

Inquiry into Special Disability Trusts

Department of Families, Housing, Community
Services and Indigenous Affairs

Submission to the Senate Community Affairs
Committee

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1. Introduction

The Special Disability Trust measure was introduced on 20 September 2006 as part of a package of future planning measures to assist families with the financial means to make private financial provision for the current and future care and accommodation of a family member with severe disability.

The measure aimed to respond to the concerns of carers and family members about the barriers in the social security system to making private financial provision for a family member with disability.

This submission has been prepared by the Department of Families, Housing, Community Services and Indigenous Affairs in consultation with the Department of Veterans' Affairs to outline the policy and legislative framework under which Special Disability Trusts currently operate. The submission also presents feedback on Special Disability Trusts that the Department has received from those with an interest in Special Disability Trusts and through various consultation processes.

We note that the Inquiry Terms of Reference refer only to the effectiveness of Part 3.18A of the *Social Security Act 1991*. Similar provisions exist under the *Veterans' Entitlement Act 1986*, however these have not been specifically commented on in this submission.

The submission has four parts:

- background to Special Disability Trusts;
- uptake of Special Disability Trusts;
- feedback on Special Disability Trusts; and
- other current work of relevance.

The Department of Families, Housing, Community Services and Indigenous Affairs produced a booklet called *Special Disability Trusts – Getting things sorted*. This booklet (**Appendix 1**) identifies the who's who and what's what of trusts and wills, Special Disability Trusts and social security, the general rules and concessions for Special Disability Trusts and the Model Trust Deed.

This booklet identifies that a trust is a legal relationship between a **trustee**, who looks after or administers the trust, and a **beneficiary**, the person who benefits from the trust. The nature of a trust is a legal obligation on the trustee to look after the trust property, and invest it and use it wisely and carefully for the benefit of the beneficiary.

The beneficiary has the right to receive benefits from the trust as required by the terms of the trust, usually set out in a document such as a **trust deed** or **will**. Where a trust is established for the benefit of a person with severe disability, that person may be called the **principal beneficiary**.

2. Background to Special Disability Trusts

2.1 Context of development

The development of Special Disability Trusts occurred in the context of many parents and carers being concerned about what would happen to their family member with disability when they were no longer able to provide care.

When parents and families start thinking about planning, the options available to them may be limited by funding constraints. This may lead families to make plans so that they and their family member with disability can retain access to other supports and services, such as government funded income support and concessions.

One option that has always been available to parents wishing to make private financial provision for their family member with disability is to establish a Protective Trust. This type of trust helps to financially protect a vulnerable beneficiary with disability.

However the rules within the social security system limit the assets a person can hold without those assets affecting their entitlement to income support payments. Further, a person who gives away an asset is treated, for a five-year period, as if that person still owned the asset when assessing entitlement to income support payments.

The operation of these rules therefore made it difficult for family members caring for someone with disability to set up a trust to ensure that person's continued care without their income support payments being affected.

The Government recognised that people with disability are amongst the most vulnerable in the community and that parents were concerned about their family member's protection when they were no longer able to care for them. As a result the Special Disability Trust model was based on a modification to the existing protective trust structure, allowing some social security means test concessions.

The Government considered that this would make it easier for families to provide for the future care and accommodation needs of their family member for whom they were currently providing care, while at the same time maximising the protection of the beneficiary and minimising abuse and inequity around the social security system.

The Special Disability Trust was announced in October 2005 along with the establishment of an advisory group to provide advice to government on the policy detail of the measure. It was asked to overlay its considerations with the following principles:

- the protection of the beneficiary's interests and needs;
- minimising opportunities for abuse of both the beneficiary and social security concessions; and
- containing the costs of administration and compliance for Centrelink, customers and trustees of Special Disability Trusts.

2.2 Ministerial Advisory Group

The advisory group consulted with peak organisations, individuals, parent groups and disability sector organisations. Its members were Mr Ian Spicer (AM) Chair, Mr Tony Blunn (AO), Ms Sue Boyce, Ms Judy Brewer-Fischer, Mr Ian Gresswell and Mr Allan Swan.

The advisory group was asked to consider the following issues:

- the definition of severe disability;
- the definition of parent and immediate family member;
- the care and accommodation costs the Special Disability Trusts could pay for; and
- measures needed to be in place to ensure the protection of beneficiaries and families.

