

Special Disability Trusts

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June 2018

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Disclaimer

The information presented in this report is of a general nature. It does not constitute legal or financial advice and should not be relied upon as such. People with disability and families considering investment in a Special Disability Trust are strongly encouraged to seek independent financial advice based on their personal and financial circumstances.

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Glossary

CPI	Consumer Price Index
Cth	Commonwealth
DIG	Disability Investment Group
DVA	Department of Veteran's Affairs
DPO	Disabled People's Organisation
DSS	Australian Department of Social Services
FaHCSIA	Australian Department of Families, Housing, Community Services and Indigenous Affairs (former)
FHOG	First Home Owners Grant
NDIS	National Disability Insurance Scheme
SDT	Special Disability Trust
SPRC	Social Policy Research Centre
SSAct	Social Security Act 1991
UNSW	University of New South Wales Sydney

Executive summary

This report presents the findings of a research project exploring the status, operation, and use of Special Disability Trusts in Australia. The project aimed to identify the facilitators and barriers to establishing and maintaining a Special Disability Trust for people with disability and families, identify strategies to increase awareness of Special Disability Trusts, and recommend areas for future legal reform of the trust mechanism. A key focus was exploring ways in which Special Disability Trusts can be used to secure appropriate private housing. The project involved a review of the legislative scheme and specific literature, stakeholder roundtable discussions and interviews with families who had experience or interest in establishing a Special Disability Trust.

About Special Disability Trusts

Special Disability Trusts were introduced by the Commonwealth Government in 2006 through an amendment to the *Social Security Act 1991 (Cth)*. They must be established with the primary purpose of paying for the reasonable care and accommodation needs of the beneficiary during their lifetime, and offer taxation and social security benefits for both the donor and beneficiary that are not available under traditional fixed or discretionary trusts. Eligibility is restricted to those who have disability and high support needs, and trust funds can generally only be used to meet the housing and care costs of the principal beneficiary, with a limited amount of discretionary spending permitted for other purposes benefiting the beneficiary.

Special Disability Trust uptake

The most up to date government figures available publicly (from June 2016) show there are presently 1,781 Special Disability Trusts in Australia, with a total value of \$149.9 million, and with the average value of the trusts quite low at \$84,174.61. This research found that this data may be misleading as many Special Disability Trusts are established in wills, and some that have been established while the donors are still living may have been established with a small amount of funds that families intend to add to over time.

Special Disability Trusts and housing

The roundtable and family interviews confirmed that many families who were interested in Special Disability Trusts saw them as a possible avenue to obtain stable and suitable independent living arrangements. For families, the benefits of using a Special Disability Trust to purchase a home included the security of life-long tenancy if the principal residence of the beneficiary was owned in the trust, and the security of knowing that the beneficiary's social security entitlements would not be affected by housing assets if they are owned in the trust.

Roundtable participants commented that there are many significant barriers to people with disability acquiring suitable housing, including housing availability and housing affordability, and warned that mechanisms to enable the transfer of money from family members will not in themselves overcome these challenges—Special Disability Trusts do not create options that do not exist otherwise.

There may, however, be opportunities to combine an NDIS package of support with the funds held in a Special Disability Trust, which could then focus on meeting the accommodation needs of the beneficiary. Indeed, this was a key aspiration of all the family interviewees. The research also found that shared ownership or pooling of housing assets does not appear to be expressly prohibited by the Special Disability Trusts legislation, but the experts who participated in the roundtable discussion indicated that it is certainly prohibited to do so in practice. This restricts the usability of the mechanism for people with disability who do not have the individual assets to purchase a home themselves but could buy (or rent) a home with a friend, family member or spouse.

Benefits of Special Disability Trusts

Special Disability Trusts offer a number of taxation and social security benefits to both beneficiaries and donors. A Special Disability Trust can have assets worth up to \$657,250 (as at 1 July 2017, indexed annually) without these funds impacting on the beneficiary's social security entitlements (i.e. Disability Support Pension). The roundtable discussion and family interviews indicated that retaining social security benefits for their family member with a disability was the primary motivation for families in establishing a Special Disability Trust.

In addition, the principal beneficiary's immediate family members can claim a 'gifting concession' on gifts to a Special Disability Trust of up to \$500,000. Further, if the primary beneficiary of the trust resides in a residential property owned by the trust as their primary residence, that residence is not included in the assessable assets of the trust and is not included in the principal beneficiary's assessable assets for the purposes of Social Security eligibility. There are also stamp duty concessions, and land tax and council rate exemptions available to beneficiaries of a Special Disability Trust that depend on jurisdictional law.

Roundtable participants noted that the potential benefits of a Special Disability Trust depend heavily on the individual financial situations of those involved. A Special Disability Trust is likely to be of most benefit where the beneficiary relies on the Disability Support Pension and the amount intended to be gifted to the trust exceeds the asset test limits.

Barriers to Special Disability Trusts

The roundtable and interviews found that families continue to face significant barriers to establishing a Special Disability Trust, consistent with the challenges

identified in previous governmental reviews and public submissions into the operations of Special Disability Trusts since 2006. These include:

- eligibility restrictions that deny access to Special Disability Trusts to those who might benefit from them
- financial disadvantage experienced by people with disability and families, and low financial literacy among people with disability and their families
- lack of information about Special Disability Trusts in the community, including within service organisations and among legal and financial professionals.

Restrictive spending rules, the complexity of the rules and legal arrangements, and significant legal fees and administrative costs were identified as further disincentives to establishing a Special Disability Trust.

The future of Special Disability Trusts

Information and awareness raising is needed around all future planning options for people with disability and families. Research participants argued that increasing knowledge about Special Disability trusts requires a targeted education and awareness campaign that considers who would most benefit from Special Disability Trusts and the different State/Territory legal and policy environments for Special Disability Trusts. Participants suggested that service providers, disability and carer advocacy organisations and community legal centres are a good place to start in disseminating information about Special Disability Trusts, as they often act as gateways and information referral sources.

Uptake of Special Disability Trusts is low and has not met original expectations. In some instances, the government has responded to the uptake barriers identified in successive government reports with legislative change by, for example, increasing the amount that the trust can expend on 'discretionary' items in favour of the beneficiary.

