



13 June 2008

Mr Elton Humphery
Secretary
Senate Community Affairs Committee

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Dear Mr Humphery

Inquiry into Special Disability Trusts

I am making this submission in response to the invitation for submissions to your enquiry.

My background in this area is as a lawyer. I am a Principal in the firm Coleman & Greig, and have been involved in legal issues affecting people with a disability, and particularly with intellectual disabilities, since 1984. I have advised many families of people with a disability about estate planning issues over that period, and since September 2006, I have advised many families (I estimate at least one a week) about special disability trusts (SDTs) in the context of estate planning, and have drafted wills for many of those families.

Over the years I have spoken to many community groups, usually of parents, about these issues, and in 1999, I wrote a booklet, *When I'm Gone*, a plain language guide to estate planning for parents of people with a disability, in conjunction with the NSW Intellectual Disability Rights Service and the Public Trustee. In 2006 I co-wrote both *Getting things sorted* and *Planning for the future* for FACSIA as plain language components of the information package associated with the introduction of SDTs.

With respect to paragraph 2(a), (b) and (c) of the terms of reference, my comments are as follows:

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1. None of the people that I have spoken to have been motivated to look at SDTs by the desire to improve their eligibility for age pension by divesting themselves of assets using an SDT. None have even been interested in this option.
2. The people that I have spoken to are generally reluctant to set up an SDT while they are alive, because if they commit significant assets to such a trust while they are alive, those assets will no longer be available to fund their own retirement and whatever unforeseen possibilities may arise in their own lives. While the assets remain in their own control, they can use them for the person with a severe disability, in whatever way seems appropriate at the time, without incurring the compliance costs (paperwork, time, and accounting costs) of operating an SDT, and without being limited by the "reasonable care and accommodation" criterion. None have instructed me to set up an SDT while they are alive.
3. When it comes to including an SDT in a will, once it is explained that
 - (a) it is unclear what the rules and form of an SDT would be when the will comes into effect (5, 10, 20 or more years into the future),
 - (b) it is difficult to know what assets will be available for an SDT or for the benefit of the person with a severe disability at the time of the parents' deaths (depending on how much is spent during retirement and the needs of other members of the family and so on), and
 - (c) it is difficult to foretell the care and accommodation needs of the person with the disability many years in the future

most of my clients choose not to commit definitely to an SDT, even in a will, at this point. Rather, they prefer to provide it as an option for the trustees to adopt if the circumstances are appropriate at the relevant time. This is particularly the case where there is uncertainty as to whether the amount of assets potentially available for the person with a severe disability will be large enough to have an effect on the disability support pension of the person with a severe disability, or not. Since all these matters are very often imponderable at this stage, people see the SDT as very a useful part of estate planning, but not something that they can definitely say is the structure that they would wish to see adopted.

4. In the case of many families that I have spoken to, the status of the person with a disability as having a “severe disability” appears to be fairly straightforward and therefore has not resulted in an enquiry of Centrelink to confirm eligibility, since it seems to be unnecessary. Even more is this so where the possibility of an SDT being established is in the future, so that the question as to severe disability will need to be answered at some point possibly well into the future, when the situation may be different from the situation today.
5. It is my assessment that families with a member with a severe disability see an SDT as a most attractive and important option, but as eligibility for, and the desirability of having, such a trust are subject to so many imponderables, the actual establishment of a trust is something that they postpone to a more appropriate time.
6. On the basis of an SDT being available, many of these families have structured wills accordingly, anticipating that if necessary, the asset tests concessions available from an SDT will be available to their son or daughter. They have therefore provided funds in their wills, sometimes more than an equal proportionate share with other siblings, on the basis that should it be necessary, the SDT can be used to enable the person with a severe disability to retain the disability support pension. These families have spent time and emotional energy considering these issues, as well as professional fees in establishing their estate planning structures and wills etc, and would be significantly disadvantaged if the SDT option ceased to be available, requiring re-assessment of these matters in a less favourable environment.
7. I think the low take-up rate which Centrelink reports is only the tip of an iceberg, the rest of the iceberg being many, many people who have had regard to SDTs, and have made decisions and structured their affairs accordingly, or are considering doing so. Therefore, the actual take-up of the concept is far in excess of the cases that actually come to Centrelink’s attention, and is likely to increase steadily as time goes on, apparently without the cost to the revenue which the social security concessions for donors to SDTs were seen as likely to cause (and which seems to be the rationale for many of the restrictive rules affecting SDTs).

