

## CHAPTER 2

### BARRIERS TO THE ESTABLISHMENT OF SPECIAL DISABILITY TRUSTS

2.1 There are several key barriers to the establishment and use of SDTs which contribute to why few families with dependents with disabilities have established SDTs since they were introduced. Witnesses and submissions consistently highlighted problems with the eligibility requirements for SDTs, issues around the provisions for contributing to the trusts, the heavy tax regime applied to the trusts and the limitations on the allowed uses of trust funds. Taken together, these barriers were major disincentives for families that might otherwise seek to establish a SDT.

2.2 These key barriers are discussed in this chapter of the report. Other concerns relating to the operation of the trusts and to wider support for families caring for dependents with disabilities are discussed in the next chapter.

#### **Eligibility restrictions**

2.3 SDTs were introduced to assist those families caring for someone who was, and would continue to be, unable to provide for themselves. During the second reading of the Bill which introduced SDTs, then Senator the Hon Kay Patterson noted the measure was 'meant for people who have limited or no testamentary capacity and who cannot manage their own affairs'.<sup>1</sup>

2.4 To be eligible to be a principal beneficiary of a SDT, a person must meet the requirements set out in section 1209M of the *Social Security Act 1991*. A beneficiary of a SDT must be:

a person who has reached 16 years of age:

- whose level of impairment would qualify the person for Disability Support Pension or who is already receiving a Department of Veterans' Affairs Invalidity Service Pension or Department of Veterans' Affairs Invalidity Income Support Supplement, and
- who has a disability that would, if the person had a sole carer, qualify the carer for Carer Payment or Carer Allowance or the person is living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement between the Commonwealth and states and territories, and

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<sup>1</sup> Senator the Hon, Kay Patterson, *Senate Hansard*, 22 June 2006, p.71.

- who has a disability as a result of which he or she is not working and who has no likelihood of working for a wage that is at or above the relevant minimum wage.

2.5 A child under 16 years of age may be the beneficiary of a SDT if they meet the definition of a profoundly disabled child in section 197 of the *Social Security Act 1991*. Centrelink is responsible for assessing the eligibility of persons to be beneficiaries of proposed SDTs. A beneficiary eligibility assessment must be completed by Centrelink prior to a SDT being established

2.6 While the eligibility requirements for potential beneficiaries of SDTs are intended to target the concessions to those with severe disability and high level care needs, a number of submissions raised concerns that the criteria were operating to inappropriately exclude some people. For example the Trustee Corporations of Australia acknowledged that while SDTs are being offered on a targeted basis, the definition of 'severe disability' may be overly-restrictive, limiting the number of people who might potentially benefit from the concessions.<sup>2</sup> The Activ Foundation also argued that the eligibility criteria should be broadened to allow family members of people with moderate disability to establish a SDT. They noted that many people have 'a level of disability that does not qualify them for government funding, but is nonetheless at a level that means that they lack the management, planning and self care skills necessary to look after themselves...'.<sup>3</sup> A number of issues regarding the eligibility requirements were raised including the carers allowance, intellectual disabilities and mental illnesses, institutional accommodation, minimum wages and possible reform to eligibility requirements.

### ***Carer allowance requirement***

2.7 The requirement that the beneficiary of a SDT must have a disability that would, if the person had a sole carer, qualify the carer for the carer payment or carer allowance was seen as too restrictive by many submitters. For example Mr Spicer, the former chair of the advisory group, noted that while the existing assessment process was important 'it may exclude some who might not require the degree of care needed to qualify for a carer payment or carer allowance but for whom privately funded support would be the difference between true independent living and ongoing family support or supervision'.<sup>4</sup>

2.8 The former Minister for Family and Community Services, the Hon Dr Kay Patterson noted that in using the carer payment or carer allowance the intention was to define eligibility to be a SDT beneficiary in such a way that it reduced, as much as possible, the need for further assessment. However she gave the example of a family who had to have further assessments because they had not realised they were eligible

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2 Trustee Corporations of Australia, *Submission 16*, p. 2.

3 Activ Foundation, *Submission 9*, p. 2.

4 Mr Spicer, *Submission 19*, p. 6.

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for the carer allowance, which involved two visits to a doctor and three visits to Centrelink.<sup>5</sup> She stated:

It seems to me that if you are eligible for a disability pension and you are receiving Commonwealth assistance in a business service, supported employment or day care, it would be hard to say that that person was not eligible to be able to have a special disability trust...It would seem to me that one of the things that are really inhibiting people is that a lot of people have not applied for carers allowance...<sup>6</sup>

2.9 The committee was also concerned to hear that families were having additional burdens placed on them through assessments for the carer allowance or carer payment before they could be considered eligible for a SDT. Mr and Ms Walter noted that the eligibility requirements for SDTs were forcing families to apply for the carer allowance, a 'payment they may have been entitled to receive but not sought to receive in the past.'<sup>7</sup> Mr West argued that the SDT application process needed to be less bureaucratic. He noted his son, who has cerebral palsy and had received a disability support pension for 22 years would still need to submit doctor and health service reports to verify his condition to apply for a SDT.<sup>8</sup> Similarly Ms Johnstone commented that the carer allowance forms 'do very little to acknowledge that a person with a significant disability may still have well developed independent living skills, physically able, but nonetheless need the security of SDT...'<sup>9</sup>

### ***Intellectual disabilities and mental illness***

2.10 Several submitters noted that the eligibility requirements for beneficiaries of SDTs appeared to preference people with physical disabilities rather than those with intellectual disabilities or with mental illnesses.<sup>10</sup> This accords with feedback which FaHCSIA has received in relation to SDTs.

Many people with disability, such as those with mental illness or impairment (for example autism, schizophrenia, bipolar or obsessive compulsive disorders) may not require care on a daily basis yet they may require ongoing care and supervision in relation to their financial and administrative affairs. At present, people in these categories may not pass the level of care criterion and therefore may not be eligible to be a beneficiary of a Special Disability Trust.<sup>11</sup>

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5 Dr Patterson, *Submission 43*, p. 1.

6 Dr Patterson, *Proof Committee Hansard*, 29 July 2008, pp. 1 and 5.

7 Mr and Mrs Walter, *Submission 21*, p. 4.

8 Mr West, *Submission 33*, pp. 2-3.

9 Ms Johnston, *Submission 45*, p. 1.

10 For example Mr and Ms Walter, *Submission 21*, p. 5 and Carers Australia, *Submission 18*, p. 6.

11 FaHCSIA, *Submission 13*, p. 15.

2.11 In particular, concerns regarding the application process for the carer payment were raised. Mr and Mrs Raine noted that there are not appropriate forms for applying for a SDT from Centrelink. They commented on the situation of their son Steven:

Steven suffers a permanent medical condition, a pervasive developmental disorder, which has been rigorously assessed and legitimately qualifies him for a Disability Support Pension, but this cannot be demonstrated on the 'Carer Payment' application forms which give very little scope to describe psychiatric / psychological impairment.<sup>12</sup>

2.12 The Public Trustees stated that anecdotally most inquiries in relation to SDTs are from the families of individuals with mental health disabilities, rather than physical disabilities. They also highlighted the difficulties in relation to eligibility:

Many persons with a severe mental health disability will meet the pension/support supplement requirements. However, due to the particular nature of many of the more common mental illnesses, one or more of the other criteria may not be fulfilled in many such cases. For example, the person may fail on the requirement that they live in a government-funded institution or qualify for a carer, or they may have a likelihood of working, at some point in time, for an above-minimum wage.<sup>13</sup>

2.13 Some submitters highlighted that people with disability with a significant degree of impairment to management, planning, judgement and/or decision making abilities would significantly benefit from SDTs, but were not eligible to be beneficiaries as their disabilities are not of a magnitude to be defined as 'severe'.<sup>14</sup>

### ***Institutional accommodation***

2.14 The eligibility requirements in sub-section 1209M(2)(b)(ii) of the *Social Security Act 1991* specifies that where the person with disability is cared for within an institutional/hostel/group home setting, that accommodation must be one that is funded, wholly or partly, under an agreement between the Commonwealth, states and territories. However FaHCSIA noted this may exclude people who live in accredited supported accommodation that is not funded publicly under such an agreement, such as Supported Residential Services in Victoria.<sup>15</sup>

2.15 Ms Hughes of Carers Australia also told the Committee this was also a barrier for families starting to think creatively about housing options for family member with disabilities. She argued that SDTs should be able to be used for different housing

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12 Mr and Mrs Raine, *Submission 31*, p. 2.