Legislation passed by Parliament and the subsequent model trust deed drew heavily on the recommendations of the advisory group.

2.3 Target population

The Special Disability Trust was introduced to assist those families caring for someone who was, and would continue to be, unable to provide for themselves. That is, it was targeted to those with severe disability and high level care needs.

It was estimated that over four years, around 5,000 people with severe disability would benefit through the establishment of Special Disability Trusts. These estimates were derived from an analysis of the people reported to have a profound core activity limitation (*Survey of Disability, Ageing and Carers 2003*: Australian Bureau of Statistics) and Centrelink data regarding the number of people in receipt of Disability Support Pension being cared for by their parents and/or people who had high care needs and were unlikely to be able to manage their own affairs.

2.4 Social Security Concessions of Special Disability Trusts

Special Disability Trusts offer social security and veterans' entitlement means test concessions to the beneficiary as well as eligible contributors to the Special Disability Trust.

The following concessions are available to the beneficiary:

- their income support payment is not affected by the value of assets of the Special Disability Trust up to a limit of \$516,500 (current at 1 July 2007 and indexed annually). This is in addition to the existing social security assets test free area of up to \$166,750 for a single homeowner or \$236,500 for couples who are homeowners and \$287,750 for a single non-homeowner or \$357,500 for couples who are non-homeowners; and
- the income test is not applied to income generated from the Special Disability Trust.

Consistent with the normal application of the social security assets test, the principal home of the beneficiary is exempt from the assets test. That is, the value of this home is exempt and not included in the Special Disability Trust exemption cap amount (currently \$516,500).

The concession available to immediate family members of age pension age contributing to a Special Disability Trust is an exemption of up to the value of \$500,000 (combined) from the usual social security or veterans' entitlement rules relating to making gifts or disposal of assets. This is referred to as the gifting concession.

An 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).

2.5 Contributory requirements

Special Disability Trusts can be established with any amount of money, and contributions of any amount can be made to the Special Disability Trust at any time.

Anyone except the beneficiary, their partner or settlor of the Trust (other than the settled sum) is able to contribute to the Special Disability Trust. The beneficiary is however able to transfer to the Special Disability Trust any assets that are received as a bequest or superannuation death benefit not more than three years after receiving the bequest/benefit.

The reason that the beneficiary and their partners are not allowed to contribute to the Special Disability Trusts is that the measure was for immediate family members to make provision for the beneficiary. It is not intended to allow the beneficiary to move their assessable assets for social security purposes into an unassessable environment.

2.6 Current legislative provisions

The Special Disability Trust was introduced through amendments to both the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986*.

Section 1209L of the *Social Security Act 1991* states that a trust is a Special Disability Trust if the following requirements are complied with:

- (a) the beneficiary requirements (see section 1209M);
- (b) the trust purpose requirements (see section 1209N);
- (c) the trust deed requirements (see section 1209P);
- (d) the trustee requirements (see section 1209Q);
- (e) the trust property requirements (see section 1209R);
- (f) the reporting requirements (see section 1209S); and
- (g) the audit requirements (see section 1209T).

Other legislative provisions to note are:

- Section 1209U provides the Secretary with the power to waive a failure to comply with a requirement of Sections 1209M-1209T and allow a trust to be a Special Disability Trust;
- Section 1209ZD deals with what happens when Special Disability Trusts cease to exist, or cease to be Special Disability Trusts.

2.6.1 Beneficiary requirements (S1209M)

Section 1209M of the *Social Security Act 1991* sets out the requirements for who can be the sole beneficiary of a Special Disability Trust. This section provides that each trust can only have one beneficiary. A family with multiple children with disability may set up a Special Disability Trust per family member with disability. This ensures some protection of the interests of each beneficiary, given their differing needs.

To be eligible as a beneficiary of a Special Disability Trust, the person must be assessed as meeting the definition of severe disability and be not able to work in an open competitive workplace because of their disability.

The definition of severe disability is:

- 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
 - 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;

OR

- a child under 16 years of age who is a profoundly disabled child within the meaning given by Section 197 of the *Social Security Act 1991*.

