

**PLANNING FOR SONS AND DAUGHTERS
WITH SEVERE DISABILITY**

ADVISORY GROUP REPORT

27 March 2006

Overview

On 13 October 2005 the Prime Minister, the Hon John Howard, in conjunction with the former Minister for Family and Community Services, Senator the Hon Kay Patterson, announced a \$200 million package to assist parents and immediate family wishing to make private financial provisions for the current or future accommodation and care for a son or daughter with severe disability.

The package of measures includes:

- means test concessions to encourage families to make private financial provisions for the care and accommodation of a son or daughter with severe disability;
- family mediation;
- future care information package; and
- further research on the needs of carers planning for the future.

Senator Patterson also announced the establishment of an advisory group to provide advice on the policy detail in relation to the means test concession measure. The issues that the advisory group were asked to consider included the:

- definition of severe disability;
- definition of parent and immediate family member;
- the care and accommodation costs the trust can pay for; and
- what measures needed to be in place to ensure that the child and parent are protected.

The advisory group members are Mr Ian Spicer (AM) Chair, Mr Tony Blunn (AO), Ms Sue Boyce, Ms Judy Brewer-Fischer, Mr Ian Gresswell and Mr Allan Swan.

In considering their advice, the advisory group consulted with peak organisations, individuals, parent groups and disability sector organisations. Issues raised as part of these consultations were considered by the advisory group and form part of the issues and recommendations contained in this report. The advisory group were mindful of the time limitations, and expressed their desire (had time allowed) to consult more widely.

The advisory group met on three occasions in Melbourne to consider these and other related issues.

The advisory group also noted that the Australian Government had already determined a number of the policy parameters. These are outlined in the 'basic principles' of this report.

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In fulfilling their terms of reference the advisory group discussed a broader range of issues. While these considerations have not formed recommendations, they are provided for the information of the Minister.

In conclusion the advisory group noted that while the means test concession was a significant step forward in assisting parents to make private financial provisions for their son or daughter with severe disability, it would not assist all families. The advisory group urged the Australian Government to continue its commitment to finding solutions to facilitate, at the earliest possible time, succession planning by parents for their sons and daughters with disability.

This report reflects the advisory group's discussions of the issues and has been prepared for consideration by the Minister for Families, Community Services and Indigenous Affairs (FaCSIA).

RECOMMENDATIONS and FINDINGS

Recommendation 1:

For the purposes of the means test concession the definition of severe disability should be:

- a) a person whose level of impairment meets the criteria for Disability Support Pension or DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement, and has care needs that would qualify a carer for Carer Payment or Carer Allowance, and who has no likelihood of working in open competitive employment; or
- b) a person whose level of impairment meets the criteria for Disability Support Pension or DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement, and is living in a state funded accommodation service for people with severe disabilities, and who has no likelihood of working in open competitive employment; or
- c) a child under 16 years of age whose level of impairment would qualify their carer for Carer Payment.

Recommendation 2:

People with disabilities who have received a lump sum compensation settlement and meet all eligibility criteria should be allowed to have a trust established for them by their parents or immediate family members (as defined). However the preclusion rules take precedence and the preclusion period must be satisfied before the concessions under the trust rules are accessed.

Recommendation 3:

There be no restriction for people in gaol and psychiatric confinement (in connection with a criminal charge) having a trust established where they meet the eligibility criteria.

Recommendation 4:

For the purposes of the means test concession, a parent or immediate family member should be defined as:

- natural parents;
- legal guardians (as defined);
- adoptive parents;
- step parents;
- grandparents; and
- siblings.

Recommendation 5:

Self-contributions be allowed only when funded by a bequest or superannuation death benefit from a parent or immediate family member (as defined), within three years of receipt of the bequest or superannuation death benefit.

Recommendation 6:

The term 'legal guardian' used in the definition of parent or immediate family member includes a natural person who is or had been the legal guardian of the person with a severe disability whilst that person was under the age of 18 years.

Recommendation 7:

In keeping with the general intent of the measure, children of people with severe disability can contribute to the trust, but not derive a benefit.