13 Public Trustees of States and Territories and State Trustees Ltd, *Submission 22*, pp. 10-11.

14 National Disability Services, *Submission 15*, p. 2.

15 FaHCSIA, *Submission 13*, p. 15.

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options, including independent housing or investment in unstaffed housing cooperatives.<sup>16</sup> The eligible uses of SDTs are discussed further later in this chapter.

### ***Minimum wage***

2.16 Concerns were also raised that people with disability who are employed in disability business services and who might receive award wage may be excluded from eligibility. For example Pave the Way, Mamre Association argued that:

The definition of 'severe disability' is too restrictive - there are many families who might want to set up a trust fund for their family member with a disability who does not qualify because they receive award wages, if only part-time. There are a number of people working in supported employment who are in receipt of award wages.<sup>17</sup>

2.17 The Trustee Corporations of Australia noted that providing for people with mental illnesses has particular difficulties over and above those for a person with physical disability. Due to the fact that mental illness can be episodic and sufferers may do part time or casual work they may find it difficult to qualify for a SDT.<sup>18</sup>

### ***Possible eligibility changes***

2.18 Given the limited uptake of SDTs to date, the committee received broad support for more flexible eligibility rules concerning who could be a beneficiary of a SDT. However there was little agreement on the detail of how this should be done. National Disability Services acknowledged 'that identifying objective alternative criteria for determining eligibility will not be easy'.<sup>19</sup> Dr Baker of National Disability Services acknowledged that while expanding access to SDTs also risked expanding the misuse of those trusts but argued the greater risk was in deterring people who might be willing and able to set aside assets for the care of a person with a disability. He noted:

In many of these cases the choice really is between a person with a disability being wholly dependent on government or partially dependent, with the supplementation of a special disability trust.<sup>20</sup>

2.19 A number of submissions suggested that SDT eligibility should be open to anyone who qualified for a disability support pension.<sup>21</sup> The National Council on Intellectual Disability recommended that all people be eligible to be the beneficiary of a SDT or 'at a minimum that it applies to all person who receive a full or part DSP, but

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16 Ms Hughes, Carers Australia, *Proof Committee Hansard*, 29 July 2008, p.13.

17 Pave the Way, Mamre Association, *Submission 14*, p. 8.

18 Trustee Corporations of Australia, *Submission 16*, p. 2.

19 National Disability Services, *Submission 15*, p. 4.

20 Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 75.

21 For example Pave the Way, Mamre Association, *Submission 14*, p. 9.

that the ABS definition of needing assistance in one or more daily activities be made the criteria.<sup>22</sup> Mr Pattison of the National Council on Intellectual Disability argued that as long as people are eligible for the disability support pension, they should be eligible for a SDT. He stated:

I think it becomes very hard to set rules for who is in and who is out, so I would just set the rule, 'Everyone in.'<sup>23</sup>

2.20 Similarly Sunnyfield Independence argued that the current restrictions discriminate against people with a disability that do not meet the SDT definition of 'severe disability' and recommended that all people with a disability be able to access a SDT.<sup>24</sup>

2.21 The Public Trustees suggested that consideration be given to amendments that would increase the prospect of persons with mental health disabilities being eligible for a SDT. They suggested options could include different criteria for persons with such disabilities or requiring a qualifying pension, plus one or more (but not necessarily both) of the carer/institution requirement; and the inability-to-work requirement. Others such as Winacom suggested that any person with an intellectual disability which entitles that person to a disability support pension should be able to access a SDT without reference to carer payment or carer allowance eligibility.<sup>25</sup>

2.22 Mr and Mrs Walter outlined a number of options to extend eligibility to SDTs. These included allowing persons eligible for a special disability service funded through the Commonwealth State Territory Disability Agreement to be eligible or that eligibility assessments should be made through an independent panel.<sup>26</sup>

2.23 While agreeing that a more flexible eligibility test could be considered, Mr Ian Spicer argued that 'every effort should be made to utilise an existing assessment test rather than creating a new one'.<sup>27</sup> He noted the burden of multiple assessments on people with disabilities and their families and carers.<sup>28</sup> Similarly the Hon Dr Patterson noted that 'the intention was to make it easy for genuine applicants to qualify' for SDTs and suggested that criteria be relaxed so that 'older parents and carers do not have to jump through interminable hoops'.<sup>29</sup>

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22 National Council on Intellectual Disability, *Submission 11*, p. 8.

23 Mr Pattison, National Council on Intellectual Disability, *Proof Committee Hansard*, 29 July 2008, p. 34.

24 Sunnyfield Independence, *Submission 46*, p. 9.

25 Winacom Association, *Submission 6*, p. 9.

26 Mr and Ms Walter, *Submission 21*, p. 5.

27 Mr Spicer, *Submission 19*, p. 6.

28 Mr Spicer, *Proof Committee Hansard*, 29 July 2008, p. 73.

29 Dr Patterson, *Submission 43*, p. 1.

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**Committee comment**

2.24 The committee agrees that the eligibility requirements for a person with a disability to be a beneficiary of a SDT should be made more flexible. As a number of witnesses noted during the inquiry, it is difficult to construct objective eligibility requirements which are fair to all. The committee is also conscious that people with disabilities and their families and carers are already subject to many assessments and does not wish to add to that burden.

2.25 The evidence the committee has received indicates that the requirement in section 1209 (b) (i) and (ii) of the *Social Security Act 1991* are the key problem for SDT eligibility. This is the requirement that a beneficiary of a SDT must have a disability that would, if the person had a sole carer, qualify the carer for the carer payment or carer allowance or that the person must be living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the states and the territories.

2.26 Removing this requirement would mean that to be eligible for a SDT a person would still need to qualify for a disability support pension (or appropriate veteran's entitlement) and would need to have a disability as a result of which he or she is not working and would have no likelihood of working for a wage that is at, or above, the relevant minimum wage.

2.27 The committee is also concerned that the current eligibility criteria are not capturing some people with intellectual disabilities or mental illnesses. The committee considers that SDTs are an appropriate mechanism to assist these individuals. The committee is recommending that changes be developed to the criteria to allow persons with intellectual disabilities or mental illnesses to become beneficiaries of SDTs. These criteria should be developed by FaHCSIA in conjunction with peak disability bodies.

**Recommendation 1**

**2.28 The committee recommends that the special disability trust eligibility requirements in section 1209M of the *Social Security Act 1991* be amended to:**

- **remove section 1209M(b);**
- **include eligibility requirements which effectively enable those with intellectual disabilities or mental illnesses to become beneficiaries of special disability trusts.**

## Contributions

### *Capacity to contribute*

2.29 Several submissions noted that families of a person with a disability frequently have very limited to capacity to contribute to SDTs.<sup>30</sup> The National Council on Intellectual Disability noted that SDTs only address the needs of a minority of families living with disability and that 'the majority of families do not have excess resources to set aside for the future'.<sup>31</sup> This echoed feedback received by FaHCSIA from consultations in 2007 that indicated many parents, because of the costs of disability and caring, may not have accumulated many assets during their lifetime and may not be able to financially provide for their child's future without significant government assistance.<sup>32</sup>

2.30 The Kew Cottages Parents' Association argued that the base threshold needed to make a SDT worthwhile was unachievable for the majority of parents. They indicated that the minimum amount required to counteract the costs and restrictions associated with a SDT was in the order of \$200,000 and that an extremely low number of parents would be able to place this sum or more in a special needs trust for their child.<sup>33</sup> The committee also received evidence that many parents with disabled children may be including SDTs in their wills. Many of these testamentary trusts will be able to incorporate the assets of the estate.

