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The Secretary
Senate Community Affairs Committee
PO Box 6100
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Senate Community Affairs Committee Inquiry into Special Disability Trusts

Submission by John Skinner
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The Public Trustee of Western Australia (PTWA) acknowledges the initial beneficial thrust of the policy decision to introduce the concept of Special Disability Trusts (SDTs).

However the implementation and operational interpretation of the policy has, in our opinion, not delivered what was expected.

One advantage of SDTs is that some PTWA clients may be eligible for a pension, part pension, or increased pension than would otherwise be the case.

Another advantage is that a donor is, up to a point, exempted from Centrelink's gifting provisions which may be beneficial to people who are trying to plan for the future of their severely disabled child.

PTWA is trustee of **29** protective trusts established under Wills. These trusts were examined with the view to converting all or part of the trust or trusts relating to this estate into SDTs. It was determined that it was not worth doing this for the following reason/s:

- The assets are not large enough for this to be worthwhile or the assets are considerably over $2 million;

- The main asset is the client's principal place of residence which is currently exempt from Centrelink's income and assets tests;

- The beneficiary/ies does not appear to be eligible, as the interest is contingent; and

- The definitions applying to "reasonable care and accommodation" are too restrictive.

PTWA is also the administrator, manager and attorney of many disabled persons, **33** of whom fit the criteria set out in Part 3.18A s1209M *Social Security Act 1991*. Some of these clients have received outright gifts under Wills or intestacies or superannuation benefits in the previous three years. The arrangements for these clients were examined and it was considered unnecessary (or disadvantageous to our clients) to set up SDTs.

Terms of Reference:

2a. why more families of dependents with disabilities are not making use of the current provisions to establish Special Disability Trusts;

PTWA as trustee and administrator of people with disabilities has not converted any of its existing trusts into SDTs, nor has it established any new SDTs and it is not providing the opportunity to its Will-making clients to include SDTs in any of the Wills this office prepares since the legislation was enacted.

The reasons are detailed further in my submission but briefly, this office has found SDTs in their current form to be:

1. too complicated (a standard protective trust clause is one page long compared with the model SDT deed which runs to 18 pages);
2. not worth establishing if there is less than $50K of assets;
3. disadvantageous to our clients because of the taxation aspect;
4. uncertain in the event of capital gains tax implications;
5. too restrictive in what the income of the trust may be used for; and
6. onerous and unnecessarily expensive because of the audit requirements.

Terms of Reference:

2b. the effectiveness of Part 3.18A of the *Social Security Act 1991*;

PTWA considers this legislation to be too restrictive and it is ineffective in promoting future planning for disabled people. For example, PTWA works closely with families or carers of disabled people and in some instances pays wages or allowances to family members to enable them to continue caring for the disabled person. Under SDTs – these payments to family members or carers are not possible, which appears to be in conflict with the whole-of-government approach which fosters allowing or assisting people to stay in their own homes.

Terms of Reference:

2c. barriers in the relevant legislation to the establishment of Special Disability Trusts; and

PTWA considers that if the restrictive approach to "reasonable care and accommodation" needs is relaxed and the treatment of tax on undistributed income from SDTs is amended, the conversion of an existing testamentary trust to SDTs would be more attractive.

Terms of Reference:

2d. possible amendments to the relevant legislation.

PTWA considers there may be a number of ways in which to better assist the families of disabled people prepare financially for their future, rather than establish SDTs:

Firstly, a tax concession for giving assets to severely disabled children may be more appropriate and attractive.

Secondly, ensure that Centrelink's deeming rules do not apply for the first $500,000 assets of any trust established for severely disabled people.

Thirdly, adopt a scheme similar to the Canadian Revenue Authority's Registered Disability Savings Plan http://www.cra-arc.gc.ca/agency/budget/2007/rdsp-e.html

The following reasons were foremost in my decision against converting existing testamentary trusts to SDTs or establishing new SDTs for PTWA clients:

1. If not all of the income from these trusts is spent, then it is taxed at 45% plus the Medicare levy. This has the potential to remove, or significantly reduce, any pension savings. In some cases, the client may even be financially disadvantaged by SDTs. This may be acceptable if SDTs could be used for broad and/or clear purposes. This is not, however, the case, as explained below.

2. SDTs must be spent on "reasonable care and accommodation" which is very narrowly defined. It does not include paying for close family to be carers and in some cases, that is the most appropriate way (or may become the most appropriate way) to care for a person. Generally speaking, the expenses must relate to the person's disability. If, for instance, a person with a mental illness needed a hip replacement, I would not expect the trust to be able to cover the cost of that. As a result, it would be unwise for all of a person's assets to be held in SDTs.

3. There is too much uncertainty as to what expenses are indeed allowable and this office is well aware of the difficulties faced by the Public Trustee

in NSW with paying institutional expenses where they charge fees covering a number of items, not limited to care and accommodation.

4. The problem can also be illustrated in a simple example: Can a power bill be paid? The *Social Security Act 1991* talks about "reasonable … accommodation" and these days it would seem reasonable to have electricity in a house. The *Social Security (Special Disability Trust) Guidelines*, however, exclude payment of utilities. At the meeting with Public Trustee representatives in April 2007, however, Department of Families, Housing, Community Services and Indigenous Affairs staff said that if there was an excessive use of electricity over and above the normal domestic usage then this amount could be paid for from the trust. Advice has been contradictory and PTWA cannot risk establishing a trust that cannot be used for the purposes for which it was intended.

5. The terms of SDTs are extremely complicated and the model trust deed runs to 18 pages. Complying with the terms of the trust could be very expensive and time consuming as there are reporting requirements and Centrelink can demand an audit. These requirements can reduce any pension savings made.

6. There is confusion as to how the legislation is to operate.

7. PTWA clients with small amounts of money get either a full pension or close to a full pension anyway. Clients with much larger sums (for example, $2 million) have too much money for SDTs. For clients between those amounts, the problem is that the more you put into SDTs, the less scope there is to spend it. The less you put in, the less pension you get.

8. It is not possible to have half of an existing trust treated as a SDT, but not the other half. To split a trust or take a substantial amount of money out of it would probably require court approval, although this, like many other things, is unclear. That could be expensive and would have no guarantee of succeeding.

9. There is a real question as to whether SDTs actually apply to trusts set up in Wills. The *Social Security Act 1991* uses the term "trust deed" but a Will is not a trust deed. True, the model trust deed does allow for a Will, but the model trust deed must always be read subject to the *Social Security Act 1991*.

   It could be said, "Centrelink accept that it can be set up in a Will. Who is going to say otherwise?" The answer could be - an indemnity insurer. At some stage in the future, someone might sue a trustee (or a trustee's lawyer) for not considering whether to convert a trust set up under a Will into SDTs. The insurer could argue, "But it would not have been possible to do this because it does not apply to trusts set up under Wills."

Issues (1) to (6) above apply to all potential cases and were deemed significant enough to refrain from setting up SDTs. Issues (6) to (9) are additional problems in many cases.

Given that the only benefit is for the beneficiary of a SDT to be entitled to a pension and in some cases that would only be a part pension, it is considered that the risks and costs involved outweigh any possible benefits at this stage.

One of PTWA's represented persons is the beneficiary of a trust set up under a Will. The trustees of that trust contemplated splitting it into two, with one of them designated a SDT. They have since obtained their own independent legal and financial advice and decided not to go ahead with the establishment of a SDT because the advice they received indicated that the establishment of a superannuation fund was more appropriate.

Yours sincerely

John Skinner
PUBLIC TRUSTEE

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