2.6.2 Trust Purpose requirements (S1209N)

Subsection 1209N(1) of the *Social Security Act 1991* sets out that, subject to the rest of section 1209N, the sole purpose of a Special Disability Trust must be to meet the beneficiary's care and accommodation needs. This is referred to as the sole purpose requirement. The trust may have ancillary purposes that are necessary or desirable to facilitate the achievement of meeting the beneficiary's care and accommodation needs.

As a result of the sole purpose requirement, a beneficiary of a Special Disability Trust is prevented from receiving income generated from the Trust. Income can only be used on reasonable care and accommodation expenses, or ancillary items as described above.

Under subsection 1209N(4) of the *Social Security Act 1991*, the Secretary may, by legislative instrument, make guidelines for deciding what are, and what are not, reasonable care and accommodation needs for principal beneficiaries of Special Disability Trusts.

The Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008 (the Guidelines) (and the *Social Security (Special Disability Trust) (DEEWR) Guidelines 2008*) assist to determine what constitutes reasonable care and accommodation needs (**Appendix 2**). Section 2.2 of the Guidelines sets out what is a reasonable care need. Generally a care need will be a reasonable care need where it arises as a direct result of the disability of the beneficiary, the need is for the primary benefit of the beneficiary and the need is met in Australia. In other words, the Special Disability Trust can pay for costs which are necessarily higher due to the nature of the beneficiary's disability.

Subsection 2.2 (2) of the Guidelines sets out a number of examples of reasonable care needs, including: professional care and case management; therapy; specialised food; mobility aids, prostheses and positioning aids; sleeping and sensory aids; personal care, pressure care and continence aids; communication devices; modified vehicles; transport required; training for transitional or independent living; medical needs; health insurance and ambulance cover; specialist and general practitioner services; dental services and surgery due to the beneficiary's disability. These examples are not intended to be exhaustive.

Section 2.3 of the Guidelines sets out what would not be a reasonable care need. Subsection 2.3 (2) sets out a number of examples of things that are not reasonable care needs, including: food; toiletries; medical needs not required due to the beneficiary's disability; vehicle maintenance and expenses that are not related to the beneficiary's disability; vehicle registration, insurance and petrol, recreational and leisure activities; and family care provided by a family member. These examples are not intended to be exhaustive.

Section 2.7 of the Guidelines sets out what is a reasonable accommodation need. Generally an accommodation need will be a reasonable accommodation need where it arises as a direct result of the disability of a beneficiary. Subsection 2.7 (4) of the Guidelines sets out a number of examples of a reasonable accommodation need including: acquiring a property and paying for its maintenance; renting a property, or a room within a property, from a third party; purchasing a life interest in a property; and purchasing an accommodation bond.

Section 2.8 of the Guidelines sets out what would not be a reasonable accommodation need, including ordinary maintenance and upkeep of the property and the payment of utility charges.

The Department of Families, Housing, Community Services and Indigenous Affairs recently made amendments to the Guidelines, which came into effect on 30 April 2008.

These amendments specify that the daily care fee charged by accredited residential aged care facilities, and additional itemised fees, which are specifically for care and accommodation, are approved expenses which may be paid by a Special Disability Trust.

The Department of Families, Housing, Community Services and Indigenous Affairs made the decision to itemise these as allowable expenses in the tables of examples contained in the Guidelines in order to provide clarity for trustees who considered previously that nursing home daily care fees, being composite fees, were not allowable expenses.

2.6.3 Trust Deed requirements (S1209P)

Section 1209P of the *Social Security Act 1991* sets out that the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs may determine the form of the trust deed and the provisions which can and cannot be included.

The Department of Families, Housing, Community Services and Indigenous Affairs developed a sample Model Trust Deed as per Part 2 of the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaCSIA) Determination 2006*. The Model Trust Deed incorporated the recommendations from the Ministerial Advisory Group, and contains the clauses that are essential for the Special Disability Trust to comply with the requirements of the Special Disability Trust legislation. The Model Trust Deed is included in **Appendix 1**.

It was intended that the availability of the Model Trust Deed would make it easier for families and professional advisers to comply with requirements, and also that it would reduce, to some extent, the cost to families of professional services.

2.6.4 Trustee requirements (S1209Q)

Section 1209Q of the *Social Security Act 1991* sets out the requirements for trustees. The trustees can be a corporation, a professional trustee, or two or more individuals acting jointly as trustee. For an individual trustee, the requirements are that a trustee is an Australian resident, has not been convicted of an offence and has not been disqualified from managing corporations under the *Corporations Act 2001*. The Trustee requirement is aimed at protecting the interest of the beneficiary who may be vulnerable because of their disability.

