

## **DARE TO DO AUSTRALIA**

Presiding Commissioner Helen Owens  
and Associate Commissioner Kate McKenzie  
Disability Discrimination Act 1992  
Disability Discrimination Act Inquiry Public Hearing  
Level 28, 35 Collin Street  
Melbourne VIC 3000

Good morning Commissioner Owens and Associate Commissioner McKenzie,

Disability Discrimination Act Inquiry Public Hearing  
Judie Stephens of Dare to Do Australia  
10am, Thursday 19 February 2004  
Trades Hall Room, Radisson Hotel and Suites  
72 Liverpool Street, Sydney

I am the maternal grandmother of Jackson Paul Stubbs. Jackson was born on 17 August 1993. As a result of a car accident at the age of fourteen weeks, Jackson is a high level quadriplegic with visual impairment. His parents were killed in the car accident and his two older brothers escaped more or less uninjured. I was appointed Jackson's guardian in 1994 and have been his carer since his tragic car accident. Jackson is now ten and half years old. We live happily together and Jackson brings me untold joy. Jackson's brothers are in the care of their paternal grandparents.

For people unable to manage their own affairs, the Supreme Court appoints a trustee to undertake that management. In 1997, when the Protective Commissioner was appointed as financial manager for Jackson, I agreed to that appointment on the understanding that they would manage Jackson's parents' estate and help with offering financial relief to pay for Jackson's ongoing care and rehabilitation needs until his Third Party Claim was settled in the Supreme Court of NSW. Unfortunately, that financial relief never happened.

Jackson's claim for damages for his injuries and losses as a result of the car accident was settled by the NRMA Insurance in March 2003. I had acted as Jackson's Tutor in the legal proceedings. In April 2003, after payment of out-of-pocket expenses and some other claims, a sum of just over \$12.6 million was paid over by the insurer to the Protective Commissioner to manage on Jackson's behalf

I believe that the Office of the Protective Commissioner (OPC) has an unacceptable level of monopoly in the field of financial management for people in Jackson's position. The OPC's practices, in reality, influence far more than the financial matters in Jackson's life. If I were to allow the OPC to have the full extent of control it wants, the OPC would also have agreements in place concerning Jackson's rehabilitation, care and medical teams. In the real world the injured people, their carers, families and those that are close need to maintain their own choice and dignity.

I am writing this letter after dealing with the OPC since 1997. I have reached a point of thorough frustration and total mistrust concerning the level of explanation and financial management provided by that office.

I recently applied to the Supreme Court of NSW to have the fund management transferred away from the OPC and placed with Perpetual Trustee Company Limited (Perpetual Trustee) because I believe this to be in Jackson's best interests. The case was heard by Mr Justice Windeyer on 24 and 25 June 2003 and the judgment citation is **JS v Protective Commissioner & Anor Re Protected Estate of JS [2003] NSWSC 621 revised – 15/07/2003**.

While I was not successful in my application, I believe there are many important comments made by the judge that should come to your attention. There are also aspects of the service provided by the OPC, based on my direct experience, that I believe warrant immediate and urgent investigation.

### **Comparison of fees**

- ***Fees charged by the OPC*** - Based on the size of Jackson's fund, the OPC would be entitled to charge a corpus fee of \$126,000. In an affidavit sworn five days before the start of the hearing, the Protective Commissioner advised that there would be a special arrangement in Jackson's case to waive the corpus fee and to limit the management and investment fees to 1.5% of the fund value so long as that value was in excess of \$4 million (see para 20 of the judgment). That amounts to \$180,000 per annum being paid to the OPC. The waiver of the corpus fee and the capping of the annual management fee, were, I believe only offered to bring the OPC costs down to a competitive level although still higher than Perpetual Trustee - but on a one-off basis only.
- ***Fees that would be charged by Perpetual Trustee*** - In the proceedings, Perpetual Trustee put to the Court that, for a fund of \$12 million, it would have an initial charge of \$60,000 including any brokerage and legal fees, and an ongoing annual management fee in the order of \$130,000 (see paras 14-16 of the judgment).
- ***Comparative outcomes of financial services*** - Mr Justice Windeyer considered the impact of fees on Jackson's estate (see para 28 of the judgment). He was not able to tell whether, over time, the investment results of OPC or Perpetual Trustee would do better. But, in my opinion, any reasonable person would wonder why the OPC should enjoy \$50,000 per annum above the fees that Perpetual Trustee would charge in the same circumstances, yet demonstrate no additional benefit to Jackson. Jackson's life expectancy has been assessed by medical experts to be 68 years. Based on that expectation, the OPC would end up taking nearly \$3 million more in fees from Jackson than Perpetual Trustee would, **without** the OPC being required to show that it could produce a better investment outcome or better service than Perpetual Trustee.

## **Issues other than the fee comparison**

The judge was concerned as to how much the level of fees should influence the final decision as to whether the management of Jackson's estate should be transferred to Perpetual Trustee (see para 29). The judge was aware that I had lost total trust and faith in the Protective Commissioner and that the Protective Commissioner acknowledged that fact (see para 5 of the judgment).