### *Contributions by beneficiary*

2.31 Once a SDT has been established anyone can contribute any amount, subject to a number of exceptions. The SDT beneficiary or their partner may not contribute to SDT, but the beneficiary may transfer to the SDT any assets that are received as a bequest or superannuation death benefit not more than three years after receiving the bequest or benefit. FaHCSIA noted that the reason for this restriction is that SDTs were created to allow for immediate family members to make provision for the beneficiary and were 'not intended to allow the beneficiary to move their assessable assets for social security purposes into an unassessable environment'.<sup>34</sup>

2.32 However the Winacomm Association argued it was 'very unfair' beneficiaries could not contribute funds to a SDT given that SDT funds were currently only able to

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30 For example Autism Aspergers Advocacy Australia, *Submission 2*, p. 2.

31 National Council on Intellectual Disability, *Submission 11*, p. 3.

32 FaHCSIA, *Submission 13, Succession Planning for Carers: Summary of Consultations*, July 2007, p. 6.

33 Kew Cottages Parents' Association, *Submission 8*, p. 3.

34 FaHCSIA, *Submission 13*, p. 6.



be used for accommodation and special needs care.<sup>35</sup> Mr Gresswell of the Winacomm Association argued:

...in relation to funds contributed to the special disability trust, a beneficiary of a special disability trust should be allowed to contribute funds either from superannuation or own savings to the trust as long as the trust utilises those funds for the purposes of care and accommodation for the beneficiary.<sup>36</sup>

### ***Concessional asset limit on SDTs and indexing***

2.33 There is no limit on the value of assets that can be held in a SDT. However where assets in the SDT exceed the concession limit, they are assessable for social security income support purposes. The concession limit was initially set at \$500,000 on 20 September 2006 and is annually indexed to the Consumer Price Index (CPI). On 1 July 2008 the concession limit was \$532,000.

2.34 There was broad support from submitters supporting the recommendation that the concessional limit on trust assets should be approximately doubled to \$1 million.<sup>37</sup> The consensus was that there was no clear justification for the current limit and that the limit was too low given the current and likely future costs of care and accommodation for a person with a disability for a long period. Mr Spicer commented:

I think if you are really looking at the provision of care or support for a person with a significant disability the amount of money that would have to be set aside is well in excess of that which might be earned by a \$500,000 trust. It needs to certainly be more than that and it appeared in the submissions and the consultation that \$1 million was getting closer to the mark.<sup>38</sup>

2.35 Sunnyfield Independence questioned the validity of indexing the concession limit in line with CPI. They argued:

If the trustee accumulates a surplus of income over expenses in the SDT for the future care of the beneficiary with a disability... then over time the disability support pension may be reduced or lost if the accumulated surpluses exceed the amount of CPI indexing.

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35 Winacomm Association, *Submission 6*, p. 11.

36 Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 47.

37 For example The Hon Dr Patterson, *Proof Committee Hansard*, 29 July 2008, p. 4; Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 77; Winacomm Association, *Submission 6*, p. 5; National Council on Intellectual Disability, *Submission 11*, pp. 8-9; Pave the Way, Mamre Association, *Submission 14*, p. 9; Sunnyfield Independence, *Submission 46*, p. 5.

38 Mr Spicer, *Proof Committee Hansard*, 29 July 2008, p. 70.

2.36 Instead of CPI, they recommended the appropriate indexing factor would be the Official Cash Rate which is a closer proxy for the prudent investment returns a trustee should be striving to achieve for the beneficiary of the trust.<sup>39</sup>

### ***Gifts concession***

2.37 The gifting concession is available to immediate family members of the beneficiary who are of pension age and make a contribution to the SDT. The concession is an exemption for contributions to the SDT of up to the value of \$500,000 from the usual social security or veterans' entitlement rules relating to making gifts or disposal of assets.

2.38 The current definition of 'immediate family member' includes: natural parents; legal guardians (that is, a person who is, or was, the legal guardian of the person with severe disability while that person was under 18 years of age); adoptive parents; stepparents; grandparents; and siblings (that is, brother, sister, half-brother, half-sister, adoptive brother, adoptive sister, step-brother or step-sister).<sup>40</sup>

2.39 Mr Ward of Pave the Way, Mamre Association noted that immediate family members are not the only individuals who make financial contributions to support people with disabilities and that extended family members and close friends often also provide support.<sup>41</sup> The National Council on Intellectual Disability highlighted that the definition of immediate family member does not include other people who may have a special relationship with the person with a disability, such as aunts, uncles and godparents. They recommended that the definition be extended or removed so anyone can contribute to a SDT.<sup>42</sup>

2.40 Unlike the SDT concessional asset limit, the gifting concession limit is not currently indexed. National Disability Services recommended that the gifting concession limit be indexed in line with the indexation rate applied to the asset limit of the SDT.<sup>43</sup>

2.41 Some witnesses argued that further incentives could be offered to encourage contributions to SDTs. Several submissions suggested or recommended that SDT contributions could be made tax deductible.<sup>44</sup> Mr Ward also noted that families were

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39 Sunnyfield Independence, *Submission 46*, p. 17.

40 FaHCSIA, *Submission 13*, p. 6.

41 Mr Ward, Pave the Way, Mamre Association, *Proof Committee Hansard*, 29 July 2008, p. 63.

42 National Council on Intellectual Disability, *Submission 11*, p. 6.

43 National Disability Services, *Submission 15*, p. 6.

44 For example Carers Australia, *Submission 18*, p. 10; National Council on Intellectual Disability, *Submission 11*, p. 6; Activ Foundation, *Submission 9*, p. 4; Mr Spicer, *Submission 19*, p. 12.

contributing to SDTs with 'post-tax money that they are saving'.<sup>45</sup> Mrs Breheny told the committee:

If people are going to take on the whole and sole care of their family member with disability and not apply to the government for funding I do not see why it should not be tax deductible.<sup>46</sup>

2.42 Mr Pattison of the National Council on Intellectual Disability noted that if a person with a disability were receiving support from an organisation that was eligible to be deemed a charity, donations to that support organisation would be tax deductible. However he also noted that this option had received limited support from some families when it had been raised previously.

When we raised that as an option right back at the very beginning, some families said, 'No, we don't want that because we don't want to be seen as a charity. We don't want our son and daughter to start having all these charity rules and everything else put upon them.'<sup>47</sup>

### ***Compensation awards***

2.43 Under the current arrangements the assets of a SDT must not include any compensation received by or on behalf of the beneficiary.<sup>48</sup> The FaHCSIA information booklet on SDTs, *Special Disability Trusts: getting things sorted*, notes that this rule is 'intended to preserve the existing treatment of compensation payments'.<sup>49</sup> The rule relates to a general social security principle that people who are receiving compensation for loss of income should not also receive income support from the government for the same period.<sup>50</sup>

2.44 Nonetheless, some submissions recommended that people with disabilities (who otherwise meet the beneficiary requirements) should be able to contribute compensation payments into SDTs. National Disability Services noted that the favourable arrangements for the treatment of the income and assets of a SDT could, if permitted, encourage an individual requiring ongoing support services to make some provision for that support to be financed.<sup>51</sup> Ms Hughes of Carers Australia commented:

I think we need to look at the increasing numbers of young people who suffer acquired brain injury through catastrophic injury. Those people will

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45 Mr Ward, *Proof Committee Hansard*, 29 July 2008, p. 63.

