

CHAPTER 1

INTRODUCTION

Terms of reference

1.1 On 15 May 2008 the Senate referred matters relating to Special Disability Trusts (SDTs) to the Community Affairs Committee for inquiry and report by 18 September 2008. These were:

(1) The Senate:

(a) notes:

- (i) the inclusion in 2006 of Part 3.18A – Private financial provision for certain people with disabilities – to the *Social Security Act 1991* to enable the establishment of special disability trusts, and
- (ii) that since the introduction of Part 3.18A and to 31 December 2007 only 22 trusts have been established; and
- (iii) recognises the potential benefits that special disability trusts can deliver for those living with a disability, but is concerned that there remain barriers to the establishment of special disability trusts that are limiting their wider beneficial application.

(2) The following matters relating to special disability trusts be referred to the Community Affairs Committee for inquiry and report by 18 September 2008:

- (a) why more families of dependents with disabilities are not making use of the current provisions to establish Special Disability Trusts;
- (iv) the effectiveness of Part 3.18A of the *Social Security Act 1991*;
- (v) barriers in the relevant legislation to the establishment of Special Disability Trusts; and
- (vi) possible amendments to the relevant legislation.

On 18 September 2008, the Senate extended the reporting date to 16 October 2008.

Conduct of the inquiry

1.2 The inquiry was advertised in *The Australian* and through the Internet. The committee wrote to interested individuals and groups inviting submissions. The committee received 47 submissions relating to the inquiry and these are listed at Appendix 1. The committee held a public hearing in Canberra on 29 July 2008. Details of the public hearing are referred to in Appendix 2. The submissions and Hansard transcript of evidence may be accessed through the committee's website at http://www.aph.gov.au/senate_ca.

Background

1.3 SDTs were developed to assist parents and carers concerned about what would happen to a person with a disability when they were no longer able to provide care. Some parents and carers wished to use their own funds to provide, or to partly provide, for the accommodation and care of a person with a disability but were constrained by social security rules which may have altered their entitlements to disability support pensions, age pensions, veteran pensions or related benefits. They argued these means testing rules prevented them from planning a smooth transition for a person with a disability from family care to alternative arrangements.¹

1.4 On 13 October 2005 then Prime Minister, the Hon John Howard and former Minister for Family and Community Services, the Hon Dr Kay Patterson, announced a \$200 million package which included allowing the establishment of SDTs to assist parents and immediate family members wishing to make private financial provision for the current or future accommodation and care of a family member with a severe disability. Under the new trusts parents or other immediate family members of a person with a severe disability would be able to establish a trust worth up to \$500,000 (indexed annually) for the future care of that person without being affected by social security income tests or gifting rules.²

1.5 Also announced was the establishment of an advisory group to provide advice to government on some of the policy detail of SDTs.³ The advisory group consulted with peak organisations, individuals, parent groups and disability sector organisations and reported on 27 March 2006.⁴ On 20 September 2006 the Commonwealth Government amended the *Social Security Act 1991* to allow families to establish SDTs.⁵ As noted in the terms of reference, only a small number of SDTs have been established to date. The low take-up of the trusts and concerns about their operation expressed by families and carers provided the impetus for the committee's inquiry.

Special disability trusts

1.6 Under a SDT, the parents or other immediate family members of a person with a severe disability, are able to establish a trust to provide for the costs of the

1 Mr Spicer, *Submission 19*, p. 1.

2 Prime Minister John Howard, 'Private Trusts for People with Disability', *Media Release*, 13 October 2005.

3 Peter Yeend and Fiona Childs, 'Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006', *Bills Digest*, 14 June 2006, no. 151 2005-06, p. 19.

4 Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Submission 13*, Ministerial Advisory Group report, 'Planning for sons and daughters with severe disability', 27 March 2006.

5 *Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006 (No. 82, 2006)*.

accommodation and care of the person. A trust is an arrangement whereby property in a trust is managed by one person (the trustee) for the benefit of another (the beneficiary).

1.7 The concessions in relation to SDTs create exceptions to the ordinary means test rules applying to trusts for a person with severe disability. For SDTs the income and asset test rules and the gifting rules normally applied under the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* do not apply. This means the income from the trust will not affect the income support payments of the person requiring care. Assets in the trust up to a set limit are not included in means tests. The cap was originally set at \$500,000 and is indexed annually in line with the Consumer Price Index (CPI) (currently \$532,000 as at 1 July 2008).⁶ Consistent with the normal application of the social security assets test, the principal home of the beneficiary is exempt from the assets test.⁷ Also, contributions from immediate family members to the SDT will not be affected by the gifting rules in relation to means testing that would normally apply to the gifting person's social security or veterans entitlements. The gifting concession available is up to the value of \$500,000, which is not indexed.

1.8 In order to qualify as a SDT a trust must meet a number of requirements set out in the *Social Security Act 1991*. These include:

- the beneficiary requirements (section 1209M);
- the trust purpose requirements (section 1209N);
- the trust deed requirements (section 1209P);
- the trust requirements (section 1209Q);
- the trust property requirements (section 1209R);
- the reporting requirements (section 1209S); and
- the audit requirements (section 1209T).

1.9 Significant requirements for SDTs include that:

- a trust must have only one principal beneficiary;
- the principal beneficiary must be assessed as eligible;
- the trust must provide only for the accommodation and care needs of the principal beneficiary;
- the trust must have an independent trustee, or have more than one trustee (e.g. two or more family members); and

6 Peter Yeend and Fiona Childs, 'Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Bill 2006', *Bills Digest*, 14 June 2006, no. 151 2005-06, p.19.

7 FaHCSIA, *Submission 13*, p. 5.

- the trustee must provide annual financial statements and conduct independent audits when required.

Uptake of special disability trusts

1.10 When the measure was announced it was estimated that over four years 5000 people with severe disability would benefit from the establishment of SDTs. This estimate was derived from an analysis of the people reported to have profound core activity limitation and Centrelink data regarding the number of people in receipt of Disability Support Pensions being cared for by parents and/or people with high care needs and unlikely to be able to manage their own affairs.⁸

1.11 The most recent statistics provided by Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) are that at 30 June 2008 there were 33 special disability trusts operating and 262 people have been granted eligibility status as beneficiaries by Centrelink.⁹ However a SDT can be a testamentary trust (established through a will). FaHCSIA and a number of other submissions the committee received suggest that more people may be opting to create SDTs through their wills.¹⁰

Acknowledgements

1.12 The Committee wishes to express its appreciation to everyone who contributed to the inquiry by making submissions or appearing before it to give evidence.

8 FaHCSIA, *Submission 13*, p. 5.

9 Ms Emerson, FaHCSIA, *Proof Committee Hansard*, 29 July 2008, p. 103.

10 FaHCSIA, *Submission 13*, p. 14.