

For discussion on
14 May 2018

Legislative Council Panel on Welfare Services Preliminary Framework of Special Needs Trust

Purpose

This paper briefs Members on our preliminary thinking on the framework of the proposed Special Needs Trust (SNT).

Background

2. Some parents have expressed the concern that although they have the financial means to meet the long-term living expenses of their children with special needs, they are still worried about the care for their children after their death, as their children lack the ability to take care of themselves. These parents have pointed out that even if they can find relatives or friends to take care of their children with special needs, they do not wish to give all their assets directly to their relatives, friends or carers. These parents wish to explore an alternative of managing their wealth under a trust to better ensure, after their death, the long term sustainability of the care plan they have prepared for their children while they are alive. However, they are concerned that the generally high management fees of private trust services will significantly deplete the assets earmarked for paying their children's living expenses or shortening the duration of the care plan. The Social Welfare Department (SWD) currently provides services to help individuals with welfare needs to manage social security payments and/or funds from other sources, to ensure proper use of these funds, and render support in respect of guardianship orders involving mentally incapacitated persons. However, these services are only applicable to specific circumstances in which the funds will only be used to pay the basic living expenses of the children or persons concerned (see details at the Annex). As these parents wish to provide, through similar services offered by a private trust, a higher living standard after their death for their children with special needs, SWD's existing services cannot meet their expectation.

3. In June 2016, the Labour and Welfare Bureau established a working group to examine the feasibility of setting up a SNT. The working group comprises parents with special needs children, representatives of non-governmental organisations in the rehabilitation sector, professionals from the legal, financial and academic fields, a person with autistic characteristics and representatives of the relevant government departments.

4. The Chief Executive announced in her 2017 Policy Address that the Government had decided to take the lead in setting up a SNT on the basis of a preliminary framework proposed by the working group, with the Director of Social Welfare Incorporated acting as the trustee to provide reliable and affordable trust services for managing the assets of deceased parents. Regular disbursements will be made to the carers of their children, who may be individuals or organisations, in

accordance with the parents' wishes. This is to ensure that their assets will be used for meeting the long-term living expenses of their children.

Preliminary Framework

5. Upon completion of the first stage of the feasibility study, the working group has put forward a preliminary framework of the SNT which is set out in paragraphs 6 to 11 below.

Legal Framework

6. The working group has proposed to adopt the existing legal framework (i.e. the Director of Social Welfare Incorporation Ordinance (the Ordinance)) under which the Director of Social Welfare Incorporated will act as the Trustee of the SNT with the following considerations:

- (a) Under the Ordinance, the Director of Social Welfare shall constitute a corporation sole, and shall have perpetual succession in the name of the Director of Social Welfare Incorporated;
- (b) In accordance with the Ordinance, the Director of Social Welfare Incorporated may use the trust assets for investment purpose; and
- (c) The Director of Social Welfare Incorporated shall discharge the statutory duty of care in accordance with the Trustee Ordinance. In other words, it is the responsibility of the corporation to invest trust funds in prudent investment products.

7. The working group has proposed that the relationship between parents using the SNT services and the Director of Social Welfare Incorporated should be established through the following trust documents which specify the content of the trust services:

- (a) Trust deed: Parents (as the Settlor) should sign a trust deed with the Director of Social Welfare Incorporated (as the Trustee) while they are alive, specifying that the Trustee is required to manage the Settlor's assets which are transferred to the Trustee in accordance with the terms and conditions of the trust deed and use the assets for purposes relating to the care of their children with special needs (the Beneficiary); the trust deed also specifies the rights and obligations of the Trustee, fees to be charged, arrangements for termination of the trust, etc.; and
- (b) Letter of intent and care plan: Settlers, when signing the trust deed, are required to submit a letter of intent and a care plan for the Beneficiary specifying the annual care services and expenses for the Beneficiary, the individual or organisation that will serve as the carer of their children, and the role of the carer/organisation in the implementation of the care plan, etc.

8. Settlers are also required to make a will specifying the arrangement for transferring their assets to the SNT after their death and the implementation of such an arrangement by the executor of the will.

