

EXPLANATORY STATEMENT

Issued by the authority of the Secretary of the Department of Social Services

Social Security Act 1991

Social Security Amendment (Special Disability Trust) Guidelines 2025

Purpose

The *Social Security Amendment (Special Disability Trust) Guidelines 2025* (the Amendment Guidelines) make technical changes to the *Social Security (Special Disability Trust) Guidelines 2021* (the Guidelines) to reflect new terminology used in the *Aged Care Act 2024* (the Aged Care Act), for the purposes of determining whether the need to pay approved fees is a reasonable care need of a principal beneficiary of a special disability trust under the *Social Security Act 1991* (the Act).

Background

Special disability trusts

Special disability trusts provide a way for families to make private financial provision for the reasonable care and accommodation needs of their family member with severe disability. Special disability trusts provide certainty for families who are concerned that a family member with disability may not have the support they require to take care of their accommodation or care needs when the family is no longer able to care for them.

Section 1209L of the Act sets out certain requirements that must be complied with in order for a trust to be a special disability trust, including meeting the trust purpose requirements in section 1209N.

Subsection 1209N(1) of the Act provides that the primary purpose of the trust during the lifetime of the principal beneficiary, as provided by the trust deed for the trust, must be to meet reasonable care and accommodation needs of the beneficiary.

Paragraph 1209N(4)(a) of the Act provides that the Secretary may make guidelines, by legislative instrument, for deciding what are, and what are not, reasonable care and accommodation needs for beneficiaries of trusts. Paragraph 1209N(3)(a) of the Act provides that where such guidelines are made, then the reasonable care and accommodation needs of a principal beneficiary of a special disability trust must be decided in accordance with the guidelines if they deal with those needs.

The Guidelines provide guidance to decision-makers as to what are the reasonable care and accommodation needs of a principal beneficiary of a special disability trust for the purposes of whether a trust meets the requirements in subsection 1209N(1) of the Act. Section 7 of the Guidelines relevantly states that a care need is a reasonable care need for the principal beneficiary of a special disability trust if the need is to pay approved fees, and the need is met in Australia.

The term “approved fees” is defined in section 5 of the Guidelines as including fees that are either charged for the daily care of the principal beneficiary, or itemised additional fees related to the principal beneficiary’s care and accommodation, and are charged by an approved provider who is providing a service to the principal beneficiary in a residential care service or an institution, hostel or group home for which funding is provided under an agreement. The terms “approved provider” and “residential care service” in section 5 of the Guidelines are both determined by reference to their meaning in the *Aged Care Act 1997*.

Aged care reforms

The Royal Commission into Aged Care Quality and Safety recommended the development of a new Aged Care Act to support fundamental reforms to the aged care system. The Aged Care Act provides the legislative foundation for these aged care reforms and will commence from 1 November 2025. As the Aged Care Act replaces the whole of the existing aged care legislative framework, technical and consequential amendments are required to a range of legislation, including the Guidelines, to ensure that these instruments continue to operate as intended and in alignment with the concepts and terminology established under this new Act.

The *Aged Care (Consequential and Transitional Provisions) Act 2024* contains consequential and transitional provisions to support the commencement of the Aged Care Act, including legislative and administrative mechanisms to allow for elements of the existing aged care framework to move to the new arrangements.

Amendment Guidelines

The Amendment Guidelines update the references to the terms “approved provider” and “residential care service” in the definition of “approved fees” in section 5 of the Guidelines, to ensure that relevant fees are determined by reference to the new terminology used in the Aged Care Act. The Guidelines will provide that reasonable care needs include services by a registered provider in an approved residential care home for the daily care, or additional to those for the daily care, of the principal beneficiary.

As the Aged Care Act is replacing relevant concepts and terminology under the *Aged Care Act 1997*, and existing elements are being transitioned to the new Aged Care Act model through the *Aged Care (Consequential and Transitional Provisions) Act 2024*, the Amendment Guidelines do not affect any current arrangements.

It is not intended that these amendments will result in any policy changes for the purposes of determining whether the need to pay approved fees is a reasonable care need for the principal beneficiary of a special disability trust in the Guidelines. That is, it is not intended that there will be any policy changes for social security purposes arising from the Amendment Guidelines.

Authority

The Amendment Guidelines are made under subsection 1209N(4) of the Act, which relevantly provides that the Secretary may, by legislative instrument, make guidelines

for deciding reasonable care and accommodation needs for beneficiaries of special disability trusts.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument. Accordingly, the Amendment Guidelines rely on this power in conjunction with the instrument-making power in subsection 1209N(4) of the Act.

The Amendment Guidelines are a legislative instrument for the purposes of the *Legislation Act 2003* and are subject to disallowance.

Commencement

The Amendment Guidelines commence at the same time as the Aged Care Act commences. Section 2 to this Act states the Act commences on a single day to be fixed by Proclamation. The *Aged Care Commencement Proclamation 2025* fixes 1 November 2025 as the day on which the whole of the Aged Care Act commences.

