

**Winaccomm Association Incorporated**

**P. O. Box 600**

**Glen Waverley. Vic 3150**

11 June 2008

The Secretary,  
Senate Community Affairs Committee  
P. O. Box 6100  
Parliament House  
CANBERRA ACT 2600

**Re – INQUIRY INTO SPECIAL DISABILITY TRUSTS**

Dear Committee Secretary,

Winaccomm Association Incorporated has attached our detailed submission on this matter.

In 2006 members of our Committee had a meeting with Senator Kay Patterson, in which we expressed our concern that the current Centrelink Gifting rules would have a negative impact on parents and their disabled offspring, were those parents to provide accommodation for their dependent sons or daughters. (We wish to place on record here our appreciation for Senator Patterson's empathy for people with a disability and their carers, and her tireless efforts to improve their situation.)

Later that year we were informed that legislation would enable Special Disability Trusts to be established, so that parents could provide funds up to \$500,000 to pay for the accommodation and on-going support for their disabled child, without it affecting the Centrelink entitlements of either party.

I remember talking to a group of parents at Ashwood Special School about this proposed legislation, and mentioning that they could start such a Trust and put savings into it, together with perhaps grandparent's bequests, so that when the youngster was in his or her 30's, there could be sufficient funds in the Trust so that they would not be dependent on the Government for accommodation or support. One parent actually described such legislation as "life-changing."

Imagine my shock and disappointment when the fine print revealed that parents **would not be able to save** towards their child's future, without their hard-earned savings being eroded away by the Government, in tax!

As we know, the thousands of parents who continue caring for their disabled son or daughter in the family home, often into their 80's, **save Governments \$30 billion a year**. Eventually many of those with disability will end up on a Government's "doorstep". Already its ability to meet current demand is pitifully inadequate, let alone into the future! At last here is the chance to encourage those families who are willing and able to take some of this burden off Government through self help - and yet, inexplicably, the Government has chosen to punish them if they take steps to do so! Why? Do you really wonder that so few families have set up and are using a SDT?

Winaccomm Association Inc Submission to Senate Community Affairs Committee June 2008

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I had envisaged the Trusts as working in much the same way as a superannuation scheme, which relieves the Government of enormous expense through self funded retirees. What would be the response if superannuation funds were taxed at 46.5%? Yet the purpose is the same - to encourage people to save for their own future. Is not the life of the disabled and their carers hard enough already, without this added discrimination?

We are hopeful that the necessary changes to the SDT legislation set out in this submission will be implemented. This will, we believe, facilitate more families to set up a SDT to make future provision for the care and accommodation for their son or daughter. Just give them an incentive to do so!

Yours sincerely,

Wendy Verhagen

President

Winacomm Association Incorporated

## **WINACCOM ASSOCIATION INCORPORATED**

P.O.Box 600 Glen Waverley. Vic. 3150

### **SUBMISSION TO SENATE COMMUNITY AFFAIRS COMMITTEE**

#### **INQUIRY INTO SPECIAL DISABILITY TRUSTS (SDT)**

##### 1. BACKGROUND OF WINACCOM ASSOCIATION INC

- 1.1 Winaccomm Association Inc was formed in 2003. Its members comprise families who have a son or daughter with significant disability, (intellectual) and, who are in receipt of a Disability Support Pension.
- 1.2 Winaccomm members recognised that at some future point, their son/daughter would have to face living without the support and care of their parents. Consequently, parents embarked on developing plans that would prepare their son/daughter with the necessary skills for such a situation, and provide them with appropriate long term accommodation.
- 1.3 Winaccomm members realised that adequate support was unlikely to be available for their son/daughter from State or Commonwealth Government Agencies when required, and therefore set out on their journey with the view that some "self help" was required to achieve their objectives. A "partnership" with Government Agencies was envisaged.
- 1.4 Their efforts are now beginning to achieve results. Following attendance at a specially designed TaFE Course, and other development activities, approximately 30% of our members are now living "independently" (with some support), away from their parents.