This research found that Special Disability Trusts remain a 'niche' instrument, focused on a particular demographic. This narrow focus, a product of legislative intent and traditional trust and fiduciary law, means that reform beyond a certain point may not be possible before the essential nature of the instrument is altered, rendering it something 'other' than a trust. Reform of some aspects may still be possible to make Special Disability Trusts more attractive and accessible to a larger population. This could include making eligibility rules less restrictive and raising the gifting concession for a donor/s. Further research to examine precisely where reform may be realistically directed and to provide clarity on areas of uncertainty concerning how a trust can and cannot be used, such as the possibility of pooling trust resources for the purchase of property, is needed. The housing aspirations of the families who participated in this research, and their expectations of the positive role that NDIS support would play in achieving in these housing aspirations, underscore the importance of this review and potential reform process.

1 Introduction

Special Disability Trusts are a legal and financial arrangement designed to help families provide for the current and future housing and support needs of a family member with disability. While they share many fundamental features with other kinds of trusts (such as laws governing the relationship between trustee and beneficiary), they offer unique characteristics designed to assist those who are eligible. They are a product of legislation, given legal effect by Part 3.18A of the *Social Security Act 1991* (Cth) (SSAct) introduced by the Commonwealth Government in 2006.

The report will examine:

- how Special Disability Trusts work
- how Special Disability Trusts are used
- the strengths and weaknesses of Special Disability Trusts, and
- how Special Disability Trusts may be improved in the future.

In particular, the report will explore the potential use of Special Disability Trusts as an instrument to assist some people with disability and their families to secure appropriate and suitable housing.

1.1 Policy context

Access to suitable and stable housing is critical to the wellbeing of people with disability. The National Disability Insurance Scheme (NDIS) presents significant opportunities for people with disability to move out of inappropriate accommodation through the provision of support to live independently. Living in a home that appropriately meets their needs and preferences has been shown to increase independence, improve physical and mental health, and improve social participation among people with disability – all key goals of the NDIS.¹

However, without an associative transformative growth in affordable housing options, very few people with disability will be able to enjoy suitable housing in the future despite the opportunities presented by the NDIS. Providing a sufficient supply of affordable, well-located and appropriately designed housing for people with disability will require a mix of private capital and public funding.² Maximising the

¹ Wiesel, I, Laragy, C, Gendera, S, Fisher, K. R, Jenkinson, S, Hill, T, Finch, K., Shaw, W & Bridge, C 2015, *Moving to my home: housing aspirations, transitions and outcomes of people with disability*, AHURI Final Report No.246. Melbourne: Australian Housing and Urban Research Institute, <<https://www.ahuri.edu.au/research/final-reports/246>>.

² The shortfall in affordable housing for NDIS participants alone (who represent only 10% of all people with disability in Australia) is estimated at 83,000-120,000 dwellings. Wiesel, I. and Habibis, D. (2015) NDIS, housing assistance and choice and control for people with disability, AHURI Final Report 258,

financial contributions from those families who can afford to assist a relative with disability could release publicly funded housing assistance to people with disability whose families cannot provide such support.

Special Disability Trusts are a potential mechanism through which families with private assets and funds may, with planning, make it possible for their family members with disability to reside in private housing; for example, by transferring residential premises to the trust for use by the beneficiary, or the trustee using trust money to purchase property for the beneficiary. Tax and social security concessions, which are established with the primary purpose of paying for the reasonable care, accommodation and other needs of the beneficiary during their lifetime, are available to both the contributor and the beneficiary of a Special Disability Trust.

The initial projection of 5,000 new Special Disability Trusts being established in the first four years of the scheme represented a potential transfer of up to \$2.5 billion from families towards housing for people with disability.³ However, the uptake of Special Disability Trusts to date has been much lower, with only 1,781 such Trusts with total assets of approximately \$150 million established.⁴ Indeed, eligibility for Special Disability Trusts has been found to be highly restrictive, and the processes of establishing and maintaining a Special Disability Trust can be highly complex. This raises substantial questions about how effective the current legislative and policy environment is for promoting uptake of Special Disability Trusts as a way for people with disability and their families to effectively provide for the future.

There have been a number of calls for reform and adjustment of Special Disability Trusts to maximise their uptake and benefits. For example, the Senate Standing Committee found that the eligibility requirements for Special Disability Trusts are overly restrictive, the upper limit on holding assets in trust with tax concessions is too low, and the rate of tax applied to trust earnings is too high.⁵ The first parts of this report examine the perspectives of families of people with disability and other stakeholders on these issues, including the benefits they have experienced or anticipate experiencing from establishing a Special Disability Trust and the problems they have encountered. The final parts of this report examine opportunities for

Australian Housing and Urban Research Institute, Melbourne, <<https://www.ahuri.edu.au/research/final-reports/258>>.

³ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p 4
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

⁴ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p xii
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

⁵ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p xii
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

legislative review and reform of the Special Disability Trust mechanisms, and opportunities to expand the information and resources available to people with disability and their families to assist them in negotiating Special Disability Trust processes.

1.2 Aims and methods

This research project aimed to:

- identify the barriers that families face in establishing and maintaining Special Disability Trusts
- identify what factors enable families to establish and maintain a Special Disability Trust
- recommend legislative and policy changes that will reduce complexity and promote uptake of Special Disability Trusts for those who would benefit from one
- identify strategies to increase awareness of Special Disability Trusts and assist people with disability and family members to negotiate the legal requirements of establishing them.

The findings presented in this report are based on three key research activities:

1. A review of the legal issues and contexts of Special Disability Trusts

The researchers conducted a desktop review of the current legislative and policy framework for Special Disability Trusts and the other comparable mechanisms available. This included identification of eligibility requirements for donors and beneficiaries, the parameters and restrictions on spending of trust funds, pension and stamp duty concession rules, and any key changes and reforms in the legislation. Key findings of the legislation and policy review are analysed in the body of this report with the other project findings, and the review in its entirety is also included in Appendix A.