Recommendation 8:

Except as otherwise expressly provided (eg, by a beneficiary as a consequence of a bequest), anyone except the beneficiary or their partner/spouse be allowed to contribute to the trust, however only parents and immediate family members (as defined) derive a benefit from the gifting concession.

Recommendation 9:

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.

Recommendation 10:

The trust be allowed to hold or fund property or an interest in property, including the person's principal residence, and that the value of the principal residence not be included in determining the value of the trust.

Recommendation 11:

The trust be allowed to buy a right to or an interest in accommodation (eg a share of a house or specialist disability accommodation).

Recommendation 12:

The trust not be allowed to meet the costs of care provided by the trustee, partner, parent or immediate family member (as defined) for care provided.

Recommendation 13:

The Department of Families, Community Services and Indigenous Affairs develop a communication mechanism to inform trustees of any changes to the trust cap limit.

Recommendation 14:

If an arms length professional trustee is appointed, it would be appropriate for one trustee to administer the trust. However, if no arms length professional trustee is appointed, two or more trustees should be required with voting procedures stipulated in the trust deed.

Recommendation 15:

That the trustee provide yearly financial statements certified by an appropriately qualified accountant to Centrelink and the Trust Deed specify that the beneficiary and/or the donor can request an audit if they are not satisfied with the management of the trust. Centrelink may also require random audits.

Recommendation 16:

The model trust deed include the option for non-professional trustees to be able to apply to the Court or Tribunal for payment as per current legislation.

Recommendation 17:

In addition to the current rules contained in the *Superannuation Industry (Supervision) Act and Regulations*, the trust would not be allowed to own any in-house assets or own any business property used by a related party, other than the beneficiary.

Recommendation 18

The Minister for Families, Community Services and Indigenous Affairs consult with his State colleagues to ensure that access to services and concessions provided by schemes administered by state/territory governments, is not negatively affected by the establishment of the trust.

Recommendation 19:

For schemes administered by Commonwealth Departments, the Minister for Families, Community Services and Indigenous Affairs should ensure that provisions are put in place so that there are no adverse impacts on severely disabled persons entitlements following the establishment of a trust.

Recommendation 20:

Results from the *'further research on the needs of carers planning for the future'* be used to develop further measures that will complement the establishment of trusts and encourage families of children with severe disabilities to make private financial arrangements.

FINDINGS

Finding 1:

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:

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 3:

There is an anomaly regarding indexation between the gift amount and the trust amount that needs to be addressed.

Finding 4:

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.

Finding 5:

The success and take up of the trust measure would be greatly enhanced through further appropriate consultation on the process of implementation and that the Minister might consider establishing an Advisory Group for this purpose.

PURPOSE

The purpose of this report is to:

- document the key policy positions that the advisory group were asked to provide advice on in relation to the private provisions trust measure, namely:
 - define what is a ‘severely’ disabled child;
 - define who is a parent or immediate family member;
 - the care and accommodation needs the trust should be able to pay for;
 - identify methods to ensure that the severely disabled child and parents are protected; and
- provide a series of recommendations to the Minister for Families, Community Services and Indigenous Affairs.

MEANS TEST CONCESSIONS OVERVIEW

The means test concession will allow qualifying parents and/or immediate family members from 20 September 2006 to place up to \$500,000 into a trust for the current and future care and accommodation of the person with severe disability without being affected by social security means test or gifting rules (subject to certain conditions).

This means that the trust will not impact on the person’s income support payments, nor will the gift impact on the parent or immediate family member’s income support payments or Department of Veterans’ Affairs service pension or income support supplement.

A ‘trust’ was chosen as the mechanism that would best protect the interests of a person with severe disability.

Apart from the means test concessions, all existing rules and entitlements will continue to apply.