##### 2. BRIEF COMMENTARY ON INTRODUCTION OF SDT's

- 2.1 During early 2006, Winaccomm had a discussion with the Hon. Senator Kay Patterson about the problems of gifting assets by parents to provide for the future of people on a disability support pension. These problems in the main revolved around the negative impact of Centrelink means tests on both the pensioner and parents, when assets were transferred into the name of, (or in a trust for) the disability support pensioner.
- 2.2 Winaccomm considers the introduction of the legislation for SDT's as a step forward, (but with major drawbacks) to help families provide for the long term care and accommodation of their children with significant disability.
- 2.3 Two of Winaccomm's current members participated in the Ministerial Advisory Group on the matter of Special Disability Trusts that reported to the Minister for Families, Community Services and Indigenous Affairs in March 2006.
- 2.4 Unfortunately, a number of recommendations from the Ministerial Advisory Group that would have facilitated the use of SDT's by families were not taken up. (In particular Recommendation<sup>1</sup> 9 was critical to sensible operation of the Trust.)

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<sup>1</sup> Refer Page 3

Further a number of Findings were brought forward for the Minister's consideration, but because they fell outside the allowable Terms of Reference, could not become Recommendations. In particular, Findings<sup>2</sup> 1, 2, and 4, if they had been included in the legislation, were matters that would have significantly enhanced the likelihood of families setting up SDT'S.

The Recommendations not taken up, and the Findings ignored, are now major reasons why SDT's have not been taken up by families.

### 3. RESULTS OF SURVEY OF WINACCOM MEMBERS

- 3.1 Winaccom members contain a significant number of families who, in theory, would be prime candidates to set up a SDT for a son or daughter.
- 3.2 The reality is that not one of its families has done so.
- 3.3 A survey was sent to all members prior to this submission being prepared, to ascertain what our members knew of, and thought about SDT'S. The results are set out hereunder,  
The % of members responding to the survey was 22%.
- 3.4 The following numbers are expressed as a % of those who responded:
  - 25% had not considered the matter in depth.
  - 75% had considered the matter in depth.
  - 0% had actually set up a SDT
  - 12% had considered the matter, but indicated they were unlikely to set up a SDT now or in the future.
  - 50% have made provision in their will to allow their executor/trustee to set up a SDT
  - 50% indicated they may have set up a SDT by now, were it not for the "negatives" surrounding the SDT's.
  - The major "negatives" listed as a disincentive to set up a SDT were:
    - Punitive income tax rate on unexpended Trust income
    - Limited range of expenses that can be paid from the Trust
    - Too complicated and costly to set up SDT
    - Costs of SDT audit and administration requirements

### 4. FURTHER DETAIL IN ATTACHMENT 'A'

Two of our member families have compiled a detailed analysis of constraints to setting up a SDT, and also provided some suggested solutions for these constraints.

This analysis forms the major part of our submission, and is attached.

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<sup>2</sup> Refer Page 3

## 5. FURTHER INFORMATION

Should you require any further information from us, or wish to discuss our submission, contact details are:

Ian Gresswell

Honorary Treasurer

Winacom Association Inc.

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### **References**

“PLANNING FOR SONS AND DAUGHTERS WITH SEVERE DISABILITY”  
ADVISORY GROUP REPORT to Minister for Families, Community Services and  
Indigenous Affairs  
27 March 2006

1. Recommendation 9: Page 5

The trust be allowed to pay for any reasonable costs incurred by or on behalf of the person with severe disability including day-to-day living expenses.

2. Finding 1: Page 6

On the establishment of the trust, the trust may be liable to pay significant amounts of tax, such as capital gains tax. This may deter some parents or immediate family members from establishing or contributing into the trust.

Finding 2: Page 6

If the trustee decides to accumulate income to provide for future needs, the trust will have to pay the highest marginal tax rate on the income. This may significantly reduce the capacity for the Trust to accumulate funds.

Finding 4: Page 6

The advisory group noted the concerns raised during consultations that the trust exemption cap is unlikely to meet the long term real needs of people with disabilities and suggest that the Minister may wish to revisit this issue. If so, a maximum limit of \$1 million should be considered.