Consultation

The Department of Social Services consulted with the Department of Health, Disability and Ageing and Services Australia on the intention to make the Amendment Guidelines. These agencies supported the Amendment Guidelines.

It was not necessary to consult with the social security recipients likely to be affected by the Amendment Guidelines given it is technical in nature, consequential to the commencement of the Aged Care Act, and does not result in any policy changes for social security purposes.

Availability of review

Decisions made under the Act in relation to special disability trusts, including those made with regard to the Guidelines, are subject to internal and external merits review under Parts 4 and 4A of the *Social Security (Administration) Act 1999* respectively.

Explanation of the provisions

Details of the *Social Security Amendment (Special Disability Trust) Guidelines 2025*

Section 1 – Name

This section states how the instrument is to be cited, that is, as the *Social Security Amendment (Special Disability Trust) Guidelines 2025* (the Amendment Guidelines).

Section 2 – Commencement

This section provides for the commencement of the Amendment Guidelines, that is, at the same time as the *Aged Care Act 2024* (the Aged Care Act) commences. This is on 1 November 2025, which is the date that has been fixed by Proclamation for the purposes of that Act. This ensures that the changes to the *Social Security (Special Disability Trust) Guidelines 2021* (the Guidelines) align with the commencement of the Aged Care Act.

Section 3 – Authority

This section provides that the Amendment Guidelines are made under subsection 1209N(4) of the *Social Security Act 1991*.

Section 4 – Schedules

This section provides that each instrument specified in a Schedule to the Amendment Guidelines is amended or repealed as set out in the applicable items in the relevant Schedule, and any other item in a Schedule has effect according to its terms.

Schedule 1 – Amendments

Social Security (Special Disability Trust) Guidelines 2021

Item 1 of Schedule 1 repeals and substitutes subparagraph (b)(i) of the definition of “approved fees” in section 5 of the Guidelines to reflect the new Aged Care Act.

Subparagraph (b)(i) has referred to fees charged by an approved provider, who is providing a service to the principal beneficiary in a residential care service. The terms “approved provider” and “residential care service” have been defined by reference to the *Aged Care Act 1997*. However, the new Aged Care Act uses different terminology and subparagraph (b)(i) of the definition of “approved fees” in the Guidelines is repealed and substituted to reflect this change in terminology.

New subparagraph (b)(i) provides that “approved fees” includes fees charged by a registered provider, who is providing a service to the principal beneficiary in an approved residential care home. The terms “registered provider” and “approved residential care home” are intended to have the same meaning as in the Aged Care Act.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security Act 1991

Social Security Amendment (Special Disability Trust) Guidelines 2025

The *Social Security Amendment (Special Disability Trust) Guidelines 2025* (the Amendment Guidelines) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The Amendment Guidelines make technical changes to the *Social Security (Special Disability Trust) Guidelines 2021* (the Guidelines) to reflect the new terminology used in the *Aged Care Act 2024* (Aged Care Act), for the purposes of determining whether the need to pay approved fees is a reasonable care need of a principal beneficiary of a special disability trust under the *Social Security Act 1991* (the Act).

Human rights implications

The Amendment Guidelines engage the following human rights:

- the right to social security in Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Article 28(2)(b) in the Convention on the Rights of Persons with Disabilities (CRPD); and
- the right to an adequate standard of living in Article 11 of the ICESCR and Article 28(2)(a) in the CRPD.

The Amendment Guidelines engage the right to social security under Article 9 of the ICESCR and Article 28(2)(b) of the CRPD. The right to social security requires that a system be established under domestic law, and that public authorities must take responsibility for the effective administration of the system. The social security scheme must provide a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

Article 28(2)(b) of the CRPD provides the recognition of the rights of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and the appropriate steps to safeguard and promote the realisation of that right including access by persons with disabilities, in particular, women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes. Social security is one example of a social protection programme.

Article 11 of the ICESCR recognises the right of individuals and their families to an adequate standard of living. Article 28(2)(a) of the CRPD recognises the right of

persons with disabilities to an adequate standard of living for themselves and families. The right to an adequate standard of living recognises the right of everyone to an adequate standard of living for all individuals and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Special disability trusts provide a way for families to make private financial provision for the future care and accommodation needs of their family members with severe disabilities, so the most vulnerable of our society can maintain an adequate standard of living. The requirements for special disability trusts in the Act and the Guidelines achieve a legitimate objective, as they balance a person's right to social security and an adequate standard of living with the resources of the community. These rights are supported through the provision of social security means test concessions available to primary beneficiaries and eligible contributors of special disability trusts, including exemptions from the assets test and gifting rules.

Conclusion

The Amendment Guidelines are compatible with human rights because they promote the protection of the rights of people with disability in Australia, and do not limit or preclude people from gaining or maintaining access to social security in Australia. To the extent the Amendment Guidelines limit human rights, these limitations are reasonable, proportionate and for a legitimate objective.

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Delegate of the Secretary of the Department of Social Services**