46 Mrs Breheny, *Proof Committee Hansard*, 29 July 2008, p. 84.

47 Mr Pattison, National Council on Intellectual Disability, *Proof Committee Hansard*, 29 July 2008, p. 28.

48 *Social Security Act 1991*, subsection 1209R(2)

49 FaHCSIA, *Submission 13, Special Disability Trusts: getting things sorted*, 2007, p. 16.

50 FaHSCIA, *Guide to Social Security Law*, Section 4.13.1.30.

51 National Disability Services, *Submission 22*, p. 2.

need to be cared for in some way for the rest of their lives, and their levels of care and therapy will be very high for different periods in their lives. I think that is a group that could really benefit from a special disability trust if some of those compensation payments could be put into it.<sup>52</sup>

2.45 The Public Trustees noted that they were often the trustees of choice for courts in matters related to accidents and injuries suffered by people involved in motor vehicle accidents, workers compensation and personal injury cases. They highlighted that the NSW State Government has capped awards for workers compensation, motor vehicle compulsory third party personal injury and that due to capping 'awards are not always sufficient to provide full and adequate care and because the award may be over the Centrelink threshold the beneficiary is not eligible for a pension'. If the award was able to be contributed to a SDT, a pension may be available to the beneficiary.<sup>53</sup>

### *Committee comment*

2.46 Given the high costs of caring for a person with a disability, both currently and into the future, the committee agrees that the current concessional asset limit for SDTs is too low. The committee recommends that the limit be increased to \$1 million and annually indexed according to a rate which reflects ordinary investment returns or the Consumer Price Index whichever is greater.

### **Recommendation 2**

**2.47 The committee recommends that the asset value limit for special disability trusts in section 1209Y of the *Social Security Act 1991* be increased to \$1,000,000 and annually indexed according to a rate which reflects ordinary investment returns or the Consumer Price Index whichever is greater.**

2.48 The committee agrees that the gifting concession should be indexed to the rate applied to the special disability trust asset value limit. The committee supports measures to encourage the community to assist with the care and accommodation of people with a disability. However the committee was concerned that some proposals to extend the definition of 'immediate family member' would expand the eligibility for the gifting concession inappropriately. In the opinion of the committee, if after the adoption of the recommendations in this report there is no improvement in the uptake of SDTs in the next two years, options to expand eligibility for the gifting concession should be reviewed.

### **Recommendation 3**

**2.49 The committee recommends that the provisions relating to the special disability trust gifting concession be amended to annually index the gifting concession limit to the rate applied to the special disability trust asset value limit.**

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52 Ms Hughes, Carers Australia, *Proof Committee Hansard*, 29 July 2008, p. 13.

53 Public Trustees of States and Territories and State Trustees Ltd, *Submission 22*, p. 11.

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## Recommendation 4

**2.50 The committee recommends that, if after the adoption of the recommendations in this report there is no improvement in the uptake of special disability trusts after two years, options to expand eligibility for the gifting concession should be reviewed.**

### Tax on trust assets and earnings

2.51 The tax arrangements which currently apply to SDTs diminish their value for carers and people with disabilities. The application of capital gains tax to assets transferred to SDTs and to the sale of a beneficiary's primary residence and the high rate of tax applied to trust earnings were of particular concern. These issues are discussed below.

#### *Capital gains tax payable*

2.52 FaHCSIA described two possible capital gains tax events in relation to SDTs:

- If a parent purchased a property a number of years ago (after 20 September 1985) and wants to place that property in the Special Disability Trust as the beneficiary's principal place of residence, the property would be subject to capital gains tax.
- Unlike any other owner-occupied property, a Special Disability Trust which owns the beneficiary's principal place of residence incurs capital gains tax if that residence is sold, for example, in order to purchase accommodation for the beneficiary elsewhere so as to be close to services.<sup>54</sup>

2.53 Mr and Mrs Wilson and Mr Gresswell, members of Winacomm Association, emphasised that the first of these capital gains situations is a 'big drawback' to parents making financial provisions for their son or daughter during their lifetime, as they are likely to incur significant capital gains tax.<sup>55</sup> Similarly members of Autism Aspergers Advocacy Australia observed that most families cannot afford the capital gains payable on stocks and the stamp duty on property if they are transferred into an SDT. They considered that waiver of capital gains and stamp duty on assets transferred into an SDT would 'free up significant opportunities' for families to contribute to the trusts.<sup>56</sup> Submitters also suggested that allowing tax issues to be deferred until the trust is wound up would alleviate the current disincentives.<sup>57</sup>

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54 FaHCSIA, *Submission 13*, pp. 17–18.

55 Winacomm Association, *Submission 6*, p. 9; see also Disability Services Commission, *Submission 3*, p. 2; Kew Cottages Parents' Association, *Submission 8*, p. 3; Activ Foundation, *Submission 9*, p. 3; Mr and Mrs Smale, *Submission 32*, p. 1; Mr Hughes, *Submission 42*, p. 2; Mrs McGarry, *Submission 44*, p. 1;

56 Autism Aspergers Advocacy Australia, *Submission 2*, p. 4.

57 Mr Spicer, *Submission 19*, p. 10.

2.54 Mr and Mrs Walter recommended that:

If it can be shown that a property was purchased solely for the purpose of accommodation for a disabled family member and held in a trust or in the name of the purchaser and never used as a rental investment property it should be able to be transferred to a SDT without incurring Capital Gains Tax.<sup>58</sup>

2.55 The committee received one example where an Australian Taxation Office private ruling had provided exemption for capital gains tax for the transfer of property from an established trust to a SDT.<sup>59</sup>

2.56 The second possible instance of capital gains tax, the sale of a beneficiary's principal residence, was a particular source of consternation among submitters and witnesses to the inquiry.<sup>60</sup> Witnesses pointed to the inherently discriminatory practice of applying capital gains tax to the principal residence of a person with disability, whose residence is owned by a SDT, but not to the principal residence of any other members of the community. Mr and Mrs Walter asked:

Do you believe it is fair, just and reasonable that some people with disabilities have been singled out to be the only members of our community to pay Capital Gains Tax on the sale of their place of residence?<sup>61</sup>

2.57 SDTs are also liable for state and territory taxes and levies associated with transfer or acquisition of property, such as land tax, stamp duty and emergency levies. The FaHCSIA noted that the Western Australian Government offers stamp duty concessions to trusts acquiring property on behalf of disabled beneficiaries.<sup>62</sup>

### ***Tax on trust income***

2.58 Income from SDTs is taxed in the same way as other trusts. The tax-free threshold that applies to individual income does not apply to income from an SDT. Therefore, all unexpended SDT income is taxed and it is taxed at the top marginal rate, currently 46.5 per cent.<sup>63</sup>

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58 Mr and Mrs Walter, *Submission 21*, p. 6.

59 Mr and Mrs Broughton, *Submission 26*, p. 2.

60 See for example, The Hon Dr Patterson, *Proof Committee Hansard*, 29 July 2008, p. 2; Ms Hughes, Carers Australia *Proof Committee Hansard*, 29 July 2008, p. 14; Mr Ward, Pave the Way, Mamre Association, *Proof Committee Hansard*, 29 July 2008, p. 66; Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 79; Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 81 and *Submission 21*, pp. 3 and 9; Kew Cottages Parents' Association, *Submission 8*, p. 3; Activ Foundation, *Submission 9*, p. 3; People with Disabilities Inc, *Submission 12*, p. 2.