BASIC PRINCIPLES OF THE MEASURE

The basic principles are that:

- there is one trust per disabled child;
- there can only be one lifetime beneficiary per trust;
- the trust is to be protective, and must, as a minimum, comply with the terms of the model trust deed provided by FaCSIA. The trust can be a testamentary trust (established through a Will). The model deed will specify who the lifetime beneficiary must be, and who can be a residual beneficiary;
- only the disabled child can be a lifetime beneficiary of the trust;
- the trust is to cease upon death of the lifetime beneficiary (i.e. the trust will vest);
- upon vesting of the trust, the remaining assets will be returned to the original contributors (or their estates) unless the trust specifies otherwise;
- parents and/or immediate family members (as defined in this report) who are of age pension age or within five years of age pension age, are able to receive concessional treatment under the gifting rules;
- a \$500,000 lifetime gifting exemption will apply for each person/trust in addition to the current gifting rules;
- a gifting concession of up to \$500,000 is available per trust;
- assessable assets in the trust up to \$500,000 will be exempted from the assets test for the person with disability. Where the assessable assets of the trust exceed the limit, the amount in excess of the limit will be counted as assessable assets for the person, and will be assessed against the relevant assets test thresholds;
- the \$500,000 assets test concession will be indexed to the Consumer Price Index (CPI) each year on 1 July;
- additional contributions can be placed in the trust;
- all gifts must be unconditional;
- reasonable costs of maintaining the trust can be paid for by the trust (but cannot include payment for service to non-professional trustees); and
- the trust must have an investment strategy that solely has regard to the care and accommodation needs of the person with the severe disability and all investments must comply with that strategy.

POLICY ISSUES

1. Who is a person with a severe disability?

The advisory group noted that disability was difficult to define and that there was no single definition of either disability or severe disability. Many of the definitions of disability stem from programs that have specific objectives and eligibility criteria designed to ensure that the program or service is effective and reaches the intended beneficiaries.

The advisory group noted that the Australian Government's intention for this measure was to use existing assessment processes so that determination of severe disability would be administratively practical and consistently interpreted. This could include the assessment process currently used for Disability Support Pension, Carer Payment and/or Carer Allowance.

The advisory group also noted that since September 2002, the assessment process for Disability Support Pension included a determination as to whether a person was unable to work in open competitive employment at award wages. The advisory group understood that most Disability Support Pension recipients are assessed as being able to work at open competitive employment – although not at 30 hours or more per week. From 1 July 2006, the assessment process will also include a determination about a person's capacity to work at award wages, however the qualification criteria will change to 15 hours per week. It is understood that the current process to determine a person's inability to work at award-based wages will remain the same. People employed in supported employment and under the supported wage scheme are not considered to be working at an award wage.

It was also noted that if Disability Support Pension was granted prior to September 2002 it was likely that no assessment would have been made regarding a person's inability to work at award wages. The advisory group considered that grandfathered Disability Support Pension customers could be asked to either:

- undergo a work capacity test under the new DSP rules; or
- if they are in a business service, the test for eligibility to work in a supported business service could be used to determine that the person has been assessed as having no likelihood of working in open competitive employment; or
- if not in a business service they undergo the existing business service assessment process to determine suitability.

In making this recommendation, the advisory group recognised that some existing Disability Support Pension recipients may be uncomfortable about undergoing a work capacity test in order to qualify as a beneficiary under such a trust. As a result, the promotion associated with this measure would have to make it quite clear that a person's entitlement to Disability Support Pension would not be affected as a result of option for a work capacity test.

The advisory group were mindful that the eligibility criteria do not require the person with a severe disability to be in receipt of Disability Support Pension,

but rather to have a level of impairment that meets the criteria for Disability Support Pension.

The advisory group also were mindful that the eligibility criteria do not require the person with a severe disability to have a carer in receipt of Carer Allowance or Carer Payment, but rather that their care needs would qualify a carer for these payments.

The advisory group considered whether people with severe disabilities in state funded accommodation services should be eligible for this measure. Such accommodation services could include residences, institutions, hostels and group homes that receive funding through State or Commonwealth sources and provide their residents with some levels of care. The advisory group considered that even though people with severe disabilities in supported accommodation services already receive government funding, any additional private funds could be used to 'top up' their care costs, and pay for items such as aids and appliances.