2. A roundtable discussion with stakeholders in Special Disability Trusts

The research team identified key stakeholders with expertise in Special Disability Trusts who were invited to participate in a facilitated roundtable discussion. The roundtable discussion took place on Tuesday, 20 February 2018, and was video linked between two locations in Melbourne and Sydney. It involved 14 participants, including lawyers and financial planners with experience in Special Disability Trusts, a representative from a Disabled People Organisation (DPO), a representative from a carers organisation, a family representative, and university researchers. Other key stakeholders from a housing association, a law firm, and a carers organisation, who were unable to attend the roundtable, were consulted by the project team after the roundtable.

The purpose of the roundtable was to present an overview of the findings from the preliminary legislative review to participants for discussion and feedback, and to seek their perspectives on the following discussion questions:

- What are the benefits of Special Disability Trusts, and who benefits (or could benefit) from establishing one?
- To what extent are Special Disability Trusts a mechanism for assisting families to transfer assets that may assist people with disability to acquire their own home?
- What are the challenges of establishing a Special Disability Trust for people with disability and families?
- What legislative and policy changes would reduce the challenges of establishing a Special Disability Trust?
- What information and resources could help people with disability and their families to navigate the processes of establishing a Special Disability Trust?

3. Qualitative interviews with families who have personal interest in or experience with Special Disability Trusts

In-depth, qualitative interviews were conducted with a small number of families (4) who have personal interest or experience in establishing a Special Disability Trust or who have personally investigated the processes involved in setting up a Special Disability Trust and decided not to proceed.

Over the course of this project, the research team were contacted by many individuals and families who were interested in Special Disability Trusts and wanted to find out more about how to establish one, indicating that there is considerable interest in (and a considerable information gap about) Special Disability Trusts amongst Australians with disability and their families. Due to the low uptake of Special Disability Trusts across Australia, families who had actually established a Special Disability Trust were difficult to recruit for this research project. Interviews were conducted with participants in the following circumstances:

- parents who were interested in making provisions for a Special Disability Trust in their will to secure accommodation for an adult child with disability
- a family who had successfully established a Special Disability Trust that contains a property and funds to support a family member with disability
- a family that had considered establishing a Special Disability Trust to purchase a property for a family member with disability but opted to establish a family trust instead
- a family that applied for a Special Disability Trust to purchase property for a family member with disability but was rejected.

The interviews aimed to identify the challenges, barriers, and facilitators these families experienced, as well as their perceptions of the opportunities, limitations and outcomes of Special Disability Trusts for securing appropriate housing for their

family members with disability. Interviews were semi-structured and interview questions were adapted in response to the personal situations and circumstances of individual interview participants.

1.3 Report structure

This report begins with an overview of the Special Disability Trust legal mechanism and the purpose and parameters of Special Disability Trusts as delineated in law. This section is based primarily on the legislative and policy desktop review.

The second section of the report describes the current use of Special Disability Trusts amongst people with disability and their families in Australia. It examines the benefits of establishing a Special Disability Trust, the barriers families experience when negotiating Special Disability Trust processes, and alternative mechanisms available to them for financial planning. This section is based on the legislative review, the perspectives of stakeholders who participated in the roundtable discussion, and the interviews with families with personal experience of Special Disability Trusts.

The final section of the report examines potential future directions of the Special Disability Trust mechanism. This section is also based on the legislative review, stakeholder perspectives, and interviews with families. It explores the information pathways available to people with disability and their families and the need for more resources and support for future planning and targeted or specialised financial planning. It also explores the shortcomings of Special Disability Trusts and options for future reform and improvement. It concludes with a brief discussion of the importance of Special Disability Trust reform and attention to housing security and availability for people with disability in the context of the NDIS.

2 About Special Disability Trusts

A trust is a legal relationship between a beneficiary and a trustee who is obligated to safeguard and hold property and/or funds for the benefit of the beneficiary. There are many kinds of trusts that exist for different purposes (i.e. business trusts, family trusts, charitable trusts and super funds) but in all cases, the trustee is responsible for managing the trust on behalf of the beneficiary, including managing the trust's tax affairs, investments and income and reporting arrangements.

Special Disability Trusts were introduced by the Commonwealth Government in 2006 via amended legislation inserting a new Part 3.18A to the *Social Security Act 1991* (Cth) (SSAct).⁶ The Explanatory Memorandum that accompanied this amendment stated that the purpose of introducing Special Disability Trusts was to assist families to make private financial provision for the future care and accommodation needs of their children and “certain close relatives” with disability. The outcome of this measure was anticipated to be “provid[ing] certainty for families who are concerned that their disabled family member may not have the financial support to take care of their accommodation or care needs when the family is no longer able to care for them”.⁷

Social security rules and definitions of ‘income’ meant that traditional trusts were often seen to be unattractive or unsuitable for families with children who had severe disabilities, as the trust assets would impact on the person with disability's entitlements to social security payments.⁸ Special Disability Trusts offer taxation and income identification benefits for both the donor and beneficiary that are not available under traditional fixed or discretionary trusts. These include exemptions from gifting rules which may impact on the donor's eligibility to receive a social security payment and means test concessions in the case of a beneficiary seeking or receiving a social security payment such as the Disability Support Pension. These tax and social security concessions are intended to support and encourage families to make future arrangements for their family member with a disability, and also to prevent the beneficiary from being disadvantaged in terms of their access to social security benefits because of access to assets that would assist them with long-term financial security.

Special Disability Trusts are quite narrow in scope. There is an emphasis on restricting their use to a specific population group governed and defined by strict parameters in the legislative scheme. This narrow focus is aimed at ensuring the

⁶ *Families, Community Services and Indigenous Affairs and Other Legislation (2006 Budget and Other Measures) Act 2006* <<https://www.legislation.gov.au/Details/C2006B00075>>. Note that a Special Disability Trust can also be established via similar rules under the *Veterans Entitlement Act 1986* (Cth).

⁷ Explanatory Memorandum, Schedule 7

<<https://www.legislation.gov.au/Details/C2006B00075/Explanatory%20Memorandum/Text>>.