61 Mr and Mrs Walter, *Submission 21*, p. 3.

62 FaHCSIA, *Submission 13*, p. 18.

63 FaHCSIA, *Submission 13*, p. 17.

2.59 Witnesses described these tax measures as punitive and a major disincentive to accumulating funds in the trust.<sup>64</sup> Currently trust funds can only be used for very specific purposes, making it quite possible that not all fund income will be used in a particular year and therefore will be liable for the high rate of tax.

2.60 The tax rate that currently applies to SDT income limits families' ability to accumulate funds in the trust to cover the larger expenses that often occur later in the beneficiary's life. For example, parents may want to save up to purchase independent accommodation for the person with disability or to pay for care and support when they are no longer able to provide these themselves. General health costs also increase later in life. FaHCSIA reported that it had received feedback noting the difficulty families have estimating the level of funds required to pay for a beneficiary's care and accommodation into the future.<sup>65</sup>

2.61 Mr Spicer noted that the high tax rate on undistributed trust income discourages people from setting up an SDT before their death and building it up over time. He pointed to two major consequences: the resources in the trust available for the support of the person with disability are limited, and families are discouraged from planning for the future of their loved one with disability.<sup>66</sup>

2.62 Mr Gresswell, who has made provision for an SDT in his will described the current disincentive for establishing an SDT earlier:

...at the moment to set up a trust to buy him his own accommodation I would be incurring significant income tax from the trust income. That is because right now he does not need a lot of medical care, for instance, but down the track he may well do. At the moment, the situation does not warrant setting up a trust. If it did not have the drawback, yes, I certainly would consider setting it up for him.<sup>67</sup>

2.63 Carers Australia suggested that undistributed income should be retained as capital accumulation within the trust without being taxed.<sup>68</sup> Representatives from Winacomm Association agreed that no tax should be paid on undistributed income retained in the trust. Mr Gresswell of Winacomm Association Inc, noted that any remaining undistributed income could be taxed at a reasonable rate when the SDT was

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64 See for example, Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 47 and *Submission 6*; Mr Spicer, *Proof Committee Hansard*, 29 July 2008, pp. 73–74 and *Submission 19*, p. 11; Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 81; Disability Services Commission, *Submission 3*, p. 1; Mr O'Hart, *Submission 5*, p. 10; Public Trustee of Western Australia, *Submission 7*, pp. 2–3; Activ Foundation, *Submission 9*, p. 3; Mrs Breheny, *Submission 24*, pp. 1–2; Sunnyfield Independence, *Submission 46*, p. 14.

65 FaHCSIA, *Submission 13*, p. 17; see also Sunnyfield Independence, *Submission 46*, pp. 15–16.

66 Mr Spicer, *Proof Committee Hansard*, 29 July 2008, p. 73.

67 Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 49; see also Mrs Breheny, *Proof Committee Hansard*, 29 July 2008, p. 87.

68 Ms Hughes, Carers Australia, *Proof Committee Hansard*, 29 July 2008, p. 14.

wound up.<sup>69</sup> Winacomm Association considered that 'at worst, tax on unexpended income should be in line with superannuation funds (at 15%)'.<sup>70</sup> Mr O'Hart suggested that nil tax, tax at 15 per cent similar to superannuation or tax at 30 per cent similar to company tax would all be preferable to the current situation.<sup>71</sup>

2.64 Mr Spicer outlined that there are a range of options for rectifying the high tax on undistributed SDT income. These include using special tax rates built into the trusts or deferring tax until the trust is wound up and disbursed.<sup>72</sup> The Trustee Corporations of Australia and others suggested that it would be appropriate for SDTs to be treated the same way as a compensation trust, where 'the trust and the beneficiary are taxed as one using the beneficiary's tax rate'.<sup>73</sup>

#### *Other tax concerns*

2.65 Mr Gresswell of Winacomm Association raised a further concern about the treatment of undistributed SDT income. He was concerned that SDT beneficiaries may become liable for income tax:

If one assumes that the beneficiary could have other income such as wages from working in supported business service, for example, then with this income added to the income distributed from the special disability trust, it could place them in a tax-paying situation. This would seem to be an anomaly that was not predicted and should be rectified.<sup>74</sup>

2.66 Winacomm Association suggested that unexpended income from the trust should not be included in the income test applied by Centrelink. The Hon Dr Patterson saw merit in applying this approach after a certain age, similar to the superannuation benefits 'enjoyed by people who have the opportunity of super and do not have a disability'. The Hon Dr Patterson suggested 55 years, or perhaps 50 years, would be an appropriate age for this tax concession, given that people with disability usually exhibit ageing issues earlier than those who are not disabled.<sup>75</sup> Currently separate income tax is not paid on the SDT income, which as discussed above is already taxed at the highest rate, and income generated by the trust is not included in Centrelink income assessment. However these concerns need to be taken into account in making any changes to the existing tax arrangements.

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69 Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 47.

70 Winacomm Association, *Submission 6*, p. 12; see also *Pave the Way*, Mamre Association, *Submission 14*, p. 9.

71 Mr O'Hart, *Submission 5*, p. 10.

72 Mr Spicer, *Proof Committee Hansard*, 29 July 2008, p. 73.

73 Trustee Corporations of Australia, *Submission 16*, p. 5; see also Mr and Mrs Broughton, *Submission 26*, p. 6; Mr Hughes, *Submission 42*, p. 3; The Hon Dr Patterson, *Submission 43*, p. 43.

74 Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 48.

75 The Hon Dr Patterson, *Proof Committee Hansard*, 29 July 2008, p. 4.



2.67 The Public Trustees raised the issue of 'whether a special disability trust consisting of monies arising both from a deceased estate and from an inter-vivos donation will retain the more favourable characteristics of the testamentary trust for taxation purposes'. The Public Trustees called for an Australian Taxation Office ruling on such matters.<sup>76</sup>

2.68 FaHCSIA commented that issues around income tax and capital gains tax on SDTs are issues for Treasury and the Australian Tax Office.<sup>77</sup> While changes to the tax arrangements for SDTs will indeed require coordination across different government departments, the committee considers that FaHCSIA, as the department responsible for the trusts and the portfolio encompassing disability, has a clear responsibility to work with other areas of government to make sure the trusts work in practice.

### *Committee comment*

2.69 It is obvious to the committee that the tax arrangements that currently apply to SDTs are a major disincentive for families considering setting up such a trust. For families that have already established some private provisions for a loved one with disability, such as purchase of a property, there are disincentives for moving these assets into a SDT. The application of capital gains tax to the sale of beneficiary's principal residence, where that residence is owned by the SDT, is fundamentally inconsistent with the treatment of the principal residences of other members of the community. The committee considers that this is a critical flaw in the current SDT arrangements requiring urgent rectification.

2.70 The committee is strongly of the view that the tax rate that applies to unexpended income returned to a SDT needs to be changed. The current 46.5 per cent tax rate is a major disincentive to using a SDT to build up funds to support someone with a disability throughout their life. Particularly as healthcare and support costs can increase in the later years of life, mechanisms should be in place to support, not discourage, growth of the trust.

### **Recommendation 5**

**2.71 The committee recommends that the tax arrangements applying to SDTs be changed so that:**

- **the sale of a property that is owned by a special disability trust and used by the beneficiary as their principal place of residence be treated the same as any other person's principle place of residence, that is, exempt of capital gains tax;**
- **the transfer of property and other assets to a special disability trust is exempt from capital gains tax and stamp duty;**

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76 Public Trustees of the States and Territories and State Trustees Ltd, *Submission 22*, p. 5.

77 *Proof Committee Hansard*, 29 July 2008, p. 108.