2.6.5 Trust property requirements (S1209R)

Section 1209R of the *Social Security Act 1991* sets out what assets may be included in Special Disability Trusts and what type of assets cannot be included in the Special Disability Trust.

It identifies that:

- the assets of a Special Disability Trust must not include any assets transferred by the beneficiary or the beneficiary's partner, except where the asset is all or part of a bequest, or a superannuation death benefit received not more than three years before the transfer;
- the assets of a Special Disability Trust must not include any compensation received by or on behalf of the beneficiary;
- the Special Disability Trust must not be used to pay an immediate family member, or a child of the beneficiary for the provision of the beneficiary's care services, or services for the repair or maintenance of the beneficiary's accommodation; and
- the Special Disability Trust must not be able to purchase or lease property from an immediate family member, or a child of the beneficiary, even if the property is used for the beneficiary's accommodation.

The last two provisions ensure the protection of the beneficiary's interest by having arm's length arrangements in place.

2.6.6 Reporting requirements (S1209S)

Section 1209S of the *Social Security Act 1991* sets out that the trustee must, on or before 31 March, provide the financial statements of the Special Disability Trust as at 30 June of the relevant financial year in accordance with the *Income Tax Assessment Act 1936*. As per the *Social Security (Special Disability Trust – Trust Deed, Reporting and Audit Requirements) (FaCSIA) Determination 2006* a declaration must be included that confirms expenditure for the relevant financial year was spent on care and accommodation costs and expenditure was not spent on day to day living expenses or payments to immediate family members.

A copy of the tax return for the relevant financial year must also be provided.

2.6.7 Audit requirements (S1209T)

Section 1209T of the *Social Security Act 1991* sets out audit requirements for Special Disability Trusts, including who can request an audit, when an audit can be requested, who can perform an audit, and the information that must be included in an audit.

2.6.8 Waiver of contravention (S1209U)

Subsection 1209U(1) provides, in relation to a trust that would be a Special Disability Trust apart from a failure to comply with a requirement of Division 1 of Part 3.18A of the *Social Security Act 1991*, that the trust is not prevented from being a Special Disability Trust if the Secretary gives the trustees a written waiver notice.

Under subsection 1209U(4) of the *Social Security Act 1991*, the Secretary may, by legislative instrument, make guidelines for whether or not to give waiver notices to trustees of trusts; what conditions to include in waiver notices; and the periods during which waiver notices are to have effect.

These guidelines are set out in Part 3 of the *Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008* (the Guidelines) (see **Appendix 2**).

A waiver notice allows time for a trustee to repair/amend the non-compliance where a Special Disability Trust is found to be non-compliant as a result of non-fraudulent behaviour. If fraudulent behaviour has occurred, or the non-compliance cannot be amended, the trust is no longer a Special Disability Trust and will be assessed under normal Private Trust provisions under the *Social Security Act 1991*.

2.6.9 Cessation of a Special Disability Trust (S1209ZD)

The trust will cease to be a Special Disability Trust when the beneficiary dies. As noted in 2.6.8 above, it may also cease to be a Special Disability Trust because of infringements of the rules.

2.7 Role of Centrelink

Centrelink is responsible for assessing the eligibility of prospective beneficiaries and trusts to be Special Disability Trusts. It provides assistance through a 1800 number. Centrelink also manages the compliance of Special Disability Trusts under the *Social Security Act 1991*.

Centrelink conducts annual reviews for the Special Disability Trust, the trustee, contributions to the Special Disability Trust, and expenditure behaviour of the Special Disability Trust. This includes annual statutory declarations by the trustee(s) and any legislative requirements relating to waivers issued for the Special Disability Trust.