⁸ Carney, T & Keyzer, P 2007, ‘Private Trusts and Succession Planning for the Severely Disabled or Cognitively Impaired in Australia’, *Bond Law Review*, vol. 19, no. 2, pp. 1–18.

mechanism is not misused by those who may not meet the high threshold for participation, and that those who are eligible have an enhanced degree of protection against abuse by a trustee. This section of the report will describe the eligibility requirements, purpose and structure of the Special Disability Trust mechanism, and its rules and restrictions.

2.1 Eligibility requirements

Social Security Act 1991 (Cth), s 1209M(1), states that a Special Disability Trust must have no more than one beneficiary (known as the principal beneficiary). There are strict eligibility requirements for potential beneficiaries of Special Disability Trusts, designed to direct the concessions to those with severe disability and high-level care needs:

SOCIAL SECURITY ACT 1991 - SECT 1209M Beneficiary requirements

Impairment or disability conditions

(2) If the principal beneficiary has reached 16 years of age:

(a) the beneficiary must:

- (i) have an impairment that would qualify the person for disability support pension; or
- (ii) be receiving invalidity service pension under Part III of the *Veterans' Entitlements Act*; or
- (iii) be receiving income support supplement under the *Veterans' Entitlements Act* on the grounds of permanent incapacity; and

(b) the beneficiary must:

- (i) have a disability that would, if the person had a sole carer, qualify the carer for carer payment or carer allowance; or
- (ii) be living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories, nominated by the Secretary under subsection (3); and

(c) the beneficiary must have a disability as a result of which either:

- (i) he or she is not working, and has no likelihood of working, for more than 7 hours a week for a wage that is at or above the relevant minimum wage; or
- (ii) he or she is working for wages set in accordance with the program administered by the Commonwealth known as the supported wage system.

If the beneficiary or their primary family carer is not already receiving disability or care related Centrelink payments (and maybe even if they do), it is likely that medical evidence will be required to prove the beneficiary meets these eligibility

requirements. A beneficiary may only work up to seven hours a week at or above the minimum relevant wage in open employment and still qualify for a Special Disability Trust. People with disability working in supported employment situations in which they earn less than minimum wage may work more than 7 hours per week and still be eligible for a Special Disability Trust.

2.2 Purpose

A Special Disability Trust must be established for the primary purpose of meeting the future care and accommodation needs of a family member who has a severe disability or medical condition. Originally a Special Disability Trust had to be established *solely* for the purpose of providing for the current and future care and accommodation needs of the beneficiary. This strictness was relaxed slightly by 2011 amendments to the *Social Security Act 1991* (Cth), which removed the sole purpose criteria and broadened it to being a *primary* purpose of the trust.⁹ Thus, *Social Security Act 1991* (Cth) s 1209N(1) states:

Subject to this section, 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.

The Trust can also have limited other purposes that are ancillary to the primary purpose and necessary or desirable to facilitate the achievement of that primary purpose.¹⁰ Generally, trust assets can be used this way for the following items:

- accommodation for the beneficiary
- care costs arising from the beneficiary's disability
- medical expenses (including health insurance)
- maintenance expenses on the trust assets (for example, reasonable house maintenance costs).

The 2011 amendments now also allow the trust to undertake a level of discretionary spending for 'other purposes' that are 'primarily for the benefit of the principal beneficiary'.¹¹ The amount that can be spent on purposes other than the primary purpose (or facilitating the primary purpose) is limited and a Social Security *determination* (guidelines) may be made determining the amount by the Secretary.¹²

⁹ *Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendments (Budget and Other Measures) Act 2011* (Cth) < <https://www.legislation.gov.au/Details/C2011A00034>>.

¹⁰ SSAct s 1209N(2)(a). The Secretary can make guidelines via legislative instrument as to what are and are not reasonable care and accommodation needs and what are and what are not trusts' purposes other than the primary purpose: SSAct s 1209N(4).

¹¹ SSAct s 1209N(2)(b).

¹² See SSAct s 1209N(3)(b); and s 1209RA (3). SSAct s 1209RA(1) and (2) is invoked where a determination under s 1209RA(3) has been made.

In the case of discretionary spending, there *has* been a determination made.¹³ Originally introduced in 2011 as \$10,000, this is the amount that may be spent each year as a 'discretionary' element. It is indexed each year to the Consumer Price Index (CPI). The current maximum amount that can be applied by a Special Disability Trust for the primary benefit of the beneficiary, other than the primary purpose, is \$11,750 for the 2017-2018 financial year.¹⁴

Examples of items that may come under 'discretionary' spending for the benefit of the beneficiary (but not related to the primary purpose of reasonable care needs) include:¹⁵

- food, toiletries and household items for the beneficiary
- vehicle maintenance, registration and insurance, and vehicle-related expenses (other than those related to the principal beneficiary's disability)
- recreation and leisure activities
- computer and other communication devices (except those related to the principal beneficiary's disability)
- therapy that is not required for, or because of, the principal beneficiary's disability or that is not approved in writing by a medical practitioner
- improvements to the principal beneficiary's place of residence not arising from his or her disability
- building and content insurance, capital improvements, utilities charges and household cleaning services in connection with the principal beneficiary's place of residence
- clothing and footwear
- life skills and social inclusion workshops.

Significant restrictions to the general purpose of a Special Disability Trust remain in place. A Special Disability Trust cannot be used to provide general income for a beneficiary (unlike a traditional family type discretionary trust or fixed trust). Further restrictions to the spending of trust assets also apply and are discussed further in the following sections.

The beneficiary of a Special Disability Trust cannot create the trust themselves. The Trust cannot be used to hold the personal savings of the beneficiary, nor can they gift their own assets into it. It can only be used to transfer assets from donors. Only in narrow circumstances (such as a bequest or a superannuation death benefit) can the assets of the trust include any assets transferred to the trust by the beneficiary

¹³ *Social Security (Special Disability Trust – Discretionary Spending) Determination 2017* <<https://www.legislation.gov.au/Details/F2017L00531>>.

¹⁴ *Social Security (Special Disability Trust – Discretionary Spending) Determination 2017*, r 5. <<https://www.legislation.gov.au/Details/F2017L00531>>.