- **unexpended special disability trust income is taxed at the beneficiary's personal income tax rate.**

### **Eligible uses of the trust**

2.72 Currently, the *Social Security Act 1991* states that the sole purpose of a SDT 'must be to meet the reasonable care and accommodation needs of the beneficiary'.<sup>78</sup> Ancillary purposes, necessary to facilitate this primary purpose are also allowed. Beneficiaries cannot derive an income from the SDT and immediate family members cannot be paid for providing care to the beneficiary or maintenance to their home.

2.73 Guidelines issued by the Secretary of FaHCSIA set out what are considered to be reasonable care and accommodation needs. The guidelines include examples of the kinds of needs that are considered to be reasonable care and accommodation needs, as well as examples that are not. The tight restriction on eligible uses of SDTs was seen as a major shortcoming in the current arrangements.

### **Care needs**

2.74 Under the guidelines care needs are eligible if they arise 'as a direct result of the disability of the principal beneficiary', are for the primary benefit of the principal beneficiary and are met in Australia. SDTs are not allowed to be used for needs that are met outside Australia and needs that 'would be required by the principal beneficiary whether or not the principal beneficiary had his or her disability'.<sup>79</sup> The legislation also specifically prohibits using the SDT to pay an immediate family or child of the beneficiary for the provision of the beneficiary's care services.<sup>80</sup>

2.75 There was unanimous agreement that the definition of what constitutes an allowable 'care need' is a major problem with SDTs and a big disincentive to setting up a trust.<sup>81</sup> The current arrangements, which require expenses to be directly related to a person's disability, were considered to be complex and difficult. This definition means that many of the needs of people with disabilities cannot be met from the trusts even when money is available. Submitters noted that families face the complexity and

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78 *Social Security Act 1991*, Subsection 1209N(1).

79 FaHCSIA, *Submission 13*, Appendix 2, Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008, pp. 4–5.

80 *Social Security Act 1991*, Subsection 1209R.

81 See for example, Ms Hughes, Carers Australia, *Proof Committee Hansard*, 29 July 2008, p. 13; Mr Gresswell, Winacomm Association, *Proof Committee Hansard*, 29 July 2008, p. 47 and *Submission 6*, p. 4; Mr Ward, Pave the Way, Mamre Association Inc, *Proof Committee Hansard*, 29 July 2008, p. 63; Mr Weir, Planned Individual Networks, *Proof Committee Hansard*, 29 July 2008, p. 97; Disability Services Commission, *Submission 3*, p. 1; Planned Individual Network, *Submission 4*, p. 2; Public Trustee of Western Australia, *Submission 7*, p.2.

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costs of setting up two trusts; one as a SDT and another to meet the other expenses incurred by the person with disability.<sup>82</sup>

2.76 Submitters pointed out that it is complicated and in some cases impossible to determine what portion of a care cost is directly due to a person's disability. Dr Baker, Chief Executive of National Disability Services, provided an example:

... everyone at one time or another has to visit a medical doctor, but for a person with intellectual disability or for profound communication difficulties that visit to the doctor, which may be for a normal condition that would occur for anyone else, a cold or a flu, may take twice as long because of the communication difficulties. Is it then appropriate to say that half the cost of the medical appointment should be attributed to disability or what proportion? In practice, these are extremely difficult issues to disentangle.<sup>83</sup>

2.77 Mr Walter also provided an example:

The stupidity of it was that even to the point whereby if someone was in an electric wheelchair the electricity used to charge the battery for that wheelchair each night could be paid by the trust, but no other portion of that electricity bill.<sup>84</sup>

2.78 The Public Trustees submitted that the need for some items may not be directly due to a person's disability, but the use of the items and associated costs are higher because of the person's disability. An example was a computer and access to the internet. Although these may not be specifically related to a person's disability, because of a mobility impairment they may be used often and be particularly important for a person's social connection and wellbeing. Other examples of costs which can be higher because of a person's disability included recreation activities and the costs of the ordinary maintenance and upkeep of a person's residence.<sup>85</sup>

2.79 Some other costs, which can be directly due to disability, are still not eligible:

You cannot pay for utilities but it is well known, for example, that some people are unable to control their temperatures, hence they need air conditioners; good full-blast air conditioners for heating in winter and cooling in summer. That is a direct result of their disability, it is a utility, and yet they have to make an argument for this.<sup>86</sup>

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82 Public Trustees of the States and Territories and State Trustees Ltd, *Submission 22*, p. 6; Planned Individual Networks Inc, *Submission 4*, p. 2; Mr O'Hart, *Submission 5*, p. 13; Mr Booth, *Submission 10*, p. 4; Pave the Way, *Submission 14*, p. 4.

83 Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 76.

84 Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 85; see also examples in National Disability Services Ltd, *Submission 15*, pp. 5–6; Sunnyfield Independence, *Submission 46*, pp. 9–10.

85 Public Trustees of the States and Territories and State Trustees Ltd, *Submission 22*, pp. 8–9.

86 Mr Pattison, National Council on Intellectual Disability, *Proof Committee Hansard*, 29 July 2008, p. 25.

2.80 Many costs that cannot be met from a SDT affect the general health and wellbeing of people with a disability. Being able to provide for some of these expenses would contribute to the person's quality of life and help to reduce other expenses associated with poor health later in life. Examples of expenses which submitters and witnesses considered should be eligible included:

- private health insurance, medical and dental treatment;
- white goods, household appliances and furniture;
- utilities;
- clothing;
- property maintenance and house cleaning;
- attending day programs;
- holidays, recreation and entertainment;
- social activities and sporting activities;
- costs of support workers;
- financial and decision making support;
- assistance with nutrition;
- vocational activities;
- special assistance with raising children, for people with mild intellectual disability; and
- 'household costs' paid by individuals in shared supported accommodation, such as groceries, manchester, gardening, cleaning, and household equipment.<sup>87</sup>

2.81 Ms Hope, Section Manager, FaHCSIA, explained that at the time SDTs were introduced the rationale for limiting the uses of the trust funds was that 'the disability support pension was expected to cover the day-to-day living expenses and therefore the care and accommodation requirement was considered to be a reasonable expense, given that the disability support pension should cover the other day-to-day living expenses'.<sup>88</sup>

2.82 Evidence from FaHCSIA indicates that many people do not intend to set up an SDT while they are alive, preferring instead to establish SDTs through their wills.

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87 See for example, The Hon Dr Patterson, *Proof Committee Hansard*, 29 July 2008, pp. 2–3; Mr Pattison, National Council on Intellectual Disability, *Proof Committee Hansard*, 29 July 2008, pp. 25 and 29; Mr Spicer, *Proof Committee Hansard*, 29 July 2008, p. 71; Mr O'Hart, *Submission 5*, p. 7, 12–13; Kew Cottages Parents' Association, *Submission 8*, p. 2; Activ Foundation, *Submission 9*, p. 2; Pave the Way, Mamre Association, *Submission 14*, p. 4; Mr and Mrs Smale, *Submission 32*, p. 1; Mr West, *Submission 33*, p. 2; Sunnyfield Independence, *Submission 46*, p. 12; Carers Australia, *Submission 18*, p. 6.