The advisory group also considered the issue of age for eligibility for the trust, given the intended target group are parents or immediate family members (as defined) seeking to make private financial provisions for sons and daughters. However, it was agreed that no age limits should be imposed, and that parents of young children with severe disability should also be encouraged to consider private financial provisions.

Recommendation 1:

For the purposes of the means test concession the definition of severe disability should be:

- (a) a person whose level of impairment meets the criteria for Disability Support Pension or DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement, and has care needs that would qualify a carer for Carer Payment or Carer Allowance, and who has no likelihood of working in open competitive employment; or***
- (b) a person whose level of impairment meets the criteria for Disability Support Pension or DVA Invalidity Service Pension or DVA Invalidity Income Support Supplement, and is living in a state funded accommodation service for people with severe disabilities, and who has no likelihood of working in open competitive employment; or***
- (c) a child under 16 years of age whose level of impairment would qualify their carer for Carer Payment.***

Related Issues considered include:

Compensation

Using the above definition, a person precluded from receiving Disability Support Pension because of a lump sum compensation settlement but who has a level of impairment that would qualify, could also be the beneficiary of a trust established by a parent or immediate family member, as described in this measure.

The advisory group noted that Social Security law is designed to ensure that people who receive compensation for loss of income do not also receive income support from the government. That is to avoid 'double dipping' which is considered not appropriate.

Most income support payments (including Disability Support Pension) are compensation-affected payments. This means that any lump sum or weekly compensation payments that have an economic loss component are treated differently to ordinary income.

Under the compensation provisions, there are two main impacts:

- weekly payments of compensation are deducted 'dollar for dollar' from the amount of social security income payable to the person in receipt of compensation; and
- a lump sum compensation payment that has an economic loss component will result in the person being precluded from receiving a compensation affected payment for a period of time (preclusion period),

Recommendation 2:

People with disabilities who have received a lump sum compensation settlement and meet all eligibility criteria should be allowed to have a trust established for them by their parents or immediate family members (as defined). However the preclusion rules take precedence and the preclusion period must be satisfied before the concessions under the trust rules are accessed.

Establishment of a trust for a person who is in gaol or in psychiatric confinement (in connection with a criminal charge).

The advisory group noted that, in general terms, social security income support is not payable to people in gaol.

As the proposed eligibility criteria states that a person does not have to be in receipt of Disability Support Pension – all that is necessary is a level of impairment that meets the criteria for the payment and that would qualify their carer for Carer Payment or Carer Allowance – this allows for trusts to be established for people who are currently in gaol.

The advisory group felt that if a person was in gaol or psychiatric confinement (in connection with a criminal charge) and meet the eligibility criteria, they should be allowed to have a trust established, as it should assist their transition back into the community.

Recommendation 3:

There be no restriction for people in gaol and psychiatric confinement (in connection with a criminal charge) having a trust established where they meet the eligibility criteria.

2. Who is a parent or immediate family member?

The advisory group noted that the original intention of the measure was to assist ageing parents to make private financial provisions for their son or daughter with a severe disability. The Prime Minister supported a proposal to expand eligibility for those who can contribute to the trust and benefit from the gifting provisions to include immediate family.

As the gifting concession only applies to parents and immediate family members, the advisory group considered the definition of parent or immediate family member.

Again, there was no existing definition of family member that could reasonably be used for this measure. Parents could include natural parents, adoptive parents, foster parents, etc. In some areas of Social Security law, there is a very liberal interpretation given to the definition of family member.

In considering who should be included in the definition of family member, the advisory group noted that in some cases grandparents or siblings might be in a better financial position than parents to make private provision, particularly given that parents have often endured the burden of the costs associated with disability. The advisory group also considered whether the definition should be extended very broadly to include aunts, uncles, friends, etc, but noted that the intention of the measure was around ageing parents.

Recommendation 4:

For the purposes of the means test concession a parent or immediate family member should be defined as:

- ***natural parents;***
- ***legal guardians (as defined);***
- ***adoptive parents;***
- ***step-parents;***
- ***grandparents; and***
- ***siblings.***

Related Issues considered include:

Spouses, partners or self-contributions

Whether spouses or partners should be able to contribute to the trust and benefit from the means test concessions was also discussed.