¹⁵ See Australian Government, *Guide to Social Security Law*, [4.14.3.35] Special Disability Trusts – Discretionary Spending (Version 1.244, 7 May 2018) <<http://guides.dss.gov.au/guide-social-security-law/4/14/3/35>>.

or their partner (including any compensation).¹⁶ A rationale for this is to prevent the trusts from being used purely to lessen the impacts of social security assets testing. In the matter of *CGJ* [2012] QCAT 603, Senior Member Endicott in the Queensland Civil and Administrative Tribunal stated this rationale thus:

The purposes and effect of a special disability trust is to permit family members to contribute their money for the support of a person with a disability and in doing so to quarantine that money from the impact of the assets test of Centrelink. It is not the purpose of a special disability trust to enable an adult with a disability to quarantine the assets of that person from the assets test of Centrelink.¹⁷

2.3 Defining housing and care needs

What constitutes reasonable care and accommodation needs for the purposes of a Special Disability Trust is outlined under *The Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011*.¹⁸

Guideline 2.4 (1) and (2) outline what constitutes reasonable accommodation needs:

- (1) An accommodation need is a reasonable accommodation need 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 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.

¹⁶ SSAct s 1209R(1).

¹⁷ *CGJ* [2012] QCAT 603 per Endicott SM at [10]. Emphasis in original.

¹⁸ *Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011* <<https://www.dss.gov.au/about-the-department/policies-legislation/legislation/social-security-special-disability-trust-fahcsia-guidelines-2011>>.

Thus, (assuming the property was not purchased or rented from a family member¹⁹) it does appear that trust assets *can* be used to purchase property (or importantly, also an interest in property) for the principal beneficiary – i.e. independent housing and living. The reference to ‘interest in property’ in 2.4(2) is interesting in that it potentially suggests that a Special Disability Trust *may* be able to purchase housing in cooperation with another Special Disability Trust. However, the question of whether a Special Disability Trust can be used to participate in ‘cooperative’ or ‘group housing’ under the legislation is *not* clear, though it does not appear to be prohibited.

Trust assets can also be used to rent housing for the beneficiary, to pay for housing maintenance costs, and to meet the costs of other housing related expenses such as council rates and taxes. Special Disability Trusts can facilitate either a property transfer (i.e. housing transferred to the person with disability for accommodation purposes or the transfer of a property to the trust to enable a donor to retain Centrelink eligibility) or the transfer of money to acquire accommodation. Importantly, there are stamp duty and land tax concessions if a property is purchased by a Special Disability Trust although these rules vary from state to state (see Section 3.6).

One issue that has caused confusion is a belief that housing options that can be accessed by a beneficiary of a Special Disability Trust are limited to those where the person with disability will be ‘living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories...’.²⁰

This view stems from one of the beneficiary eligibility requirements under the *SSAct* described earlier:

(2) (b) the beneficiary must:

- (i) have a disability that would, if the person had a sole carer, qualify the carer for carer payment or carer allowance; or
- (ii) be living in an institution, hostel or group home in which care is provided for people with disabilities, and for which funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories, nominated by the Secretary under subsection (3);*²¹

Note, however, that in regards to eligibility, the requirement in (i) and (ii) above is an ‘either/or’ requirement rather than a ‘mandatory’ requirement. You can be eligible

¹⁹ *SSAct* s 1209R(4).

²⁰ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) pp 8, 26 – 27.
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

²¹ *SSAct* s 1209M(2)(b)(ii). Emphasis added.

under either limb of s 1209M(2)(b) - (i) or (ii) as the alternative for eligibility under s 1209M(2)(b)(ii) is that the beneficiary has a sole carer who would qualify for carer payment or carer allowance – s 1209M(2)(b)(i). This means a beneficiary under a Special Disability Trust is not automatically limited to housing choices that are wholly or partly funded by government.

If the beneficiary is living in an institutional, hostel, or group home setting, and this living situation is used to meet eligibility requirements for a Special Disability Trust, then this must be one in which 'funding is provided (wholly or partly) under an agreement, between the Commonwealth, the States and the Territories'. It is unclear how this may impact (though potentially negatively) on beneficiaries who live in otherwise accredited supported Residential Support Services which do not fall under such funding arrangements. A further important consideration of relevance to this report is that it is also unclear whether this section relates solely to the time of determination of eligibility (i.e. at the time the trust was constituted) or whether it is an ongoing requirement to maintain eligibility. In other words, if you were eligible for a Special Disability Trust because of s 1209M (2)(ii), does this mean you must continue to stay in such a housing arrangement?

According to s 2.2 of the Guidelines, a care need is deemed to be a reasonable care need if: ²²

- (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.

There is some overlap between reasonable care needs and a beneficiary's housing situation in the case of providers of bundled care and accommodation services such as institutions and group homes. 'Approved fees' are defined in s 1.4 of the Guidelines as fees that:

- (a) are:
 - (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

²² *Social Security (Special Disability Trust) (FaHCSIA) Guidelines 2011* <<https://www.dss.gov.au/about-the-department/policies-legislation/legislation/social-security-special-disability-trust-fahcsia-guidelines-2011>>.

(b) are charged by:

- (i) an approved provider who is providing a service to the principal beneficiary in a residential care service; 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.

There are thus a number of provisions within the guidelines indicating how trust assets may be spent on residential care services of some description. However, in the context of the NDIS, many people with disability and their families aspire to independent living situations where housing is uncoupled from support services. Later sections of this report will describe how the motivation of many families in establishing a Special Disability Trust is to enable the purchase of independent housing for their family member with disability, with support services provided through the NDIS.

2.4 Gifting rules and social security benefits

Generally, the transfer of assets, even between family members, can have significant implications for a person's social security entitlements, such as for a Disability Support Pension. Special Disability Trusts provide a number of exceptions to these usual arrangements.

