



Social Security (Special Disability Trust) Guidelines 2021

I, Ray Griggs AO CSC, Secretary of the Department of Social Services, make the following instrument.

Dated 21 September 2021

Ray Griggs
Secretary of the Department of Social Services

Contents

| | |
|--|----|
| Part 1—Preliminary | 1 |
| 1 Name..... | 1 |
| 2 Commencement | 1 |
| 3 Authority..... | 1 |
| 4 Schedules | 1 |
| 5 Definitions | 1 |
| Part 2—Trust purpose requirements | 3 |
| Division 1—Primary purpose for reasonable care needs | 3 |
| 6 Guidelines about reasonable care needs..... | 3 |
| 7 What are reasonable care needs | 3 |
| Division 2—Primary purpose for reasonable accommodation needs | 4 |
| 8 Guidelines about reasonable accommodation needs | 4 |
| 9 What are reasonable accommodation needs..... | 4 |
| 10 What are not reasonable accommodation needs..... | 5 |
| Division 3—Other purposes | 6 |
| 11 Guidelines about other purposes | 6 |
| 12 Other purposes relating to expenditure for the primary benefit of the principal beneficiary | 6 |
| 13 Other purposes that are not expenditure for the primary benefit of the principal beneficiary | 6 |
| Part 3—Waiver of contravention of requirements | 7 |
| 14 Guidelines about waivers | 7 |
| 15 Whether or not to give waiver notices | 7 |
| 16 Conditions to include in waiver notices | 8 |
| 17 Periods during which waiver notices have effect | 9 |
| Part 4—Nominated agreements | 11 |
| 18 Nominated agreements..... | 11 |
| Part 5—Application and transitional provisions | 12 |
| 19 Application of this instrument..... | 12 |
| 20 Things done under the <i>Social Security (Special Disability Trust) Guidelines 2011</i> | 12 |
| Schedule 1—Repeals | 13 |
| <i>Social Security (Special Disability Trust) Guidelines 2011</i> | 13 |
| <i>Social Security (Special Disability Trust Beneficiary Requirements) Nomination of Agreement Instrument 2015</i> | 13 |

Part 1—Preliminary

1 Name

This instrument is the *Social Security (Special Disability Trust) Guidelines 2021*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|---------------------------------|--|-------------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. The whole of this instrument | The day after this instrument is registered. | 23 September 2021 |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsections 1209M(3), 1209N(4) and 1209U(4) of the *Social Security Act 1991*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

5 Definitions

In these Guidelines:

Act means the *Social Security Act 1991*.

approved fees means fees that:

- (a) are either:
- (i) charged for the daily care of the principal beneficiary; or
 - (ii) itemised fees that are additional to the fees mentioned in paragraph (i) and are related to the principal beneficiary's care and accommodation;
- and
- (b) are charged by:

Section 5

- (i) an approved provider (within the meaning of the *Aged Care Act 1997*) who is providing a service to the principal beneficiary in a residential care service (within the meaning of that Act); or
- (ii) an institution, hostel or group home, for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories, nominated by the Secretary under subsection 1209M(3) of the Act, in which care and accommodation is provided for the principal beneficiary.

trust means a trust that would be a special disability trust if it were not for a contravention of a requirement of Division 1 of Part 3.18A of the Act in relation to the trust.

waiver notice has the same meaning as in paragraph 1209U(1)(a) of the Act.

Part 2—Trust purpose requirements

Division 1—Primary purpose for reasonable care needs

6 Guidelines about reasonable care needs

For the purposes of paragraph 1209N(4)(a) of the Act, this Division sets out guidelines for deciding what are reasonable care needs for the principal beneficiary of a special disability trust.

7 What are reasonable care needs

A care need is a reasonable care need for the principal beneficiary of a special disability trust if:

- (a) one of the following conditions is satisfied in relation to the need:
 - (i) the need arises as a result of the disability of the principal beneficiary;
 - (ii) the need is for any medical-related or dental costs of the principal beneficiary;
 - (iii) the need is to pay approved fees; and
- (b) the need is met in Australia.

Division 2—Primary purpose for reasonable accommodation needs

8 Guidelines about reasonable accommodation needs

For the purposes of paragraph 1209N(4)(a) of the Act, this Division sets out guidelines for deciding what are, and what are not, reasonable accommodation needs of the principal beneficiary of a special disability trust.