The advisory group noted that under existing social security rules, spouses/partners cannot gift to their partner as they are treated as one unit and therefore are assessed as though they jointly own assets. These social security rules apply to all marriage-like relationships.

That is, if a spouse/partner contributed to the trust they would just be moving assets from one part of their portfolio to another and not depriving themselves of an asset. However, if spouses/partners were included in the definition of who can contribute to the trust they would be able to move their assets from

an assessable to a non-assessable environment. This was considered to be inconsistent with the intention of the measure and the advisory group was of the view that spouses/partners (or those in marriage-like relationships) should not be included in the definition of who can contribute to the trust. Similarly, it was considered that the person with severe disability could not self-contribute to the trust, unless the contribution was funded by a bequest or superannuation death benefit that had been made within a three-year period.

During the consultation process with peak organisations, the issue of how same sex couples would be treated was raised. The advisory group agreed that the treatment of same sex partners should be consistent with general government policy as reflected across all legislation.

Recommendation 5:

Self-contributions be allowed only when funded by a bequest or superannuation death benefit from a parent or immediate family member (as defined), within three years of receipt of the bequest or superannuation death benefit.

Guardians

The advisory group noted that the term 'legal guardian' refers to people who are the legal guardians of a person under 18 years of age. The advisory group considered it important that this was accurately defined in guidelines as it could inadvertently capture other 'legal guardians' such as administrators.

However, in noting the definition, the advisory group considered that it would be unreasonable to exclude from the definition of a parent or immediate family member of a person over the age of 18 years, any legal guardian who had been in a 'parent-like relationship' with that child under 18 years of age.

The advisory group therefore recommended the following broader definition of 'legal guardian' as follows.

Recommendation 6:

The term 'legal guardian' used in the definition of parent or immediate family member includes a natural person who is or had been the legal guardian of the person with a severe disability whilst that person was under the age of 18 years.

Children

The advisory group considered whether it would be appropriate for children to contribute to the trust of a parent with severe disability. There was some concern that this may then be interpreted as children being able to establish trusts for ageing parents, and if they themselves are around age pension age benefit from the gifting rules. The advisory group noted that this was clearly not the intent of the measure.

Recommendation 7:

In keeping with the general intent of this measure, children of people with severe disability can contribute to the trust, but not derive a benefit.

Contributions by a broader group

In relation to who could contribute to the trust, the advisory group considered that anyone, apart from the beneficiary (and spouse/partner), should be able to contribute to the trust. This would allow more people to contribute towards the care and support needs of the person with a severe disability.

However, only parents or immediate family members (as defined) who are of relevant age pension age or within five years of age pension age, will be able to derive a benefit from the gifting exemption.

The following table provides examples of who can contribute to the trust and benefit (ie, defined as parents or family members) and who can contribute to the trust and not benefit.

Table 1: people who can contribute to the trust and / or receive gifting concession

Donor	Receives gifting concession	Able to contribute
“Antero” generational (legacy to future generation)		
Natural parent	Yes	Yes
Legal guardian (as defined)	Yes	Yes
Adoptive parent	Yes	Yes
Grandparents	Yes	Yes
Foster parents	NO	Yes
Aunts / Uncles	NO	Yes
Step-parents	Yes	Yes
“Intra” generational (legacy to same generation)		
Beneficiary	N/A	NO
Spouse/Partner	N/A	NO
Sibling	Yes	Yes
Step-siblings	NO	Yes
Cousins	NO	Yes
“Retro” generational (legacy to previous generation)		
Children	NO	Yes
Grandchildren	NO	Yes
Other groups		
Charities / community groups	N/A	Yes

Recommendation 8:

Except as otherwise expressly provided (eg, by a beneficiary as a consequence of a bequest), anyone except the beneficiary or their partner/spouse be allowed to contribute to the trust, however only parents and immediate family members (as defined) derive a benefit from the gifting concession.