The principal beneficiary's immediate family members can claim a 'gifting concession' on gifts to a Special Disability Trust of up to \$500,000 (instead of the usual \$10,000), which means that the gift is disregarded for the purposes of the contributor's social security means testing.²³ While a Special Disability Trust can have more than \$500,000 in assets, the tax/gifting concessions that a donor receives only apply to the first \$500,000. Apart from the beneficiary, anyone can gift assets to a Special Disability Trust, but only immediate family members will be eligible for these social security means test and gifting rule exemptions.

In addition, a Special Disability Trust can have assets worth up to \$657,250 (as at 1 July 2017, indexed annually) without these funds impacting on the beneficiary's social security entitlements, such as the Disability Support Pension.

If the primary beneficiary of the trust resides in a residential property owned by the trust as their primary residence, that primary residence, despite the trust having the legal title, is not included in the assessable assets of the trust and is not included in the principal beneficiary's assessable assets for the purposes of Social Security eligibility.²⁴ This means that the beneficiary may have assets worth up to \$657,250

²³ SSAct s 1209Y(3).

²⁴ SSAct s 1209Y(4); See e.g. <<http://guides.dss.gov.au/guide-social-security-law/4/14/3/40>>.

as well as being able to reside in a primary residence owned by the trust before there are any implications on their beneficiary's Disability Support Pension or other social security payments.

It is a little unclear then whether the concessions for a donor would apply to the first \$500,000 they provide *plus* additional property marked as the principal residence of the beneficiary (regardless of value), or just the first \$500,000, though it appears to be the latter (and this is a criticism of Special Disability Trusts). In the case of a beneficiary though, it is reasonably clear that if they reside in a property owned by the trust as their principal residence (assume value of \$800,000) and the trust has an additional \$657,250 of capital (as at 1 July 2017), the concessional asset value limit *would* apply to the beneficiary, for the purposes of social security assets means tests, to the capital and the property value.

An issue to consider is what happens if the assets of the trust exceed the asset value limit. For example, a settlor puts in \$500,000 and then 12 months later adds another \$500,000. Disregarding whether the settlor is receiving a pension to qualify for the gifting concession, because the Trust assets are over \$657,000, the additional \$343,000 *will* likely be considered as part of the beneficiary's assets for the purpose of Social Security means testing. One way around this may be to use those funds to purchase housing in which the beneficiary would reside as their principal residence, which may have the effect of bringing the fund in line with the social security concessions.

2.5 Income tax rules

Establishing and maintaining a Special Disability Trust must be considered in light of its relationship with Australia's Taxation scheme contained in the *Income Tax Assessment Act 1997* (Cth), particularly in relation to Division 6 matters of that Act which examine assessable income and exempt income.²⁵

An in-depth examination of Australian taxation law and trusts is outside the scope of this project. Australian taxation law is complex and accredited, independent, specialist advice should always be sought on any taxation related matter. A number of relevant benefits that may accrue to a donor or a beneficiary, specifically in regards to income and means test assessment for Social Security, have been noted in this report so far.

Special Disability Trusts are not subject to the higher income tax rate which normally applies to trusts. Instead, the unexpended income of a Special Disability Trust is

²⁵ See e.g. <<https://www.ato.gov.au/General/Trusts/Specific-rules-for-some-trusts/Reporting-the-income-of-a-special-disability-trust/>>.

taxed at the beneficiary's personal marginal income tax rate rather than at the highest marginal tax rate.

The income test for Special Disability Trusts is unique. Money used for the primary purposes of the trust discussed earlier (for care, accommodation, maintaining the trust assets and limited discretionary spending) is not considered income for social security means test purposes. Though to reiterate, a Special Disability Trust cannot be used to provide an 'income stream' in the traditional sense.

2.6 Stamp duty exemptions

All States and Territories in Australia have introduced exemption rules regarding Stamp Duty tax on transfers of property to Special Disability Trusts. Stamp duty is a State and Territory matter, so there are some differences between jurisdictions which are outlined in the table below.

Table 1: Stamp duty concessions by State/Territory

NSW	<i>Duties Act 1997 (NSW)</i> s 65 (22)	(22) Special disability trusts No duty is chargeable under this Chapter on: (a) a declaration of trust over dutiable property that is to be held by the trustee in the trustee's capacity as trustee for a special disability trust, or (b) a declaration of trust over property or an instrument that declares property, when vested in the person executing the instrument, is to be held in trust for a person or persons, if the instrument is executed for the purpose of establishing a special disability trust, or (c) a transfer of, or an agreement to transfer, dutiable property to the trustee of a special disability trust for the purpose of the trust, if there is no consideration for the transfer.
QLD	<i>Duties Act 2001 (Qld)</i> S 126A	(1) Transfer duty is not imposed on a dutiable transaction that is— (a) the transfer, or agreement for the transfer, of an eligible home to the trustee of a special disability trust; or (b) the creation of a special disability trust holding dutiable property, to the extent the dutiable property is an eligible home; or (c) a trust acquisition in a special disability trust, to the extent the trust interest acquired relates to an eligible home.
WA	<i>Duties Act 2008 (WA)</i> s 111	Duty is not chargeable on a transfer of, or an agreement for the transfer of, dutiable property — (a) to a special disability trust, within the meaning given in the Social Security Act 1991 (Commonwealth) section 1209L; and (b) if there is no consideration for the transfer.
TAS	<i>Duties Act 2001 (Tas)</i> s 54	Duty is not chargeable under this Chapter on – (a) a declaration of trust over property that is to be held by the trustee in the trustee's capacity as trustee for a special disability trust; or (b) a transfer of dutiable property to the trustee of a special disability trust for the purpose of the trust –