3. Uptake of Special Disability Trusts

3.1 Uptake Statistics

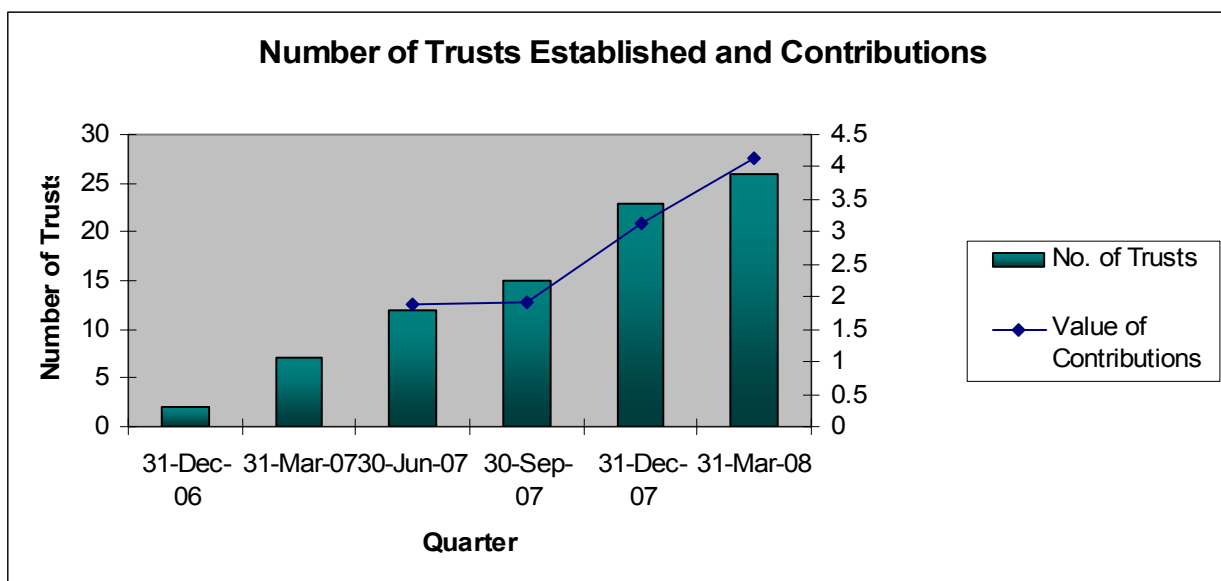
3.1.1 Trusts established and contributions

No Special Disability Trusts have been established to date under the *Veterans' Entitlements Act 1986*. As at 31 March 2008:

- 26 Special Disability Trusts were operating under the Social Security Act 1991; and
- contributions to Special Disability Trusts totalled \$4.1 million with \$3.6 million of this amount receiving concessional treatment.

Graph 1 identifies that the total number of Special Disability Trusts in operation has been slowly progressing since inception. There was an increase in the number of Special Disability Trusts established from the September to December 2007 quarter. However, the growth rate has slowed from the December 2007 to March 2008 quarter with only an additional three Special Disability Trusts established.

Graph 1 also shows that the total value of contributions has been consistent with the number of trusts established. Centrelink administrative data on the total value of contributions has only been collected since June 2007.



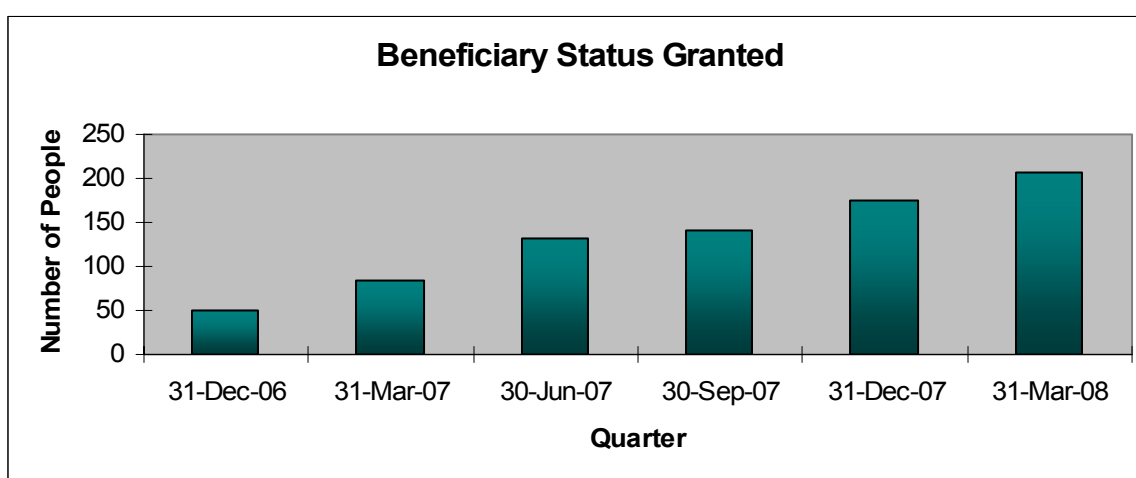
Graph 1 – Number of Special Disability Trusts Established and Contributions