9 What are reasonable accommodation needs

- (1) An accommodation need is a reasonable accommodation need of the principal beneficiary of a special disability trust if:
 - (a) the need arises as a result of the disability of the principal beneficiary; or
 - (b) the need meets the requirements set out in subsection (2), (3) or (4).
- (2) The need to pay for property, or for an interest in property, is a reasonable accommodation need of the principal beneficiary of a special disability trust if the property or interest:
 - (a) is acquired or rented from a person who is not an immediate family member of the principal beneficiary; and
 - (b) either:
 - (i) is acquired or rented for the accommodation needs of the principal beneficiary; or
 - (ii) if subparagraph (i) does not apply—is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.
- (3) The need to pay rates and taxes on a property is a reasonable accommodation need of the principal beneficiary of a special disability trust if the property:
 - (a) is owned by the special disability trust; and
 - (b) either:
 - (i) is used for the accommodation needs of the principal beneficiary; or
 - (ii) if subparagraph (i) does not apply—is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.
- (4) The need to pay for the maintenance or upkeep on property is a reasonable accommodation need of the principal beneficiary of a special disability trust if the property:
 - (a) is owned by the special disability trust; and
 - (b) either:
 - (i) is used for the accommodation needs of the principal beneficiary; or
 - (ii) if subparagraph (i) does not apply—is rented at market value and the income from the rent is used for the benefit of the principal beneficiary.
- (5) To avoid doubt, a property that is specialist disability accommodation within the meaning of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* may be a property to which this section applies.

10 What are not reasonable accommodation needs

A need that relates to property or an interest in property is not a reasonable accommodation need of the principal beneficiary of a special disability trust if the property or interest is acquired or rented from a person who is an immediate family member of the principal beneficiary.

Division 3—Other purposes

11 Guidelines about other purposes

For the purposes of paragraph 1209N(4)(b) of the Act, this Division sets out guidelines for deciding what are, and what are not, purposes, other than the primary purpose, that are primarily for the benefit of the principal beneficiary of a special disability trust.

12 Other purposes relating to expenditure for the primary benefit of the principal beneficiary

In deciding whether or not purposes relating to expenditure by a special disability trust are other purposes that are primarily for the benefit of the principal beneficiary of the special disability trust, consideration must be given to whether the expenses:

- (a) are not related to the reasonable care needs and reasonable accommodation needs of the principal beneficiary; and
- (b) are for the health, wellbeing, recreation, independence and social inclusion of the principal beneficiary.

13 Other purposes that are not expenditure for the primary benefit of the principal beneficiary

In deciding that purposes, other than purposes relating to expenditure by a special disability trust, are not other purposes that are primarily for the benefit of the principal beneficiary of the special disability trust, consideration must be given to whether the expenses:

- (a) are for payment to, or on behalf of, a person who is an immediate family member of the principal beneficiary; or
- (b) are for payment to a carer for purposes except for:
 - (i) the reasonable care needs of the principal beneficiary; or
 - (ii) other purposes primarily for the benefit of the principal beneficiary as provided by section 12.

Note: The maximum amount that may be spent in a particular financial year for purposes, other than the primary purpose of a special disability trust, that are primarily for the benefit of the principal beneficiary, as provided by paragraph 12(b), is as determined by the Secretary in the legislative instrument made under subsection 1209RA(3) of the Act.

Part 3—Waiver of contravention of requirements

14 Guidelines about waivers

For the purposes of subsection 1209U(4) of the Act, this Part sets out guidelines for deciding:

- (a) whether or not to give waiver notices to trustees of trusts; and
- (b) what conditions to include in waiver notices; and
- (c) the periods during which waiver notices are to have effect.