3. What care and accommodation needs can the trust pay for?

The advisory group noted that the Australian Government's intention is that the trust be used to meet the current or future housing, personal, nursing and health care needs of the person with a severe disability, and not their day to day living expenses.

As disability varies considerably, and the costs associated with disability also vary widely between individuals, the group considered that any attempt to specify what care and accommodation needs can be paid by the trust was unhelpful and would almost certainly prove unworkable. While not wanting to develop a prescriptive list of what can and can't be included, the advisory group considered the following broad categories of expenditure should be used as a guide to acceptability:

- personal care (only to a third party carer);
- housing;
- aids and appliances;
- medical;
- transport costs (only the proportion applicable to the needs of the person with severe disability); and
- transitional living skills / independent living skills training and recreational activities / quality of life costs, which were particularly significant costs to people with intellectual disability.

The group noted that existing payments were designed to provide for day-to-day costs of living including food, electricity, rates, entertainment and other expenses normally incurred people without disabilities. However, the group considered that it was not appropriate for the trust to meet the expenses of informal/occasional care, provided by partners, trustees or immediate family members, as defined.

Consultation conducted by the advisory group also raised the issue as to whether the trust would pay for travel/relocation costs for the person with a severe disability so that they can be closer to specialist service providers. The advisory group considered that reasonable travel costs could be appropriately paid by the trust.

In considering the broad care and accommodation cost categories that could be paid for by the trust, the advisory group strongly believed that setting criteria to make distinctions between allowable and non-allowable expenditure was likely to increase the administrative burden of the trust for both the trust and Centrelink and would be difficult, costly and open to dispute and varying interpretations.

The advisory group suggested the Australian Government consider allowing any reasonable costs associated with the person with severe disability to be paid for by the trust. The onus would be on the trustee to make a decision as to the reasonableness of the expenditure.

Recommendation 9:

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.

Types of Accommodation that can be paid for by the trust

The advisory group considered the definition of accommodation and what can be paid for by the trust. It was considered reasonable that the trust could pay for rent, accommodation bonds, specialist disability accommodation and could also hold the person's principal residence. However, given a person's principal residence is excluded from the means test, the advisory group considered that this exclusion should also apply to the trust.

Recommendation 10:

The trust be allowed to hold or fund property or an interest in property, including the person's principal residence, and that the value of the principal residence not be included in determining the value of the trust.

Recommendation 11:

The trust be allowed to buy a right to or an interest in accommodation (eg a share of a house or specialist disability accommodation).

Family Members as Carers

The advisory group considered whether the trust should be allowed to pay family members for providing care for the person. They considered that it was not appropriate for this to occur for the following reasons:

- this measure was designed to work within existing administrative arrangements as much as possible;
- establishment of the trust is not designed to provide a source of income for a family carer;
- family carers are able to access Carer Payment, which provides income support to people who because of the demands of their caring role, are unable to support themselves through workforce participation;
- family carers are also able to access Carer Allowance, which is an income supplement for people who provide daily care and attention at home to a person who has disabilities or a severe medical condition;
- there is a precedent as insurance companies and compensation bodies do not pay for family carers – rather the attendant carer needs to be a person that meets the standards and is approved as a provider of attendant care services; and that
- this could be a mechanism to avoid the means test.

Recommendation 12:

The trust not be allowed to meet the costs of care provided by the trustee, partner, parent or immediate family member (as defined) for care provided.

4. Protecting the severely disabled child and parent

Indexation of the \$500,000 trust cap

The Advisory Group noted the Australian Government's intention to index each year the \$500,000 trust cap to CPI.

Recommendation 13:

The Department of Families, Community Services and Indigenous Affairs develop a communication mechanism to inform trustees of any changes to the trust cap limit.

Who can be a trustee?

The advisory group considered who could be a trustee. It was noted that the prudent person test is to apply, such that people as described below will not be allowed to be a trustee:

- non-residents;
- those who are not allowed to be Directors of companies.

The advisory group also considered whether there should be a minimum number of trustees. It was agreed that if there is an arms length professional trustee, only one trustee is required. If there is no arms length professional trustee, the Group recommended that there should be a requirement for more than one (i.e. at least two) trustees.