Centrelink administrative data identifies that the youngest contributor is 65 years of age and the oldest is 88 years of age. The average age of contributors is 78. The youngest beneficiary is four years of age and the oldest beneficiary is 84 years of age. The average age of beneficiaries is 38 with 43 per cent of beneficiaries aged between 40 and 60.

3.1.2 Beneficiary status

As at 31 March 2008, 206 people with disability had been granted beneficiary status by Centrelink. Included in this figure are the children of some Department of Veterans' Affairs clients, who have been accepted as satisfying the beneficiary disability requirements.

The increase in people being granted beneficiary status by Centrelink has been slowly increasing as shown in Graph 2. After the spike in increase of 47 people being granted beneficiary status from the March to June 2007 quarter, the numbers of people granted beneficiary status is constantly increasing. An increase of 33 people were granted beneficiary status from the September to December 2007 quarter and a further increase of 31 people were granted beneficiary status from the December 2007 to March 2008 quarter.



Graph 2 – Beneficiary Status Granted by Centrelink

3.1.3 Beneficiary rejections

As at 31 March 2008, 17 beneficiary status applications had been rejected by Centrelink. The reasons for beneficiary rejections have been as follows:

- nine did not qualify because their need for caring assistance was not enough and their lack of ability to work was not sufficient;
- six did not qualify because their need for caring assistance was not enough;
- one did not qualify because their lack of ability to work was not sufficient; and
- one did not qualify because their need for caring assistance was not enough and their lack of ability to work was not sufficient and their level of disability was not sufficient.

3.2 Testamentary Trusts

A Special Disability Trust can be a testamentary trust established through a will. Anecdotal evidence indicates that, of the people granted beneficiary status, at least 50 per cent of these cases do not intend to have a Special Disability Trust established while the parent is still alive. Rather, they are utilising the Special Disability Trust as an estate planning tool and including an optional clause in their will to give their trustee discretion to set up a Special Disability Trust on their death.

The Department of Families, Housing, Community Services and Indigenous Affairs understands that many people are reluctant to set up a Special Disability Trust while they are alive, because if they commit significant assets to a Special Disability Trust while they are alive, those assets will no longer be available to fund their own retirement or other future needs. While the assets remain in their total control, they can use them for the person with a severe disability if they so choose, in whatever way seems appropriate at the time, and without restrictions on how the funds may be used.

4. Feedback on Special Disability Trusts

In late 2006, the Department of Families, Housing, Community Services and Indigenous Affairs engaged a consultant to undertake a series of consultations across Australia to identify the needs of carers planning for the future care and accommodation of a family member with severe disability. The key issues identified throughout that process are outlined in *Succession Planning for Carers: Summary Report on Consultations July 2007 (Appendix 3)*.

Through this and other mechanisms, the Department of Families, Housing, Community Services and Indigenous Affairs has received feedback on Special Disability Trusts, relating in particular to:

- Part 3.18A of the *Social Security Act 1991* - definition of severe disability in terms of the level of care criterion, the sole purpose of the Special Disability Trust and the expenses able to be paid by it, and the asset value for means test concessions; and
- Commonwealth taxation legislation (the impact of capital gains and income tax) and State/territory taxes/levies.

4.1 Part 3.18A of the Social Security Act 1991

4.1.1 Assessment of severe disability

4.1.1.1 Level of care requirement (non institutional accommodation)

Subsection 1209M(2)(b)(i) of the *Social Security Act 1991* specifies that those people with disability being cared for outside of an institutional/hostel/group home setting must have a disability that would, if they had a sole carer, qualify that carer to receive Carer Payment or Carer Allowance.

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.

4.1.1.2 Level of care (institutional accommodation)

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.

This may exclude many people who live in accredited supported accommodation that is not funded publicly under such an agreement, such as Supported Residential Services in Victoria.