15 Whether or not to give waiver notices

- (1) Subject to subsection (2), the Secretary may decide to give a waiver notice to the trustees of a trust if the Secretary is satisfied of the following matters:
 - (a) the requirement of Division 1 of Part 3.18A of the Act that has been contravened in relation to the trust is a requirement in one of the following provisions of the Act:
 - (i) for a trust created before 1 January 2011 in relation to which the trust deed cannot be varied—section 1209N, section 1209P or subsection 1209S(1) or (3) of the Act;
 - (ii) for any other trust—section 1209N or subsection 1209S(1) or (3) of the Act;
 - (b) the contravention of the requirement does not involve fraudulent conduct;
 - (c) for a contravention of a requirement in subsection 1209S(1) of the Act—the contravention was not caused by the trustees of the trust;
 - (d) for a contravention of a requirement to only use income that the trust derives, and the assets of the trust, for the purposes mentioned in subsection 1209N(1) or (2) of the Act:
 - (i) the total use of income that the trust derives, and assets of the trust, for a purpose other than a purpose mentioned in subsection (2) of this section does not amount to more than \$5,000 for the financial year during which the contravention occurs; and
 - (ii) having regard to all the circumstances, including the nature of the contravention and the frequency of any other such contraventions in relation to the trust, the requirement should be waived.
- (2) For the purposes of subparagraph (1)(d)(i), the purposes are any of the following:
 - (a) to meet reasonable care and accommodation needs of the principal beneficiary;
 - (b) for purposes, ancillary to meeting the reasonable care and accommodation needs of the principal beneficiary, that are necessary or desirable to facilitate the meeting of those needs;
 - (c) for other purposes that are primarily for the benefit of the principal beneficiary.
- (3) For the purposes of subparagraph (1)(d)(ii), contraventions are considered frequent if Services Australia is proposing to notify the trustees of the trust of a contravention of a kind referred to in paragraph (1)(d) in relation to the trust and

Section 16

the trustees of the trust have previously been notified of another such contravention in relation to the trust either:

- (a) in the same financial year; or
 - (b) in the previous financial year.
- (4) The Secretary may decide to give a waiver notice to the trustees of a trust created on or after 20 September 2006 and before 1 January 2011 in relation to which the trust deed cannot be varied, if the Secretary is satisfied that the trust has complied with section 1209N of the Act.
- (5) Subject to subsection (6), the Secretary may decide to give a waiver notice to the trustees of a trust in relation to a contravention of paragraph 1209R(1)(b) of the Act if the Secretary is satisfied that:
- (a) the contravention occurred as a result of court proceedings relating to the transferred asset; or
 - (b) the contravention occurred because:
 - (i) the transferor transferred the asset within the timeframe under paragraph 1209R(1)(b) of the Act to a trust intended to be a special disability trust (the *first trust*); and
 - (ii) the first trust is not a special disability trust because of a contravention of a requirement of Division 1 of Part 3.18A of the Act; and
 - (iii) the asset is transferred by the transferor to a special disability trust; or
 - (c) the transferor:
 - (i) transferred the asset to a trust intended to be a special disability trust after the end of the 3 year period mentioned in paragraph 1209R(1)(b) of the Act; and
 - (ii) can show there was an intention to transfer the asset to the trust before the end of that 3 year period.
- (6) The Secretary may decide to give a waiver notice to the trustees of a trust in the circumstances set out in subsection (5) if the Secretary is satisfied of the following matters:
- (a) the contravention does not involve fraudulent conduct;
 - (b) the contravention in relation to the first trust does not involve fraudulent conduct;
 - (c) having regard to all the circumstances, including the nature of the contravention in relation to the first trust, the requirement should be waived.
- (7) Section 17 does not apply to a waiver notice given in accordance with this section.
- (8) This section does not limit the circumstances in which the Secretary may decide to give a waiver notice under section 1209U of the Act.

16 Conditions to include in waiver notices

- (1) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust, the Secretary must consider the need to include a condition that the waiver notice ceases to have effect if the trustees cease to comply with a

condition that is included in the waiver notice after the time or times stated in the waiver notice for complying with the condition.

- (2) In deciding what conditions to include in a waiver notice that is to be given to the trustees of a trust created before 1 January 2011 in relation to which the trust deed cannot be varied, the Secretary must consider:
- (a) the need to include a condition requiring the trustees to give the Secretary a statutory declaration made by the trustees stating the matters mentioned in subsection (3); and
 - (b) if:
 - (i) the trust was created on or after 20 September 2006 and before 1 January 2011; and
 - (ii) the only contravention is due to a breach of the purpose of the trust despite the trust having complied with section 1209N of the Act before 1 January 2011;
 the need to include a condition requiring the trustees to give the Secretary a statutory declaration made by the trustees stating that the trust has complied with section 1209N of the Act before 1 January 2011.
- (3) For the purposes of paragraph (2)(a), the statutory declaration must state that the trustees will comply with Division 1 of Part 3.18A of the Act, including the following requirements:
- (a) that the trust has no more than 1 beneficiary, not including any residuary beneficiary;
 - (b) that the trustees have made reasonable inquiries to determine whether the beneficiary of the trust meets the requirements of subsection 1209M(2) or (4) of the Act;
 - (c) that the primary purpose of the trust is to meet reasonable care and accommodation needs of the beneficiary of the trust;
 - (d) that the other purpose of the trust is primarily for the benefit of the principal beneficiary;
 - (e) that the trust complies with a determination made by the Secretary under subsection 1209P(2) of the Act.
- (4) For the purposes of paragraph (3)(b), reasonable inquiries include requesting and sighting documentation from Services Australia that confirms the beneficiary of the trust meets those requirements.