End of References

## **WINACCOM ASSOCIATION INC**

### **ATTACHMENT 'A'**

#### **SUBMISSION TO SENATE COMMUNITY AFFAIRS COMMITTEE**

#### **INQUIRY INTO SPECIAL DISABILITY TRUSTS (SDT) AND EFFECTIVENESS OF PART 3.18A OF THE SOCIAL SECURITY ACT 1991**

##### **Introduction**

Part 3.18A of the Social Security Act 1991 (SDT legislation) was enacted in September 2006 with the hope and objective of encouraging families to provide accommodation and care for their disabled family members. Since the introduction of this legislation a very small number of SDTs have been established.

This attachment summarizes the requirements of the SDT as it affects the family and the disabled person and examines the restrictions of the legislation in respect of those with an intellectual disability. It is very clear to us, as a result of the restrictions applying to the creation and operation of an SDT, that the rules have been designed for the purpose of preventing abuse of the benefits of the SDT.

However, in creating these restrictions, it appears that the special needs of the intellectually disabled have not been understood when compared with those who have other types of disability.

After examining the effect of the restrictions it appears that the legislation currently offers very little of practical value to the individual with an intellectual disability or to his/her family members.

We have included some suggested changes to the legislation that would encourage families to set up a SDT for their son/daughter.

David & Pauline Wilson

Ian Gresswell

Members of Winaccomm Association Inc

4 June 2008

##### **DISCLAIMER**

The opinions expressed in the following Sections 1 and 2 of this document are those of the authors, and are not necessarily the opinions of the Committee of Management of Winaccomm Association Inc.

However, the Committee of Management endorse fully the Recommendations listed in Part 3 of this document.

Winaccomm Association Inc    Submission to Senate Community Affairs Committee    June 2008

Inquiry into Special Disability Trusts

## **ATTACHMENT 'A'**

### **COMMENTS ON PROVISIONS IN PART 3.18A OF THE ACT**

#### **Part 1 - Summary of the Provisions of SDT Legislation**

##### **1.1 Advantages to the Beneficiary**

- Income from the assets of the SDT is not included in the income test applied by Centrelink in assessing the eligibility of the disabled person
- The use of SDT funds to pay for accommodation or special needs care is not assessed in the income test by Centrelink.
- Assets up to \$500,000 in the SDT are not counted for application of the assets test by Centrelink. In addition, the principal residence owned by the beneficiary is also exempt.

##### **1.2 Advantage to Family Members Contributing to the SDT**

- Contributions to the SDT to be used for the accommodation and special care of the beneficiary of the SDT are exempt from the normal gifting restrictions when Centrelink assesses the family member for an age pension. Any contributions which cause the value of the fund to exceed \$500,000 are not exempt.

##### **1.3 Disadvantages to the Beneficiary**

- The SDT cannot be used to provide additional income or to pay for normal living costs and holidays, etc.
- Property owned by the beneficiary cannot be transferred into the SDT unless it was received as a death benefit under a will, within the previous three years.

##### **1.4 Disadvantages to the Family Members**

- Only immediate family members, which includes parents, grandparents and siblings, may gift to the fund and receive the Centrelink gifting exemption.
- The trustee, if an immediate family member, cannot be compensated for the time spent in administering the SDT.
- The SDT cannot compensate an immediate family member for providing care or maintenance services.
- The SDT cannot use funds to lease or buy property from an immediate family member to be used by the beneficiary of the SDT. This includes paying for construction of 'granny flats'.
- Funds contributed to the SDT cannot be withdrawn. As a result, family members who have contributed to the SDT would be unable to respond to any change in personal financial circumstances.

### **1.5 Administrative Requirements Applying to the SDT**

- The trust must submit and pay for the preparation of written financial statements to Centrelink on or before 31 March each year, prepared by a duly qualified person, approved by Centrelink.
- An audit of the SDT may be requested at any time by a range of interested parties. The auditor must be approved by Centrelink. Substantial costs may be incurred by the SDT in meeting this requirement.