4.1.2 Trust purpose requirement

4.1.2.1 Sole purpose – care and accommodation

Section 1209N of the *Social Security Act 1991* limits the purpose of a Special Disability Trust to meeting only the care and accommodation costs of the person with severe disability and the costs of ancillary purposes. Any ancillary purpose must facilitate the achievement of these care and accommodation needs, such as the payment of fees for professional trustees, and investment and accounting expenses.

The sole purpose requirement was intended to offer protection for the beneficiary by ensuring that Special Disability Trust funds were used exclusively for the beneficiary's benefit. For example, if the Special Disability Trust was able to pay for recreational items such as a TV or holiday, the benefit would not be exclusive to the beneficiary.

In addition, it was considered that, in receiving an income support payment which is intended to cover a person's daily living expenses, the beneficiary of a Special Disability Trust should have no advantage in terms of meeting their daily living expenses over other income support payment recipients whose families are not in a position to establish a Special Disability Trust for their benefit.

To cover the beneficiary's day-to-day living expenses, including those that aren't incurred as a direct result of the person's disability, families may wish to set up a discretionary trust.

Some trustees have provided feedback that establishing two trusts imposes an additional cost to families. They have also reported that the sole purpose requirement provides difficulties for existing testamentary trusts that are not able to be varied, yet in all other ways meet the requirements of a Special Disability Trust.

4.1.2.2 Allowable care expenses

Subsection 1209N(4) of the *Social Security Act 1991* provides for the Secretary to make Guidelines, by legislative instrument, for deciding what are, and what are not, reasonable care and accommodation needs for principal beneficiaries of Special Disability Trusts. These are currently outlined in *Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2008*, which contain tables listing examples of allowable and non-allowable expenses.

Despite the intent that a Special Disability Trust fund only care and accommodation expenses that are directly related to the beneficiary's disability, several sources of feedback have indicated a desire for the Guidelines to take a more liberal approach to 'care' expenses, including allowing the beneficiary's recreational activities to be covered. Comment has also been made that the Guidelines do not provide sufficient clarity for trustees despite the fact that the lists of examples are not meant to be exhaustive.

4.1.3 Asset value for means test concessions

Section 1209Y of the *Social Security Act 1991* specifies that the assets of a Special Disability Trust are not included in the assessable assets of the principal beneficiary up to an asset value limit of \$500,000 (\$516,500 as at 1 July 2007) which is indexed annually on 1 July. This is in addition to the amount of assets allowed under the asset test free area before the pension starts to be affected. This is \$166,750 for a single homeowner or \$236,500 for homeowner couples and \$287,750 for a single non-homeowner or \$357,500 for non-homeowner couples.

Feedback to the Department has noted that this is unlikely to be sufficient to provide for the long-term needs of a person with severe disabilities.

4.2 Commonwealth taxation legislation

Special Disability Trusts are treated in the same way as other trusts for taxation purposes. They are a separate legal structure and have their own tax responsibilities. Trustees have an obligation to submit tax returns and pay tax as required. The trustee is entitled to pay tax from the funds of the Special Disability Trust. Sometimes it is the Special Disability Trust that will have to pay tax on income.

The Treasury is responsible for the taxation policy in relation to these Trusts.

4.2.1 Income tax on unexpended annual income

Special Disability Trusts are not entitled to the tax-free threshold available to individuals. In addition, any unexpended annual income in a Special Disability Trust is taxed at the top marginal tax rate, currently 46.5 per cent. Since the Special Disability Trust funds can only be used on reasonable care and accommodation costs for the protection of the beneficiary's interest, the rate of taxation at the top marginal tax rate thus applies on any unexpended income in the Trust. (refer to paragraph two of section 2.6.2 above).

Families have commented to the Department that it is difficult to estimate the levels of funding required for care and accommodation into the future and that the tax rate on unexpended annual income prevents them from accumulating funds to cover larger expenses in later years. They have also noted that the rate of income tax is a disincentive to investing funds for higher returns. The rate of income tax is therefore seen to be prohibitive to a Special Disability Trust producing enough income to maintain the assets for the rest of the beneficiary's life.

4.2.2 Capital gains tax

There are two potential capital gains tax events for Special Disability Trusts and contributors to Special Disability Trusts.

- 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.