8. It is also fair to say that many people are put off SDTs because of the complexities surrounding them. The policy reason for many of these complexities seems to be protection of the revenue. As indicated above, I do not think that is likely, and removal of some of the complexities around SDTs would probably increase the take-up rate.
9. It is sometimes suggested that special disability trusts are welfare for people with money, ie a "lazy" \$500,000 to put into such a trust. As you can see from my comments above, in my experience people are not using the SDT to advantage themselves in relation to social security, but are using it to facilitate planning for the future of people with a severe disability, regarding it as an encouragement to commit more of their assets to the future care of a family member with disability than might otherwise be the case.
10. If there is a possibility that provision of a benefit by will to a person with a disability will cause the person with a disability to lose part or any eligibility to disability support pension, then many families consider reducing, or decide to reduce, the amount they leave to the son or daughter with a disability, because of their concern about retaining the DSP as a safety net (including health-related fringe benefits), and its effect on the cost of accommodation (often pegged at 75% of pension, but up in the air if pension reduces significantly). Parents in that situation may reduce direct provision and trust to other children to "do the right thing": should the need arise, which obviously is not desirable from the point of view of providing for the needs, or potential needs, of a person with a disability as fully as possible.
11. The criterion of "reasonable care and accommodation" is limiting because it presents a restrictive and potentially arbitrary limitation on the use of the funds in an SDT. This usually means that families need to establish another, more general, trust under their wills, to provide for discretionary expenditure (eg holidays, furniture, white goods, clothing) beyond the scope of the DSP from the benefits provided by the will. Having two trusts, governed by different rules, is another significant level of complexity, which is very off-putting for many families, especially if they contemplate the siblings of the person with a disability administering the trusts, and being faced with that complexity.

12. The present lack of clarity as to what might be “reasonable care” – and what might not – is a disincentive to using an SDT because services which parents consider to be reasonable are not necessarily so in the view of Centrelink – and trying to foresee what the situation will be well into the future, both as to services required and as to Centrelink’s attitude to such services as “reasonable care”, is very difficult.
13. The reporting and accounting obligations under the legislation are also a disincentive: not so significant in general, but something that tips the balance against using than SDT unless there are clear benefits to be derived from doing so. This is especially a reason why families will not set up an SDT while the parents are alive, even with a modest amount of assets involved: preparing the estate planning structures that way immediately involves reporting and compliance costs when there is no immediate benefit.
14. From my point of view, therefore, the SDT option is very much focused on people with severe disability, with needs for care and accommodation, with a significant likelihood of creating private funding for, and availability of resources to people with a severe disability. It seems to me that this is a rational policy outcome, since the people with whom we are concerned are, pretty much by definition by virtue of a severe disability, unable to take advantage of opportunities to provide for themselves in the way that people without a disability can do, and are expected to do. The SDT is therefore closely related to the welfare needs of that most disadvantaged group in our society. The continuation of the disability support pension despite a person having a relatively modest level of assets, which would otherwise trigger the assets test, seems to me to be a particularly civilised and worthwhile way of improving the position of people with a severe disability in our society.

With respect to paragraph 2(d) of the terms of reference, what changes to the legislation might facilitate use of SDTs, it follows from the above comments that changes along the following lines may increase the take-up of SDTs:

- (a) remove or simplify the rules relating to social security benefits for families as donors to SDTs

- (b) remove the requirement for annual financial reporting, perhaps replacing it with the possibility of random requests for financial statements and retaining the audit provisions as a protection for disabled beneficiaries
- (c) consequent on simplification of rules, simplification of the model trust deed so that it is less daunting to laypersons
- (d) clarity and transparency as to the meaning of "reasonable care" – published examples of Centrelink decisions on this issue,
- (e) broaden the definition of "severe disability" so that more people with a disability would be eligible to benefit from SDTs (bearing in mind that the take-up of SDTs for the purpose of taking advantage of the social security concessions for families seems to be rare)

I am happy to expand on these comments if that would assist the Committee.

Yours faithfully
COLEMAN & GREIG



Stephen Booth
Principal