### **1.6 Treatment of Income Generated by the SDT**

- Income, including capital gains, is not assessed by Centrelink in the income test applying to the beneficiary.
- Income distributed to the beneficiary will be taxed as normal income in the hands of the beneficiary.
- Income not distributed nor spent on special care or accommodation will be taxed at 46.5% in the Trust.

## **Part 2 - The Impact of the Legal Restrictions in the Creation and Operation of SDTs**

It is clear to us from the restrictions applying to the creation of an SDT that the rules have been designed for the purpose of preventing abuse of the benefits of the SDT. However, in creating these restrictions it appears that the special needs of the intellectually disabled have not been understood when compared with those who have other types of disability.

### **2.1 Provision of Accommodation**

Owing to their intellectual disability in a practical sense it is generally impossible for the intellectually disabled person to own and manage property in his or her own right. First, this limitation arises from this person's possible inability to contract to purchase and manage property. Second, intellectually disabled people need protection from those who would befriend them with a view to stripping their assets.

The most likely source of accommodation for the intellectually disabled are:

- In a government funded residence. This accommodation is extremely scarce and is available only to those in crisis situations. Further, important considerations such as compatibility and access to work etc are not taken into consideration.
- In a residence constructed by non-government community groups (such as "Affordable Housing Associations"). This accommodation is very rare and generally these providers do not deal directly with individuals or families, as the nomination of residents is controlled by a State Government Department.(e.g. Department of Human Services)
- In a residence constructed/purchased under a "shared equity" arrangement. Typically this will be an arrangement made between an "Affordable Housing Association" and a family or individual to provide agreed capital contributions towards the cost of construction or purchase. The Association assumes ownership and manages the property, and leases the residence (on a long term basis) to the disabled person for a fixed percentage of their total income, plus any Centrelink Rental Assistance.



- In a unit or “granny flat” constructed by the family for the disabled person. However it is prohibited to use SDT funds for this purpose.
- In a flat leased by the family to provide accommodation for a disabled person. Again the SDT funds cannot be used to provide this type of accommodation. At present there is an extreme shortage of suitable rental properties, especially as many property owners are reluctant to rent the property to the intellectually disabled.
- Living in the family home. This is the only option available to most families with an intellectually disabled child. It is generally unsatisfactory for both the parents and the child particularly in the longer term. Again the SDT funds cannot be used to support this type of care.
- In retirement villages. The SDT could be used to fund accommodation bonds. However this form of accommodation is not available until the disabled person is older than 55 years.

In summary, there are very few situations where SDT funds can practically be used for the accommodation of the intellectually disabled.

## 2.2 Contributing Funds to the SDT

The only family members who can possibly benefit by contributing to an SDT are those, who by making a contribution, would qualify for, or improve the value of a Centrelink pension by making this gift. In reality, since any gift to the SDT cannot be later withdrawn, if the family member has a sufficiently low level of assets so that this Centrelink benefit is obtainable, then it is extremely unlikely that he/she can afford to make the gift without endangering his/her future financial situation.

A further problem will occur should a family/family member gift a property into the SDT for the accommodation of the family member with disability. In the current inflationary environment for property prices, any property gifted into a SDT in the short to medium future will almost certainly incur significant capital gains tax for the donor, unless the property was their primary place of residence up to the point of gifting. (Maybe only on their death?) This is a big drawback to making future provision for their son/daughter during your lifetime.

Most intellectually disabled people have suffered their disability for the whole of their lives. During their lifetime they may have managed to put aside funds themselves or have been gifted funds by relatives to support their future needs. If the adult intellectually disabled person has been able to set aside funds because he/she has been living with the family and has only been charged a small fraction of his/her true cost of accommodation and care by the family, the SDT restrictions prevent the disabled person contributing any of this money to an SDT to support his/her accommodation needs.

Non-intellectually disabled are able to purchase a residence using these funds and not have their Centrelink entitlements affected. On the other hand, because the intellectually disabled often cannot enter into a contract to purchase or lease a property, (and are often in a position where it would be undesirable to do so because of the danger of being duped), they suffer from the impact of the assets tests, by holding funds which are primarily intended for future accommodation support.