Financial Management

9. In view of the wishes of parents that the SNT will charge fees at affordable level for the wealth management services, the working group has proposed the following fund management model :

- (a) The Settlor arranges for the fund to be transferred to the SNT after his/her death;
- (b) The Trustee pools funds from different trust accounts for making investment to achieve economy of scale, thereby lowering the management costs of individual accounts; and
- (c) The Trustee allocates investment gains or losses to individual trust accounts on a pro rata basis.

10. The working group has proposed the establishment of a management committee comprising government representatives, professionals and service users to work out details of the management and investment of the trust fund.

Mode of Service

11. The working group has proposed the creation of a dedicated SNT office under the SWD. The proposed mode of service consists of the following four steps:

While the Settlor is alive

Step (1) Setting up a trust

- (a) The Trustee provides the Settlor with templates for trust deed and letter of intent;
- (b) The Settlor is required to make a will giving instructions on the transfer of his/her assets to the SNT account after his/her death, prepare a care plan and specify the carer of the Beneficiary, who may be an individual or organisation; and
- (c) The Trustee confirms with the Settlor the care plan for the Beneficiary and opens a trust account after the signing of the trust deed by both parties.

After the death of the Settlor

Step (2) Activation of account

- (a) The executor appointed by the Settlor sells the assets of the latter and transfers the fund to the SNT; and

- (b) The Trustee activates the trust account upon receipt of the fund.

Step (3) Administration of account

- (a) The Trustee pools funds from individual trust accounts for investment. The gains or losses from investment are credited or debited to individual accounts on a pro rata basis;
- (b) The Trustee disburses funds to the carer or organisation specified by the Settlor in accordance with the instructions laid down in the trust deed;
- (c) The carer/organisation implements the care plan for the Beneficiary; and
- (d) The Trustee reviews the implementation of the care plan on a regular basis.

Step (4) Termination of account

The account will be terminated under the following circumstances:

- (a) The Beneficiary passes away: The Trustee handles the remaining cash in the account in accordance with the instructions laid down in the trust deed;
- (b) Funds in the account are exhausted: The Trustee makes referral of the Beneficiary's case to appropriate welfare service units according to the latter's actual conditions and needs;
- (c) Other reasons (e.g. the Beneficiary emigrates).

The Next Step

12. The working group has consulted parent groups and other relevant stakeholders and organisations concerned on the above preliminary framework in the first quarter of 2018. The working group will examine the implementation details of the SNT in the next stage. The Government will continue to collect the views of stakeholders before finalising the implementation details.

13. The SWD is making preparation for the establishment of a dedicated SNT office. Depending on the progress of the preparatory work, the SWD expects that the services will be launched in end 2018 or early 2019.

Advice Sought

14. Members are invited to note the progress of setting up the SNT and comment on the preliminary framework.

Social Welfare Department's Existing Services for People in Need in Respect of Financial Management and Related Care Matters

Director of Social Welfare Incorporated Accounts

Currently under the Director of Social Welfare Incorporation Ordinance, the Director of Social Welfare may, in the name of the Director of Social Welfare Incorporated (DSWI), open DSWI accounts for individuals (specified persons) who are incapable of managing their money because of age, health condition or other reasons. The aim is to help them manage their money (e.g. payments received from the Comprehensive Social Security Assistance Scheme, Emergency Relief Fund, Criminal Injuries and Law Enforcement Compensation Scheme and employee's compensation, etc.) for meeting their basic living expenses (including hostel/residential service fees, day-to-day expenses on food/clothes, education fees, pocket money for beneficiaries and other miscellaneous expenses).

2. Beneficiaries of DSWI accounts include:

- (a) Persons with intellectual disability or mental disorder/ elderly persons who are incapable of handling their money, and have no relatives or friends to help them handle their money;
- (b) children under the guardianship of the DSW; and
- (c) minors (including those whose parents are deemed unfit to manage the minors' money, and those who receive money donations that are entrusted by the donors to the DSW).