The Trust Deed should stipulate the voting procedures for multiple trustees.

Recommendation 14:

If an arms length professional trustee is appointed, it would be appropriate for one trustee to administer the trust. However, if no arms length professional trustee is appointed, two or more trustees should be required with voting procedures stipulated in the trust deed.

Audit Requirements

The advisory group considered whether an annual audit of the trust would help in protecting the right of the child by ensuring the trust operates within the legislative requirements. The advisory group noted that while an audit may identify where a trust had not operated within the legislative requirements, it could not prevent this from happening. It also noted that the cost of a comprehensive audit would be significant and may place an unwarranted financial burden on the Trust.

The advisory group noted that it may be more appropriate for there to be a requirement that the trust's accounts be prepared and certified by an appropriately qualified accountant. These accounts would be provided to Centrelink each year, and assist in providing Centrelink with a reliable basis for examining trust expenditure.

The advisory group also noted that it would be appropriate to carry out an audit in some instances, particularly where the beneficiary and/or the donor were not happy with the management of the trust. The advisory group also considered that random audits by Centrelink may be appropriate.

Recommendation 15:

That the trustee provide yearly financial statements certified by an appropriately qualified accountant to Centrelink and the Trust Deed specify that the beneficiary and/or the donor can request an audit if they are not satisfied with the management of the trust. Centrelink may also require random audits.

Payment to non-professional trustees

The advisory group considered that subject to any decision by a court or tribunal non-professional trustees should not be remunerated for services, but could recover out-of-pocket expenses. It was noted that under the current system, where the trust deed does not expressly allow for the payment of non-professional trustees, non-professional trustees must apply to the courts for payment.

The payment can include reimbursement for time spent managing the trust, as well as out-of-pocket expenses.

Given the need to protect the interests of the person with severe disability, the advisory group therefore considered that the trust could only pay *professional trustees* to administer the trust (i.e. professional trustees are licensed and registered and are remunerated for their services).

Recommendation 16:

The model trust deed include the option for non-professional trustees to be able to apply to the Court or Tribunal for payment as per current legislation.

Investment rules

The advisory group noted and supported the Department's intention to apply the investment rules contained in the Superannuation Industry (Supervision) Act 1993 and Regulations 1994) (SIS). These rules are as follows:

- the trustee must formulate and give effect to an investment strategy that solely has regard to the current and future care and accommodation needs of the child / lifetime beneficiary. Subject to these needs, it must have regard to:
 - risk involved in making, holding and realising the trust's assets, including the level of diversification of the trust's assets;
 - likely return from the trust's investments;
 - trust's cash flow requirements;
 - liquidity of the trust's assets, with regards to the trust's cash flow needs; and
 - ability of the trust to discharge its existing debts and prospective liabilities.

This approach will allow the trust to:

- purchase listed securities from related parties so long as the transaction was at arms-length and congruent with the investment strategy.
- borrow to fund short term liquidity needs for up to 90 days. This is allowed to ensure that short-term needs are satisfied without having to have a fire sale of assets. It is typically required where the trustee is currently selling an asset and has arranged to purchase a replacement, however there is a difference between the settlement dates.

The advisory group noted that under the rules contained in the SIS Act and Regulations, the fund is not allowed to:

- lend or give financial assistance to any persons, including the child. The trustee would not be allowed to provide direct financial assistance to the child (i.e. cash payments). They can only use trust funds to meet the care and accommodation costs of the child.
- Borrow funds except as discussed above.

The advisory group noted and supported the Department's suggestion that the additional following restrictions should apply:

- cannot own any in-house assets. An in-house asset is a loan or investment in a 'related party'. Related parties include any trusts or companies controlled by the trustee(s). This has been included because these arrangements are typically not arms-length.
- cannot own any business property used by a related party (eg the business premise of the family's small business).

Recommendation 17:

In addition to the current rules contained in the Superannuation Industry (Supervision) Act and Regulations the trust would not be allowed to own any in-house assets or own any business property used by a related party, other than the beneficiary.