		<p>if the Commissioner is satisfied that –</p> <p>(c) the property is land on which is situated a dwelling that is to be used by the beneficiary of the trust as his or her main place of residence; or</p> <p>(d) the property is goods that are situated on land referred to in paragraph (c) or that are to be used on such land by the beneficiary of the trust.</p>
VIC	<i>Duties Act 2000</i> (Vic) s 38A	<p>(1) No duty is chargeable under this Chapter in respect of—</p> <p>(a) a declaration of trust that establishes a special disability trust; or</p> <p>(b) a transfer of dutiable property to the trustee of a special disability trust—</p> <p>in the circumstances set out in subsections (2), (3) and (4).</p> <p>(2) The person declaring the trust, or the transferor of the dutiable property (as the case requires) must be an immediate family member of the principal beneficiary of the special disability trust.</p> <p>(3) There must be no consideration provided for the declaration or transfer.</p> <p>(4) The dutiable value of the property that is the subject of the declaration or transfer must not exceed \$500 000.</p> <p>(5) If, but for subsection (4), duty would not be chargeable in respect of a declaration of trust or transfer of dutiable property because of this section, duty is chargeable on the declaration or transfer only in respect of the dutiable value of the property that exceeds \$500 000.</p>
ACT	<i>Duties Act 1999</i> (ACT) s 73B	<p>(1) Duty under this chapter is not payable in relation to a dutiable transaction that is a transfer or grant of a residential lease if—</p> <p>(a) the transfer or grant is to a special disability trust; and</p> <p>(b) the commissioner is satisfied that the property the subject of the transfer or grant is to be used as the principal place of residence of the beneficiary of the trust.</p>
NT	<i>Stamp Duty Act</i> (NT) Schedule 2, 6(e)	<p>Exemption from duty –</p> <p>(e) in relation to which the Commissioner is satisfied of both of the following:</p> <p>(i) no valuable consideration is given for the conveyance;</p> <p>(ii) the conveyance is made to a Special Disability Trust as defined in the Social Security Act 1991 (Cth) or Veterans Entitlement Act 1986 (Cth).</p>
SA	<i>Stamp Duties Act 1923</i> (SA) S 71CAA	<p>(2) The following instruments are exempt from stamp duty in the circumstances set out in subsections (3) to (6) (inclusive):</p> <p>(a) a declaration of trust that establishes a special disability trust;</p> <p>(b) a transfer of an interest in land to the trustee of a special disability trust.</p> <p>(3) The person declaring the trust, or the transferor of the interest in the land (as the case may be), must be an immediate family member of the principal beneficiary of the special disability trust.</p> <p>(4) In the case of a declaration of trust under subsection (2)(a), the trust must hold land that constitutes the principal place of residence of the principal beneficiary of the special disability trust, or must hold land that will so constitute the principal place of</p>

		<p>residence of the principal beneficiary of the special disability trust within 12 months of the declaration of trust.</p> <p>(5) In the case of a transfer of an interest in land under subsection (2)(b), land in respect of which an interest is being transferred to the trustee of the special disability trust must constitute the principal place of residence of the principal beneficiary of the special disability trust, or the relevant land must so constitute the principal place of residence of the principal beneficiary of the special disability trust within 12 months of the transfer.</p> <p>(6) There must be no consideration provided for the declaration or transfer.</p>
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2.7 Administration

A Special Disability Trust is created using a Model Special Disability Trust Deed.²⁶ A Trust Deed identifies who the relevant parties are (beneficiary, trustee, settlor and appointor), any important factors the trustee must consider as well as the specific powers and duties of the trustee.

A trustee can be an individual or a corporation. An individual, or a director of a trustee corporation, must:

- be a resident of Australia
- not have been disqualified at any time from managing corporations under the Corporations Act 2001 (Cth)
- not have been convicted of an offence of dishonest conduct under Commonwealth, State, Territory or foreign country law
- not have been convicted of an offence under the *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth) or the *Veterans' Entitlements Act 1986* (Cth).

If appointed solely, the trustee must be a prescribed person such as a solicitor, an accountant or the Public Trustee. Alternatively, a panel of two trustees who each do not qualify as a prescribed person may be appointed.

There are a number of ongoing reporting obligations for Special Disability Trusts:

- The trustee is required to lodge a tax return for the Special Disability Trust each financial year, unless the assessable income of the trust is below the tax-free threshold.
- The trustee is required to provide annual financial statements to Centrelink.

²⁶ The Model Trust Deed is available on the Department of Social Services website at <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/model-trust-deed-for-special-disability-trusts>>.

- The trustee is required to sign a statutory declaration document confirming that expenditure for the year was for care and accommodation costs related to the principal beneficiary.

In addition, a Special Disability Trust may be audited during any financial year to ensure that trust funds are used primarily for the beneficiary's care and accommodation needs. Under law, the following persons may request an audit at any time:

- the principal beneficiary
- the beneficiary's immediate family members
- the beneficiary's legal guardian or financial administrator
- a person acting as the beneficiary's guardian on a long-term basis
- the Secretary of the Department of Social Services.

Table 2: Overview of Special Disability Trust structure

The characteristics of special disability trusts (see e.g. SSAct s 1209L)		<i>Social Security Act 1991 (Cth)</i>
1	The principal beneficiary must have a severe disability Note SSAct s 197 and especially s 23(4B) for definition of 'severely disabled'.	s 1209M
2	There can be only one principal beneficiary (i.e. the person for whom the trust is established).	s 1209M
3	The primary purpose of the Special Disability Trust must be to provide for the care and accommodation needs of the principal beneficiary.	s 1209N
4	There must be a trust deed, or the Special Disability Trust must be established via a will, so that there is a document which contains all of the compulsory clauses set out in the model trust deed (for trusts established before 20 September 2006, the trustee can be issued with a waiver notice for certain requirements).	s 1209P
5	A Special Disability Trust can have more than one trustee OR a professional trustee.	s 1209Q
6	A Special Disability Trust must comply with the legislative requirements regarding property (and any other legislative requirements).	s 1209R
7	A Special Disability Trust must provide annual financial statements and a statutory declaration to Centrelink or the Department of Veteran's Affairs (DVA).	s 1209S
8	A Special Disability Trust must conduct independent audits when required.	s 1209T

3 Special Disability Trust use

When Special Disability Trusts were initially introduced, it was estimated that around 5,000 people with disability would benefit from the mechanism in the first four years.²⁷ There have, however, been significantly fewer Special Disability Trusts established, leading to numerous concerns as to whether the current scheme is effective.²⁸

It is difficult to determine quantitative details about current use of Special Disability Trusts in Australia. While Special Disability Trusts are subject to extensive reporting requirements about their use of funds, these reports are internal to Centrelink and the Department of Social Services and are not publicly available. It is therefore difficult to know exactly what trust assets are used for. However, some minimal but recent data is available about the uptake and value of Special Disability Trusts. On 9 May 2017, Federal Senator the Hon Jenny Macklin MP, via a question in writing to the then Minister for Social Services, the Hon Christian Porter MP, asked:²⁹

- 1) How many Special Disability Trusts (a) have been entered or are currently in force under Part 3.1 8A of the *Social Security Act 1991*, and (b) are currently being actively applied to social security beneficiaries? and
- 2) What is the (a) total sum of all assets held in such trusts, and (b) average value of the assets held?