A special rule in the tax law allows any capital gain made on an asset acquired after 20 September 1985 to be disregarded if, when the person dies, the asset they own passes to their legal representative or to a beneficiary. The Department of Families, Housing, Community Services and Indigenous Affairs understands that this may be another reason that some people are amending their wills to include an optional clause for the establishment of a Special Disability Trust on their death.

4.3 State/Territory taxes/levies

The transfer or acquisition of property to or by a Special Disability Trust also incurs state/territory taxes and levies, such as land tax, stamp duty and emergency levies.

In addition, families providing homes for a family member with disability will not benefit from council concessions for utilities, such as water rates.

The Department of Families, Housing, Community Services and Indigenous Affairs understands that the Western Australian Government now offers a concessional rate of stamp duty to trusts acquiring property on behalf of disabled beneficiaries. In addition, in its 2008-09 Budget the Western Australian Government has announced land tax exemption and a removal of the 'no rent' condition for independent accommodation provided by relatives of disabled persons, which now enables these families to access Commonwealth rent assistance.

5. Other current work of relevance

5.1 Disability Investment Group

On 23 April 2008, the Parliamentary Secretary for Disabilities and Children's Services, the Hon Bill Shorten MP, announced the establishment of a Disability Investment Group to explore innovative funding ideas from the private sector that will help people with disability and their families' access greater support and plan for the future. The Department provides secretariat and other support to the Disability Investment Group which reports directly to the Parliamentary Secretary. Members of the Group are:

- Ian Silk, Chief Executive, AustralianSuper (Chair)
- Bruce Bonyhady, President of Philanthropy Australia, ANZ Executors and Trustees and Chairman of Yooralla
- Alan Fels, Professor, Dean of the Australian New Zealand School of Government, and former chairman of the Australian Competition and Consumer Commission
- Bill Moss, Boston Management Services, former Banking and Property Head at Macquarie Bank
- Mary Ann O'Loughlin, The Allen Consulting Group
- Kathy Townsend, Kathleen Townsend Executive Solutions Pty Ltd
- John Walsh, PriceWaterhouseCoopers

The Disability Investment Group provides a vehicle for a group of experts in the field to assist in identifying ways to encourage private investment (including from families) and avenues for new products and services to assist families make financial provision and plan for the future care of a family member with disability. It has an interest in Special Disability Trusts, given the low take-up rate, and has been tasked with looking into feedback received by the Department of Families, Housing, Community Services and Indigenous Affairs on the barriers to their establishment and considering possible responses including enhancements and alternatives to the current model.

5.2 International Research Project

The Department of Families, Housing, Community Services and Indigenous Affairs has commissioned the Allen Consulting Group Pty Ltd to identify and analyse interventions or incentives that exist internationally to encourage private financial provision and support future planning.

This research will examine private financial provisions and future planning initiatives that exist internationally for carers and people with disability, how these compare with those available in Australia and how other options might be feasible in Australia. It will focus on structural mechanisms such as superannuation, insurance, tax incentives, matched savings funds and/or social support schemes. The consultant is due to provide a final report to the Department of Families, Housing, Community Services and Indigenous Affairs in October 2008.

This project has a strong linkage with the work of the Disability Investment Group which is looking at other models that may encourage families to make private financial provision for the care and accommodation of their family member with disability.

5.3 Better Support for Carers Inquiry

On 14 May 2008 the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, asked the House of Representatives Standing Committee on Family, Community, Housing and Youth (the Committee) to inquire into and report on better support for carers.

To obtain an improved understanding of the challenges facing carers and their support needs, the Committee will inquire into and report on:

- the role and contribution of carers in society and how this should be recognised;
- the barriers to social and economic participation for carers, with a particular focus on helping carers to find and/or retain employment;
- the practical measures required to better support carers, including key priorities for action; and
- strategies to assist carers to access the same range of opportunities and choices as the wider community, including strategies to increase the capacity for carers to make choices within their caring roles, transition into and out of caring, and effectively plan for the future.

Broader strategies to increase the capacity of carers to effectively plan for the future will be considered as part of the Inquiry.

APPENDIX 1 – Special Disability Trusts – Getting things sorted

**APPENDIX 2 – Social Security (Special Disability Trust)
(FaHCSIA) Guidelines 2008 (the Guidelines)**

**APPENDIX 3 – Succession Planning for Carers: Summary
Report on Consultations July 2007**