Impact on entitlements that a person is able to receive from State and Territory governments

During the advisory group's consultations, a number of organisations expressed concern that State and Territory governments may see this measure as an opportunity to cost shift.

The former Minister, Senator Kay Patterson, publicly stated on a number of occasions the need for a commitment from all the Disability Services Ministers for some practical initiatives to help address the problems faced by the growing number of ageing carers.

The advisory group noted that this was an extremely important issue that the Minister for Families, Community Services and Indigenous Affairs would need to resolve.

The advisory group noted that there was also potential for schemes administered by the Commonwealth to adversely impact upon entitlements for a person with a severe disability following the establishment of the trust.

The advisory group were strongly of the view that the creation of a trust should not affect a person's entitlements to services and assistance, as the trust is meant to supplement rather than replace other supports.

Recommendation 18:

The Minister for Families, Community Services and Indigenous Affairs consult with his State colleagues to ensure that access to services and concessions provided by schemes administered by state/territory governments, is not affected by the establishment of the trust.

Recommendation 19:

For schemes administered by Commonwealth Departments, the Minister for Families, Community Services and Indigenous Affairs should ensure that provisions are put in place so that there are no adverse impacts on severely disabled persons entitlements following the establishment of a trust.

5. Other Issues

Further options for parents / immediate family members wishing to make future financial arrangements

The advisory group commented that the establishment of the trust is part of a lifetime plan and should be applauded as a measure to encourage parents of children with severe disability to make future financial arrangements.

Recommendation 20:

Results from the 'further research on the needs of carers planning for the future' be used to develop further measures that will complement the establishment of trusts and encourage families of children with severe disabilities to make private financial arrangements.

6. Issues outside the terms of reference

Taxation Implications

The advisory group noted that any changes to the taxation rules were beyond its terms of reference. However, it makes the following findings and recommendations for the information of the Minister.

Finding 1:

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:

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.

Indexation of the gifting amount

The advisory group noted that there was no provision for indexation of the gifting limit which was at odds to the indexation (CPI) of the amount of non-assessable assets allowed in the trust.

The advisory group considered that there was a strong argument for gifting amounts to be indexed in line with CPI, as per the treatment of the trust amount.

Finding 3:

There is an anomaly regarding indexation between the gift amount and the trust amount that needs to be addressed.

Increasing the trust cap

While noting that the trust can be topped up, the advisory group considered that the trust limit concession of \$500,000 might not be sufficient, particularly given the high costs of disability. Concern was also expressed during consultations that the \$500,000 exemption cap limit was not sufficient to generate the income necessary to meet the high care costs of some people with disabilities.

The limit also did not take account of the likely increase in care and accommodation costs when informal family carers, such as ageing parents, died or were no longer able to provide unpaid care.

The advisory group noted that the 2003-04 Commonwealth State Territory Disability Agreement Annual Report provided the following information on the average costs of providing care to people with disability.

(Please note that service user is different to person, a person may use more than one service so supporting a person may include costs of all types of service or only one.)

Table 2: National average cost to Government per service user, by service type

Service Type	Average cost
Accommodation Support	
Institutions and Hostels	\$74,461
Group Homes	\$83,098
Other Accommodation services	\$18,883
Community Support	\$4,514
Community Access	\$8,038
Respite	\$8,668
Employment	
Open Employment	\$3,401
Supported Employment	\$6,613
Open and Supported Employment	\$3,997

Finding 4:

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 \$1million should be considered.

Implementation

During the consultations, many groups expressed the view that the process of implementation of the trust measure was vital to its success. The way in which the concepts and details are communicated to families of children with disabilities, the legal, banking and financial advisory professions and to disability groups is a process of particular importance. Many groups also expressed an interest in providing advice and assistance in developing a communication strategy that could involve their particular networks. Consequently, further consultation on communication and implementation is thought appropriate.

Finding 5:

The success and take up of the trust measure would be greatly enhanced through further appropriate consultation on the process of implementation and that the Minister might consider establishing an Advisory Group for this purpose.