3. Under the existing service, as beneficiaries of DSWI accounts have no relatives or friends to help them handle their money or their parents are deemed unfit to manage their money, and there is no trust deed signed between the DSWI and the parents of these beneficiaries or their donors, case social workers of the SWD will help these beneficiaries with the payment for the above basic living expenses to ensure that the use of the money is in the best interest of the beneficiaries. Unlike the proposed Special Needs Trust, case social workers will not implement the long-term care plan prepared in advance by settlors for their beneficiaries. As far as beneficiaries of DSWI accounts are concerned, their money are currently deposited in separate bank accounts and will not be pooled by the SWD for investment purpose. As at 31 March 2018, there were a total of 6 403 cases of DSWI accounts handled by the SWD, about 80% of which involved persons with intellectually disability or mental disorder/elderly persons.

Guardianship Orders

4. Under Part IVB of the Mental Health Ordinance (MHO), the Guardianship Board (the Board) may make guardianship orders for mentally incapacitated persons who have attained the age of 18, appoint for such persons a guardian, either a private

guardian (a family member or a friend) or the public guardian (the DSW) and confer on appointed guardians certain specified powers. At present, guardianship orders are mainly made for persons suffering from stroke/cerebrovascular accident/vascular dementia or other kinds of dementia. There are also a few cases involving persons with intellectual disability.

5. In accordance with the statutory functions specified in Part IVB of the MHO and having regard to the needs and circumstances of individual cases, the SWD plays different roles in various stages from application to enforcement of guardianship orders, including:

- (a) providing support and assistance for a private guardian in discharging his/her guardian duties;
- (b) enforcing a guardianship order on behalf of a private guardian if the latter is unable to perform the guardian's functions due to personal reasons (e.g. illness or other causes) during the guardian's incapacity and subject to a review of these functions by the Board;
- (c) acting as the public guardian when no other suitable person is capable of acting or willing to act as a private guardian; and making decisions for the mentally incapacitated person concerned in accordance with the power(s) conferred under the guardianship order¹; and
- (d) submitting progress reports or applications for review of the guardianship order to the Board when necessary.

As at 31 March 2018, there were a total of 529 cases of guardianship orders monitored by the SWD.

6. Case social workers will pay timely visits to the persons concerned and keep in contact with their family members/carers as well as relevant stakeholders. When formulating welfare plans for the persons concerned or making important decisions on personal matters (e.g. residence or consent to medical treatment) for them, the case social workers will consider various factors and decisions will be made in the interest of the persons concerned. Should the persons concerned own

¹ According to section 59R(3) of the MHO, a guardianship order may confer on the guardian appointed under Part IVB of the MHO one or more of the following powers, namely:

- (1) the power to require the person concerned to reside at a specified place;
- (2) the power to convey, or to arrange the conveyance of, the person concerned to a specified place, and such reasonable force may be used as is necessary for the purpose;
- (3) the power to require the person concerned to attend at specified places and times for medical or dental treatment, special treatment, occupation, education or training;
- (4) the power to consent to medical or dental treatment on behalf of the person concerned if that person is incapable of understanding the general nature and effect of the treatment;
- (5) the power to allow any registered medical practitioner, approved social worker or other person specified in the guardianship order to have access to the person concerned at any place where that person is residing; and
- (6) the power to hold, receive or pay such sum (currently the maximum limit is HK\$16,000 per month) specified in the guardianship order on behalf of the person concerned for the maintenance or other benefit of that person.

properties/have a substantial amount of assets, or are involved in such issues as applying for a grant of probate and claiming work injury or accident compensations, the case social workers will seek legal advice as necessary and assist them in making applications to the Court of First Instance of the High Court in accordance with the relevant provisions under the MHO for handling such properties, assets and/or issues, with a view to safeguarding the best interest of the persons concerned.

Other Services

7. Moreover, casework service units under the SWD (e.g. integrated family service centres and medical social services units) provide welfare services, counselling and support for people with welfare needs, thereby helping them address their problems and daily needs. Appropriate assistance is also offered to those who are unable to take care of themselves. For needy persons who do not have family members or suitable carers to take care of them, case social workers from the SWD will, having regard to the circumstances and needs of the cases, refer them to residential services so that they can receive proper care.