I had sworn an affidavit that detailed the actions of the OPC that had led to my loss of trust and faith (see para 5 of the judgment) but my legal counsel persuaded me that my case would be best served by not pursuing these matters in the hearing, in return for the above acknowledgment from the Protective Commissioner.

Mr Justice Windeyer decided that, in the absence of reasons for the lack of trust, that there was no reason to replace the OPC with Perpetual Trustee (see para 30 of the judgment). I sadly realize, in hindsight, that by accepting the advice of my legal counsel to not pursue the criticisms of the OPC that I had made in my affidavit, I had unwittingly prevented the judge from considering aspects (other than those relating to fees) of the relationship with the OPC. My new legal advice is that, in these circumstances, it would be futile to attempt to appeal Mr Justice Windeyer's decision.

## **Criticisms of service provided by the OPC**

When I agreed to the appointment of the OPC as financial managers for Jackson in 1997, I had no reason to think that the OPC would do anything but act in Jackson's best interests. Since that time I have become convinced that the OPC is not acting in Jackson's best interests. Some examples of the OPC dealings that have led me to this position are given below. I can provide documentation to support these examples. I can also provide details of other incidents.

- ***Lack of support for negotiating adequate insurance settlement***

The OPC attempted to force Jackson's lawyers, without consulting with me (Jackson's Tutor and guardian) to accept a settlement amount for Jackson that was one-third the amount of the final settlement that I, as Jackson's Tutor, ultimately agreed to accept. The eventual settlement amount has been based on Jackson's rehabilitation and care needs and must last him for the rest of his life. In this matter, the OPC showed a real failure to appreciate Jackson's individual care and rehabilitation needs and his true potential.

- ***Failure to maintain adequate communication***

On 16 July 2002 (prior to settlement of the insurance claim) the OPC received from the insurer an advance of \$50,000 for Jackson's needs. This advance had been negotiated with the insurers by Jackson's legal advisors and me, not by the OPC, and was specifically to meet the costs of care. The OPC did not advise me, or Jackson's legal advisors, of the receipt of this money for 31/2 months. Meantime, I was continuing to meet the shortfall in the costs of ongoing basic care expenses for Jackson.

- ***Restricting choices in care***

The OPC is appointed to manage Jackson's finances, not his care. However, the OPC prefers to deal with particular service providers and frustrates arrangements made outside that preferred group. The OPC frustrates the arrangements by excessively delaying payments of invoices - in one case the delay was as long as 8 months. This effectively jeopardises Jackson's care, rehabilitation and therapy. By making it difficult to preserve a business-like payment regime with service-providers outside the OPC's preferred few, the OPC effectively creates a closed market and a "one size fits

all" approach to the care needs of clients. It does not treat people like Jackson as individuals who have any entitlement to receive the best-suited care from among all available and affordable options.

- ***Disinterest in its clients***

The OPC has sought direct observations of Jackson's needs, care and ongoing rehabilitation only twice in the last six years: once was to have a social worker investigate his living and care arrangements; the other time was 5 October 2003 when an OPC Financial Planner and Case Manager attended at our home to complete a financial "Fact Find" as a preliminary step in constructing Jackson's financial plan. On the basis of these two visits only, the OPC alone cannot be considered sufficiently informed to make or restrict care and rehabilitation decisions regarding Jackson. The OPC does not give appropriate weight to the ongoing observations and beliefs of guardians and carers such as myself in assessing what can work best for the developing needs of individuals such as Jackson. As guardian and carer, my views are formed and based on advice of the various medical and rehabilitation experts treating Jackson. I believe that the OPC attempts to limit the choices for Jackson's care, rehabilitation and therapy to OPC-approved arrangements primarily to serve bureaucratic convenience.

- ***Causing financial hardship to guardians/carers***

Jackson's legal advisors calculated that, as at March 2003, I had already paid in excess of \$320,000 for Jackson's treatment, care and equipment expenses over and above expenses paid by the insurer. I have managed to do that by taking out loans to my maximum capacity, using my property as security, to meet Jackson's basic needs. The OPC's dilatory attitude in attending to my reimbursement creates unnecessary cash-flow hardship for me. For five months I have been asking the OPC to send me a simple list detailing, for the accounts I have sent for reimbursement, the accounts that have been paid and those that have been declined. I have received no details. While I do receive some reimbursements from time to time, there are never any accompanying details that indicate which of the accounts I have presented are being covered by the reimbursement.

- ***Openness to fraud***

The OPC sends me some, but not all, invoices submitted by service providers in relation to Jackson so that I can confirm that the service was actually provided. If the OPC does not consistently seek a confirmation, how can any person be satisfied that there is proper financial accounting for Jackson's money? On the one hand, those invoices that the OPC does not send for confirmation are open to over-charging. On the other hand, when the OPC does choose to seek my confirmation of invoices before payment, an excessive delay in payment frequently occurs because of the OPC's tardy processing. I have continually requested to be advised of the payments made on behalf of Jackson but this is still not done. I have had phone, fax and email facilities at home for many years yet these communications options are not exploited by the OPC. For example, in April 2003 the OPC received an account relating to Jackson, amounting to \$27,321.00. The OPC delayed payment and finally provided me with a copy of this particular account last month - only then was I able to investigate it and advise that it should not be paid. Consider the consequences if OPC had gone ahead and paid this account, or, if the account had been payable, the impact of this kind of delay in the business relationship.

