), they being to -

> "(b)(i) ...
>
> (ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act;
>
> (iii) ...
>
> (iv) make an order declaring void in whole or in part and either ab initio or from such other time as is specified in the order any contract or agreement made in contravention of this Act; or
>
> (v) decline to take any further action in the matter.

Although the Act does enable the Tribunal to award damages of up to $40,000 by way of compensation and to order a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant, both those options are expressly excluded where the complaint is a representative complaint (s.127(b)(i) and (iii)).

The power under s.127(b)(ii) to prohibit the particular Respondents (or any of them) from continuing or repeating the discriminatory conduct is obviously not appropriate in the circumstances of this case. Nor is there any relevant "contract or agreement" to be declared void under s.127(b)(iv). Without wishing to canvass here the circumstances in which it would be appropriate for the Tribunal to find a complaint substantiated and then formally decline to take any further action in the matter, we simply observe that we think that is probably directed to situations which might include one in which

some form of relief may be open but the circumstances of the particular case are such that it should not be granted. In our view we do not think this is a case in which we should formally decline to take any further action in that way; but the end result must be that there is no formal order which may be ordered under s.127 of the Act in respect of the representative complaint of DL, other than to state the finding that the complaint is substantiated as against the First, Eighth, Ninth, Tenth, Twelfth. Thirteenth and Fifteenth Respondents, they being the City of Perth, David Nairn, Donald Nairn, Peter Nattrass, Salvatore Salpietro, Vincenzo Scurria and Victor Vlahos.

That does still leave the three individual complaints in matter No 18 of 1991. We find those complaints substantiated as against the same Respondents and we shall hear further submissions from counsel in relation to them.

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