88 Ms Hope, FaHCSIA, *Proof Committee Hansard*, 29 July 2008, p. 107.

This preference is in part related to the tight restrictions on the eligible uses of SDT funds. Carers see little advantage in locking their assets and funds away in a trust that cannot be used to meet many of the needs of their family member with a disability. FaHCSIA officers acknowledged:

While the assets remain in their total control, they can use them for the person with severe disability if they so choose, in whatever way seems appropriate at the time, and without restrictions on how the funds may be used.<sup>89</sup>

2.83 Sunnyfield Independence considered that the limitations on the use of SDT funds 'perpetuate a paternalistic view toward people with disabilities which is not appropriate in the contemporary environment'. Sunnyfield Independence noted that:

...people with disabilities, even severe disabilities, are able to express their needs and desires, and that they should be able to participate in determining the use of the funds from an SDT rather than have that use dictated to them.<sup>90</sup>

2.84 Sunnyfield Independence recommended that the rules for the use of SDT funds should acknowledge the right of people with disabilities to make their own decisions about their lives and what is important.<sup>91</sup>

#### *Daily care fee*

2.85 The guidelines issued by the Secretary of FaHCSIA setting out what constitutes reasonable care needs were amended in April 2008 to include a specific example relating to the daily care fee charged by approved residential care providers.<sup>92</sup> Witnesses noted that such fees cover a variety of living requirements, such as food, water, electricity and fuel for a group-home car. They submitted that it was inequitable that SDTs were allowed to be used to cover these kinds of costs through the daily care fee charged by a residential facility, but not to cover these costs when provided in other ways, for example when purchased directly.<sup>93</sup>

2.86 FaHCSIA explained that this change to the guideline had been made by the Secretary in response to concerns raised by the Public Trustees about how to treat composite fees, where the portion directly attributed to a person's disability could not be separated out. FaHCSIA representatives indicated that there was some misunderstanding as to what the fee actually covered. Ms Emerson said:

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89 FaHCSIA, *Submission 13*, p. 14; see also Mr Booth, *Submission 10*, p. 2; Pave the Way, Mamre Association, *Submission 14*, pp. 8–9.

90 Sunnyfield Independence, *Submission 46*, p. 9.

91 Sunnyfield Independence, *Submission 46*, p. 4.

92 FaHCSIA, *Submission 13*, pp. 8–9.

93 Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 85 and *Submission 21*, pp. 3 and 7; Mr O'Hart, *Submission 5*, pp. 10–11; Mrs Breheny, *Submission 24*, p. 3;

...it is actually quite a limited provision and it refers to a particular group of aged care providers as defined under the aged care legislation. It is a very small additional component of the levy, which cannot be broken down readily into very discrete elements that would exactly match the current guidelines. It is a beneficial interpretation that would allow the whole of that relatively small fee to be included as a legitimate expenditure under the trust. I heard people saying today that it was all the expenses related to somebody's living, but it is not. As I understand it, it is only a very small fee, somewhere in the vicinity of \$30 or under that amount.<sup>94</sup>

2.87 It is not entirely clear how the definition under the FaHCSIA guidelines described above fits with the general understanding of daily care fees. The Department of Health and Ageing (DoHA) describes these fees as a contribution to daily living costs such as 'nursing and personal care, living expenses, meals, linen and laundry, as well as heating and cooling'. Examples on DoHA's website list the basic daily care fee as up to \$32.05 *per day*.<sup>95</sup> The committee has sympathy with the view of witnesses if such costs are able to be borne from a SDT for eligible people in a residential aged-care facility, but not for those in other care and accommodation settings.

### ***Accommodation needs***

2.88 Accommodation needs are currently eligible to be met from an SDT if the need 'arises as a direct result of the disability of the principal beneficiary'. The trust can also be used to purchase or rent property as long as the property is not bought or rented from an immediate family member and is used for accommodation by the trust beneficiary. Payment of rates and taxes on such property is also allowed from the trust. Expenses such as maintenance and utilities for the beneficiary's place of residence are not allowed to be paid from the trust.<sup>96</sup>

2.89 Evidence to the committee's inquiry indicates that there is confusion about the eligible accommodation uses of SDTs. Carers Australia understood that the 'housing options that can be used are limited to those that are funded wholly or in part under the agreement between the Commonwealth and state and territory governments'. Ms Hughes, from Carers Australia commented:

This is a barrier for many families now who are starting to think creatively about housing options for their family member and we believe that the trust should be able to be used for independent housing for their relative or to

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94 Ms Emerson, FaHCSIA, *Proof Committee Hansard*, 29 July 2008, p. 106.

95 Department of Health and Ageing, 'Daily care fees', [www.agedcareaustralia.gov.au/internet/agedcare/publishing.nsf](http://www.agedcareaustralia.gov.au/internet/agedcare/publishing.nsf), accessed 20 August 2008.

96 FaHCSIA, *Submission 13*, Appendix 2, Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008, pp. 6–8.

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invest in unstaffed housing cooperatives: different sorts of housing options.<sup>97</sup>

2.90 As noted above, SDTs can be used for independent housing through purchase or rent of property. The restriction to housing funded wholly or in part by an agreement between the Commonwealth and states and territories is one component of the eligibility criteria for SDTs. These criteria were discussed earlier in the report.

2.91 However, as raised by Ms Hughes, the ability to use SDTs for other forms of housing, such as cooperatives and group houses, was less clear. Witnesses recommended that more than one trust be able to be used, to jointly rent or purchase accommodation where two or more people with disabilities choose to live together.<sup>98</sup> Submitters noted that such provision would be particularly useful for families with more than one child with a disability, as eventually the adult children may wish to live together.<sup>99</sup> Mr Walter also suggested that SDTs should be able to co-own property with a state housing authority.<sup>100</sup>

2.92 Mr Spicer noted that SDT rules need to account for the fact that 'home is not simply a bed'. He suggested that:

Accommodation must take into account the social, emotional and health needs of a person with a disability as well as ensuring that they have a compatible living arrangement with others and are able to participate in and contribute to the community.<sup>101</sup>

2.93 Mr Spicer highlighted that people with disability are usually unable to move into independent accommodation without a process of transition. As such, services to assist with a gradual transition to independent living, such as respite stays and travel training should be able to be paid for from the SDT.<sup>102</sup>

2.94 There was also uncertainty about the restriction that unless an accommodation need arises 'as a direct result of the disability', SDTs cannot be used to purchase or rent property directly from family members. This rule was seen as limiting some of the most used forms of accommodation for people with disabilities. For example, Mr and Mrs Wilson and Mr Gresswell, Members of Winacom Association Inc, noted that this provision means that SDT funds cannot be used for the construction of

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97 Ms Hughes, Carers Australia, *Proof Committee Hansard*, 29 July 2008, p. 13.

98 Mr Gresswell, Winacom Association, *Proof Committee Hansard*, 29 July 2008, pp. 47 and 52; Mr Ward, Pave the Way, Mamre Association Inc, *Proof Committee Hansard*, 29 July 2008, p. 66.

99 Winacom Association, *Submission 6*, p. 13.

100 Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 88.

101 Mr Spicer, *Submission 19*, p. 7.

102 Mr Spicer, *Submission 19*, p. 7.

'granny flats' attached to the family home.<sup>103</sup> They noted that constructing or leasing property from family is in many cases the 'only practical way of protecting the asset from disreputable people wishing to strip the assets of the intellectually disabled person'.<sup>104</sup> Mr Brian O'Hart provided an example where he had tried to establish whether the rent paid by someone with a disability who was highly supported to live in a family owned property could be covered by the trust.<sup>105</sup>

2.95 Witnesses also suggested that SDTs should be able to be used to pay an accommodation bond for an aged care facility, although the guidelines issued by FaHCSIA indicate that this is already allowable.<sup>106</sup> However, as outlined in the previous chapter, capital gains tax is payable if the beneficiary's residence is sold to pay for the accommodation bond.<sup>107</sup>

2.96 One further issue about using SDTs to purchase property for people with disabilities concerned access to the First Home Owner Grant. Mr Walter wished to ensure that if a SDT is used to purchase a first home for someone with disability, the First Home Owner Grant should apply as it would to anyone with the capacity to purchase a first home directly.<sup>108</sup>

### ***Suggested changes***

2.97 Submitters put forward various proposals for expanding the eligible uses of SDTs. Planned Individual Networks suggested that the legislation be altered to replace the 'sole purpose' provision with 'The purpose of a SDT is to support the Principal Beneficiary in all their care, accommodation and living cost as reasonably required by the Principal Beneficiary and determined in consultation with the Trustees.'<sup>109</sup> If a restriction is to be maintained, Planned Individual Networks suggested that a clause could be included to require that a minimum of 80% of SDT income be used for care and accommodation purposes.