17 Periods during which waiver notices have effect

Trusts created before 1 January 2011 with a trust deed that can be varied and all trusts created after 1 January 2011

- (1) Subsections (2) and (3) apply to the following:
 - (a) a trust created before 1 January 2011 (other than a trust in relation to which the trust deed cannot be varied);
 - (b) a trust created on or after 1 January 2011.
- (2) The period during which a waiver notice in relation to the trust may have effect is a period of not more than 3 months from the time the period of effect starts under paragraph 1209U(2)(a) of the Act.

Section 17

- (3) The Secretary may, on application made by the trustees of the trust, extend the period of effect of a waiver notice (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S(1) of the Act) for further periods of up to 3 months only if the total period during which the waiver notice would have effect would not exceed 12 months.

Trusts created before 1 January 2011 with a trust deed that cannot be varied

- (4) Subsections (5) and (6) apply to a trust created before 1 January 2011 in relation to which the trust deed cannot be varied.
- (5) The period during which a waiver notice in relation to the trust (other than a waiver notice given in relation to a contravention of a requirement in subsection 1209S(1) of the Act) may have effect is:
- (a) if the notice does not state a time for the end of its period of effect—an indefinite period from the time the period of effect starts under paragraph 1209U(2)(a) of the Act; or
 - (b) in any other case—from the time the period of effect starts under paragraph 1209U(2)(a) of the Act until the time stated in the notice for the end of its period of effect in accordance with paragraph 1209U(2)(b) of the Act.
- (6) A waiver notice given in relation to the trust in respect of a contravention of a requirement in subsection 1209S(1) of the Act may have effect during a period of not more than 3 months from the time the period of effect starts under paragraph 1209U(2)(a) of the Act.

Part 4—Nominated agreements

18 Nominated agreements

For the purposes of subsection 1209M(3) of the Act, the following agreements, as in force at the time this section commences, are nominated:

- (a) the Bilateral Agreement between the Commonwealth of Australia and the State of New South Wales on the National Disability Insurance Scheme;
- (b) the Bilateral Agreement between the Commonwealth of Australia and the State of Victoria on the National Disability Insurance Scheme;
- (c) the Bilateral Agreement between the Commonwealth of Australia and the State of Queensland on the National Disability Insurance Scheme;
- (d) the Bilateral Agreement between the Commonwealth of Australia and Western Australia for the transition to a National Disability Insurance Scheme in Western Australia;
- (e) the Bilateral Agreement between the Commonwealth of Australia and the State of South Australia on the National Disability Insurance Scheme;
- (f) the Bilateral Agreement between the Commonwealth of Australia and the State of Tasmania on the National Disability Insurance Scheme;
- (g) the Bilateral Agreement between the Commonwealth of Australia and the Australian Capital Territory on the National Disability Insurance Scheme;
- (h) the Bilateral Agreement between the Commonwealth of Australia and the Northern Territory on the National Disability Insurance Scheme;
- (i) the National Health Reform Agreement.

Note: These agreements could in 2021 be viewed on the NDIS website (<https://www.ndis.gov.au>).

Part 5—Application and transitional provisions

19 Application of this instrument

This instrument applies to special disability trusts established before on or after the commencement of this instrument.

20 Things done under the *Social Security (Special Disability Trust) Guidelines 2011*

- (1) If:
 - (a) a thing was done for a particular purpose under the *Social Security (Special Disability Trust) Guidelines 2011* as in force immediately before that instrument was repealed; and
 - (b) the thing could be done for that purpose under this instrument;the thing has effect for the purposes of this instrument as if it had been done for that purpose under this instrument.
- (2) Without limiting subsection (1), a reference in that subsection to a thing being done includes a reference to a notice, application or other instrument being given or made.

Schedule 1—Repeals

Social Security (Special Disability Trust) Guidelines 2011

1 The whole of the instrument

Repeal the instrument.

Social Security (Special Disability Trust Beneficiary Requirements) Nomination of Agreement Instrument 2015

2 The whole of the instrument

Repeal the instrument.