In summary it is unlikely that any family member, who would benefit from a gift to an SDT, can afford to make this gift and the intellectually disabled person who may be able to contribute to the fund is prohibited from doing so.

### **2.3 SDT Administration**

The costs of setting up an SDT for a family would typically be several thousand dollars since extensive specialist legal advice is required before undertaking this venture, and generally it would need to be done by experts in estate planning for families who have a child with an intellectual disability.

There were comments made by Government that the reasonable costs of setting the SDT could be met by Government, or, low cost "off the shelf" instructions for setting up a SDT could be provided. This has not eventuated.

Unless an expensive commercial organization is used to administer the SDT it is almost certain that this task would fall to a sibling of the intellectually disabled person. This person would almost always have significant other personal commitments which would severely restrict this person's ability to manage the SDT. Bearing in mind that this task could endure for up to 50 years or more, it is unreasonable to expect the sibling to undertake such a huge responsibility with no possibility of reimbursement for time spent.

The taxation provisions of the SDT are particularly draconian. If, despite all the problems mentioned above, funds are put aside over the years in an SDT to gradually build up a fund to provide for the accommodation and care of an intellectually disabled person, then any income earned by the fund and reinvested to grow the fund is taxed at 46.5%, largely destroying the possibility of growth. This impost effectively means most families will only set up a SDT to operate after the death of parents, as only a small percentage of families with a severely disabled child would have significant lump sums to put into a SDT until they near retirement age (of the parents).

In summary we believe the administrative and financial impact of establishing a SDT for an intellectually disabled person is severe and does provide a significant inhibitor to establishing a SDT.

## **Part 3 - Recommendations for Improving Legislation**

The following suggestions relate specifically to the intellectually disabled within the broader disabled community. This group represents a definable and significant part of the disabled group. The intellectually disabled in many cases are often able to manage their everyday activities with some supervision. However many lack the intellectual capacity to enter into contracts to purchase or lease property, and all are very vulnerable to attacks by predators who befriend them with the sole intention of stripping their assets. It appears that SDT legislation has

failed to recognize that the intellectually disabled group requires special treatment to address these issues. As a result there is little benefit and indeed often there are serious disadvantages in creating a SDT by the family of an intellectually disabled person.

The following nine recommendations, if implemented, would make the SDT more attractive to the family of the intellectually disabled person, who are desirous of providing for the long term care and accommodation of that person with minimal government support.

### **Recommendation 1 – Eligibility Rules for creating a SDT.**

In the legislation, the definition of a person with a severe disability (in short) is a person who would qualify for a disability support pension; and who needs to live in an institution, hostel or group home; and have a disability that would qualify a sole carer as eligible for the Carer Payment or Carer Allowance.

Under Centrelink rules, for a person to be eligible to receive a Carer Allowance, requires the carer to assist with the everyday activities of the disabled person. In reality, some intellectually disabled people can manage their everyday personal care, but all need considerable support for financial, health matters, employment and other major decisions.

We believe an intellectual disability which entitles that person to a Disability support pension, should, in itself, entitle the person to access the SDT with no reference to Carer Payment or Carer Allowance eligibility.

### **Recommendation 2 - Accommodation Provided by the Family of the Intellectually Disabled Person**

Because of the difficulties associated with property ownership and management by a person with an intellectual disability as discussed in detail above, often the only way that the family is able to provide accommodation for the disabled family member is to construct or lease an independent living unit for the use of that person.

We believe that the family should be able to use funds sourced from an SDT to construct an independent living unit on its property, or take out a lease for renting such a property to be used exclusively by intellectually disabled person(s). We believe in many cases this type of ownership is the only practical way of protecting the asset from disreputable people wishing to strip the assets of the intellectually disabled person.

### **Recommendation 3 - Contributions Provided by the Intellectually Disabled Person to a SDT**

Since an intellectually disabled person is unlikely to hold property in his/her own name, for reasons discussed above, then it seems very unfair that this person cannot contribute funds to an SDT bearing in mind that the SDT funds can only be used for accommodation and special needs care.