2.98 The Public Trustees suggested a range of ways to broaden the 'care and accommodation' purpose of the trusts, for example, broadening the definition to include living essentials, including as 'care needs' all expenses incurred for the broader welfare of the principal beneficiary, or including as eligible the care and

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103 Winaccom Association, *Submission 6*, p. 7.

104 Winaccom Association, *Submission 6*, p. 11.

105 Mr O'Hart, *Submission 5*, p. 6.

106 Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 79; FaHCSIA, *Submission 13*, Appendix 2, Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008, p. 7.

107 FaHCSIA, *Answers to questions on notice*, received 2 September 2008.

108 Mr Walter, *Proof Committee Hansard*, 29 July 2008, p. 88; Mr and Mrs Walter, *Submission 21*, p. 10.

109 Planned Individual Networks, *Submission 4*, pp. 2–3.



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accommodation needs that have an increased cost or incidence because of the person's disability.<sup>110</sup> The Public Trustees recommended that SDTs be able to be used for 'both compliant and noncompliant expenditure', or, alternatively the trust be able to be split into sub trusts, one for eligible and one for non-eligible costs, with 'relevant welfare relief only applying to the parts to which the compliant expenditure relates'.<sup>111</sup>

2.99 The National Council on Intellectual Disability recommended that the definition of care be extended to include:

...any support equipment or service a person with a disability requires and where the person is in receipt of a DSP that the definition of care be further extended to include such things as holidays and personal entertainment items.<sup>112</sup>

2.100 National Disability Services' perspective was that if a significant component of a cost can be attributed to disability then the whole of the cost should be able to be covered by the proceeds of the trust.<sup>113</sup> Winacom Association considered that 'the allowable expenses to be paid from the SDT should be broadened to cover all reasonable accommodation and care costs necessary to enable the disabled person to live a life comparable to a non-disabled person'.<sup>114</sup>

2.101 Mr Weir did not see a reason for restricting the uses of the trusts at all. He used an analogy to superannuation and aged care, which are partly funded by government:

...there is no restriction on aged persons on how they spend the money because it is accepted they spend it for their normal living needs. That will include accommodation and care where they need it, but it also includes anything they might need.<sup>115</sup>

2.102 Mr Ward, Manager, Pave the Way Mamre Association Inc. also did not see the need for any limitations on the uses of SDT funds, other than that the money must be used for the beneficiary.<sup>116</sup>

2.103 The National Disability Services suggested that the funding rules outlined by the Victorian Department of Human Services in its draft guidelines for the use of an individualised support package provide a model for how the purpose requirement could be broadened. National Disability Services noted that the draft guidelines, like

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110 Public Trustees of the States and Territories and State Trustees Ltd, *Submission 22*, pp 2–3.

111 Public Trustees of the States and Territories and State Trustees Ltd, *Submission 22*, p. 2.

112 National Council on Intellectual Disability, *Submission 11*, p. 9.

113 Dr Baker, National Disability Services, *Proof Committee Hansard*, 29 July 2008, p. 76.

114 Winacom Association, *Submission 6*, p. 13.

115 Mr Weir, Planned Individual Networks, *Proof Committee Hansard*, 29 July 2008, p. 98.

116 Mr Ward, Pave the Way, Mamre Association, *Proof Committee Hansard*, 29 July 2008, p. 64.

the SDT rules, do not allow funds to be used as a form of income supplementation, however, they provide much greater discretion in relation to allowable costs. The guidelines list a number of positive, inclusive objectives to which the funds can be used, such as 'being able to live as independently as possible'.<sup>117</sup>

### ***Other expenses***

2.104 Witnesses raised several other expenses, beyond care, accommodation and living expenses that they suggested should be met from a SDT. It was argued that income from SDTs should be able to be used to make contributions to superannuation and therefore attract the government co-contribution. The Hon Dr Patterson outlined:

Most of these people are on very low incomes, their supported employment or business service employment supplementing their DSP, and they have very little chance of contributing to super. It would seem a way in which they could participate in that co-contribution as low-income earners, if a trust could contribute to super.<sup>118</sup>

2.105 The cost of administering an SDT was also raised. Ancillary costs, necessary to facilitate the primary purpose of the trusts, are currently allowed to be paid from the SDT. As such, costs of administering the trusts and audits of the trust are met from the trust. However, Winacomm Association Inc noted that this provision is limited as family members are not able to be recompensed from the trust:

In order to find someone in the family who is willing to take on the administration of the SDT we believe that family members should be able to claim recompense for their time at a rate consistent with a commercial organization performing the same task.<sup>119</sup>

### ***Preventing misuse of funds***

2.106 The Winacomm Association argued that checks could be built into the existing system to prevent misuse of SDT funds even if the eligible uses are broadened:

As the SDT is audited and subject to Centrelink scrutiny, it is feasible to place the burden of proof on the Trustees of a SDT, that expenses paid from the SDT are reasonable in each individual circumstance. Centrelink could conduct random audits to monitor this.<sup>120</sup>

2.107 Witnesses for the State Trustees observed that mechanisms exist to ensure that the trusts are not abused. Mr Fitzgerald explained:

For instance, for each trust we need to do a tax return, so that would be one mechanism. The other one would be Centrelink returns each year to ensure

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117 National Disability Services, *Submission 15*, p. 5.

118 The Hon Dr Patterson, *Proof Committee Hansard*, 29 July 2008, p. 3.

119 Winacomm Association, *Submission 6*, p. 12.

120 Winacomm Association, *Submission 6*, p. 13.

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the compliance status of the trust with whatever rules ultimately are applied to this initiative, even if they are broadened...<sup>121</sup>

2.108 There was a strong view that the trusts should be considered in terms of the benefit that can be provided to the person with a disability; the focus should not be on the potential for evasion of tax commitments and responsibilities. Submitters argued that loosening the current onerous restrictions on the eligible care uses of the trusts would be a key step in refocussing SDTs on the benefits for the person with disability.

### *Committee comment*

2.109 The committee is strongly of the view that the tight restrictions on the eligible uses of SDT funds are severely hampering take-up of the trusts. People see little point in setting aside funds if those funds cannot be used to provide the accommodation, care and support that their loved one needs to live as independently as possible. The committee notes that being able to provide better care and living standards for people with disability, for example using SDTs for private health insurance, medical and dental treatment and a range of household expenses and social engagement activities stands to improve their health and wellbeing, as well as relieve some of the stress and burden on their carers.

2.110 The original intention of SDTs was to assist families able to make private financial provisions for the current or future accommodation and care of a family member with severe disability. The committee considers that the eligible uses of the trust must be expanded if this intention is to be given effect.

### **Recommendation 6**

**2.111 The committee recommends that the allowable uses of special disability trusts be expanded to include all day-to-day living expenses that are met to maximise the beneficiary's health, wellbeing, recreation and independence.**

### **Recommendation 7**

**2.112 The committee recommends that unexpended income from a special disability trust be able to be contributed, on a pre-tax basis, to a superannuation fund for the trust beneficiary.**

### **Recommendation 8**

**2.113 The committee recommends that when a special disability trust is used to purchase a first home for the trust beneficiary, the First Home Owner Grant should apply and be payable to the trust.**

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121 Mr Fitzgerald, Managing Director, State Trustees Ltd and National President, Trustee Corporations Association of Australia, *Proof Committee Hansard*, 29 July 2008, p. 37.