- ***Failure to manage conflict***

The OPC acted partially and comprised Jackson's interests by drafting correspondence for signature by Jackson's paternal grandfather (who is trustee of Jackson's parents' estate). The draft made it fairly clear that one intention of the correspondence was to restrict information to me, Jackson's guardian. Through this questionable conduct OPC staff have been inflaming the difficult

relationship between the grandparents, rather than sensitively managing it, despite the OPC's claims to the Court of its ability to competently manage conflict.

- ***Absence of a financial plan***

Despite a "Tact Find" interview conducted by an OPC Financial Planner and Financial Manager on 1 October 2003, five months have passed and the OPC still has not produced a financial plan for Jackson. As far as I am aware, Jackson's \$12 million is still languishing in cash investment accounts. It is vital that Jackson has a balanced investment portfolio that covers property, direct shares with national and international exposure, managed funds and other investments in his own name. He and other high net worth OPC clients must not have their funds thrown into a communal financial pool. Private trustee companies such as Perpetual Trustee can and do offer completely individual investment portfolios, supported by appropriately experienced staff. The OPC has been fully aware of Jackson's financial needs for seven years yet, despite holding his settlement money for ten months, has still not produced a financial plan. Alas, the present arrangement gives no real consideration to his current and future financial needs and planning. I would like the opportunity to discuss this with you further and in more detail.

- ***Lack of transparency in financial management by the OPC - individual estates***

The OPC cannot or will not provide me with monthly spreadsheets of how Jackson's estate is going and what payments have gone out. Payments are not itemised in a way that makes it clear which particular invoices have been paid (there can often be two or more current unpaid invoices from individual service providers).

- ***Lack of transparency in financial management by the OPC - the arrangement between the OPC, the NSW Treasury Corporation and State Street Global Advisers***

In relation to this I draw your attention to para 18 of Mr Justice Windeyer's judgment where the judge states:

"What this means is that the charges which are being incurred by protected estates managed by the Protective Commissioner are not known to the protected persons nor to their families. That seems to me to be an entirely unsatisfactory position."

The judge goes further to state (also para 18) that he has "difficulty in understanding on what basis or authority" the authority delegated from the Protective Commissioner to the NSW Treasury Corporation is sub-delegated to State Street Investments and that "all this would be far clearer if the Memorandum of Understanding which exists between the Commissioner and the New South Wales Treasury Corporation were in the public domain or at least in evidence in these proceedings."

## **THE WAY FORWARD**

The application that Mr Justice Windeyer heard on 24 and 25 June 2003 was about being able to exercise some choice to get the best possible outcomes for Jackson. It was, in my opinion, successfully misshapen into a reinforcement of the unearned and unjustified supremacy of the OPC within the field of trustees for protected estates. Despite the facts that:

- Jackson's guardian and carer wanted a transfer of financial management responsibility from the OPC to Perpetual Trustee; and
- Jackson's paternal grandparents ultimately did not oppose such a transfer; and
- The OPC charges Jackson \$50,000 per year more than Perpetual Trustee would; and
- The OPC have not demonstrated any superiority in services over Perpetual Trustee; and

- The OPC will not pool client's assets together for their high net worth clients ensuring that they will be individually managed. This causes great anguish and also conceals the true fees and management;

This was not sufficient to allow Perpetual Trustee to be appointed as financial managers in place of The OPC.

**I accept that Mr Justice Windeyer's decision is based on the law. It is the law that needs to be changed. A better system needs to be put in place. It is appalling that Jackson's once only payment and his lifetime capital should be depleted by legal proceedings that are seeking to save him money and in circumstances where a poor performing entity, as the OPC is, has unjustified precedence.**

**I most earnestly ask you to support**

- a review of the law to better look after the needs of people like Jackson
- a review of the operations of the OPC with the aim of.
  - producing a client-focussed culture,
  - producing clear, timely and streamlined procedures,
  - increasing flexibility in procedures to enable provision of affordable care that is most suited to the clients needs,
  - maximising transparency in estate accounting and dealings generally,
  - fostering the best possible relationships between the OPC and its clients, their carers and family.

The pertinent principle is that every person who is a client of the OPC or other similar organisation should not be discriminated against. Every person must have the right to choose his or her bankers, trustees, and service providers. The Disability Discrimination Act Amendment needs to ensure that people like Jackson and their guardians/families have choice of a trustee that meets the requirements of each State and Territory's trustee legislation. An individual may select a trustee -for example Perpetual Trustee, National Trustee, State Trustee or OPC. Clients may change their minds. It is social and financial discrimination to assume that the Government or one organisation can, by default, completely and permanently take over a protected person's financial management.

**The law concerning disability discrimination must be changed to ensure existing and future trustee relationships are flexible so that the most vulnerable people in our Australian society are protected from victimisation and provided with choice. This change would deliver that simple protection and freedom to choose.**

Yours sincerely,

Judie Stephens