Further, there are some disabled persons who have superannuation, either as a result of employment (e.g. in a Supported Business Service), and/ or as a result of family contributions to a fund. It is likely many will not be able to work until the normal retirement age of able bodied people.

They will have superannuation they cannot utilise, and may never get to utilise. It should be possible that on retirement from the workforce, or say reaching the age of 50 years of age, they can transfer funds from superannuation into the SDT.

We believe that these restrictions should be removed. Removing them would be extremely desirable, as it would allow the disabled person to purchase a property held in the name of the trust and thus protect the asset against fraud.

#### **Recommendation 4 - SDT Administration**

It is almost certain that the task of administering the SDT would fall to a sibling of the intellectually disabled person. This could be an extremely demanding and long term commitment. The SDT legislation specifies that this person cannot be reimbursed for administering the SDT.

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.

#### **Recommendation 5 - SDT Taxation**

One of the most desirable methods for a family to provide future accommodation for a disabled child is to contribute to a SDT or fund which grows over time, and would be available for the purchase of accommodation at a future date. (Desirably any such fund would exist under the umbrella of a SDT.) The property purchased would be owned by the trust for the use of the intellectually disabled person. The current draconian income tax rate of 46.5% on income earned by the trust but not distributed, make this very desirable process almost impossible to achieve. Of all the restrictions which apply to SDT's this is probably the most short-sighted and counter-productive.

We believe that since the funds in an SDT can only be used for accommodation and special care of the disabled person, then the tax on any unexpended fund income during the life of the SDT should be zero. When the SDT is finally dissolved, any unexpended income would then be taxable in the Trust's hands.

At worst, tax on unexpended income should be in line with superannuation funds (at 15%).

### **Recommendation 6 – Accommodation and Care Expenses paid from a SDT**

The present allowable expenses are too restrictive.

We are aware of Centrelink disallowing the payment from a SDT for support care required by a person receiving a DSP, and who lived “independently” from the parent’s home.

A person with severe disability often has special needs within a whole range of activities to allow “quality of life”.

This could be in such items as care in their place of residence, holidays, recreational activities, travel, special needs programs, etc. Recognition should be made that the needs and costs of these types of activities will vary widely.

Therefore, 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. 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.

If this recommendation was implemented, it would obviate the need for families to set up another separate trust to pay for these necessary expenses.

### **Recommendation 7 – Gifting of Property into a SDT.**

To encourage families to gift/transfer property into a SDT (for the future accommodation needs of the disabled person), the vendor of the property gifted should be excluded from capital gains tax, on the grounds that the property is a gift, and no “cash” value has changed hands. Where the property gifted was not the donor’s principal place of residence, the potential capital gains tax liability would be transferred into the SDT, and will be payable on dissolution of the SDT, and sale of the asset.

### **Recommendation 8 – Clarify uncertainties over accommodation owned by a SDT**

A SDT which owns a property, and with the Trust beneficiary living in it, should be able to:

- Lease portion of the property to another person, (whether another person with disability or not) and place the net income from the lease after expenses incurred into the SDT, for future use in accommodation and care of the beneficiary.
- Be a joint owner of the property with another/other SDT’s, where all the residents are beneficiaries of SDT’s (whether from the same family or not).

The current legislation does not appear to address this issue, and if required, should be amended to allow for it.

We can state that one in eight of our Members have more than one child who meets the criteria to allow a SDT to be set up for them. It seems logical that eventually, the adult children receiving a SDT could well reside in the same place of accommodation.

**Recommendation 9 – Financial Assistance to set up a SDT**

To encourage families to set up a SDT, Government should pay all reasonable costs of setting it up, on presentation of proof that it has been set up, and is operating. This could be managed in one of two ways:

- By payment of a fixed \$ amount (indexed) by Centrelink, on presentation of documentary proof.
- By families presenting evidence to Centrelink of costs paid to set up the SDT, and these costs are paid up to a predetermined maximum figure.

End of Submission