The answer provided in Parliament on 8 October 2017 by the Minister, based on data supplied by the Department of Human Services, is outlined in the table below.

²⁷ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p. 4.
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>; and see e.g.
<<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2010-11-25%2F0042%22>>.

²⁸ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p. xii.
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

²⁹ See
<https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/3bdeb044-fdb2-40bf-9c1c-e64c62b81694/&sid=0273>.

Table 3: Uptake of Special Disability Trusts

Special Disability Trusts, as at 30 June 2016	
Number of Special Disability Trusts	1,781
Number of Special Disability Trusts where beneficiary qualifies for a social security payment	548
Total value of Special Disability Trusts	\$149.9 million
Average value of Special Disability Trusts	\$84,174.61

The qualitative findings from this project indicate that these figures do not tell the whole story when it comes to the use of Special Disability Trusts in Australia. Lawyers who participated in the stakeholder roundtable discussion conducted as part of this project stated that the majority of Special Disability Trusts that they had made provisions for have been part of wills, and most of those are yet to come into effect as the will maker is still living (a 'testamentary trust'). If this finding is indicative of broader trends, it means that most Special Disability Trusts are established during estate settlement processes, after directions have been made in parents' wills, and that current numbers of active Special Disability Trusts are not representative of future numbers.

Stakeholders commented that one reason Special Disability Trusts are directed in wills rather than established while parents are alive is the need for flexibility in response to their own financial situation and needs. Unlike other trusts, funds transferred to a Special Disability Trust cannot be taken out again, which risks disadvantaging parents who may need those funds in the future to, for example, fund their retirement and future aged care services.

The lawyers who participated in the roundtable discussion had also established several operative Special Disability Trusts, funded by living parents, with the key asset being the home in which the principal beneficiary now resides. Roundtable participants reported that other families have set up Special Disability Trusts with minimal funds for the time being, so that the structure is in place and funds can be transferred more easily upon their death. This means that the current estimates of funds contained in Special Disability Trusts may not reflect the amounts they will hold in the future.

This section of the report will focus on the personal and professional experiences of participants in this project with Special Disability Trusts. It explores use of Special Disability Trusts for housing and accommodation purposes, the benefits and barriers associated with Special Disability Trust use, and other options for addressing the

housing needs of people with disability or issues to consider that were raised by participants.

3.1 Housing and Special Disability Trusts

Stakeholders who participated in the roundtable discussion reported that in their professional experience, securing housing for their family member with disability is often a key priority for families who are considering establishing a Special Disability Trust. This finding was reflected in the family interviews conducted as part of this project. The current and past housing situation and future housing aspirations of the families who participated in an interview are outlined in the table below.

Table 4: Current housing situation and housing aspirations of interviewees

<p>Family 1: Interested in establishing a Special Disability Trust, but required further information and support to do so</p> <p>Both interviewees are parents in their early 60s. They have a son with autism who is in his late 20s and currently lives with them in the family home. The family receives Centrelink payments and the adult son receives an NDIS package of supports.</p> <p>The interviewees' son had previously tried supported accommodation but moved back in with them because he did not like it. They think living independently with supports would be the best situation for him and want to set up a Special Disability Trust to provide the funds for him to purchase a home, because they "don't want to lay this responsibility on their other children".</p> <p>They said: "one of the worst fears for a parent is what will happen to their disabled child when they are gone".</p>
<p>Family 2: Successfully established a Special Disability Trust that contains a property and funds to support a family member with disability</p> <p>The interviewee's daughter currently lives in a home purchased as part of a Special Disability Trust and is located within walking distance from the family home. She had lived with the interviewee until they purchased this property. The interviewee's daughter is in a long-term relationship, plans to get engaged soon, and her partner intends to move in with her. A housemate currently lives in the home at a reduced rent rate in exchange for being around and helping with, for example, cooking, cleaning and shopping.</p> <p>For the interviewee, the key benefit of the Special Disability Trust is that the house is in her daughter's name. She received stamp duty relief and pays lower council rates and land tax on the property as a result of it being held in the trust, but these needed to be applied for separately. Prior to establishing the Special Disability Trust, the interviewee had established another small trust for her daughter. This additional small trust has offered flexibility as an alternative source of funds for expenses that cannot be funded through the Special Disability Trust due to spending rules.</p> <p>The interviewee and the beneficiary's two siblings are the trustees for the Special Disability Trust. The interviewee did not personally find it difficult to establish the Special Disability Trust or administrate it, but noted it could be difficult for others: "if you weren't very financially literate and you came to this in your late 70s, you would find it a very complex issue".</p> <p>The interviewee raised an important design flaw in the Special Disability Trust mechanism, in that funds from one trust cannot be combined with those of another to enable a married couple to purchase a house together, or, as in the case of her daughter, be used to 'buy into' the property of an existing trust. She said: "one of the ongoing issues is – should</p>

something happen to my daughter – what happens to her then husband? Because under the terms of the trust, the funds on the house would need to be dispersed back to the donors. A husband or wife could end up theoretically on the street a couple of months after the death of their spouse”.

Family 3: Considered establishing a Special Disability Trust to purchase a property for a family member with disability but opted to establish a family trust instead

The interviewee investigated Special Disability Trusts when considering the best options for facilitating the purchase of an apartment for his brother, a man in his mid-30s with intellectual disability and who receives mental health services. The interviewee’s brother has a history of negative experiences living in congregate supported accommodation and is currently living at home with his mother, receives a Centrelink pension and an NDIS package of supports.

The other two options the interviewee considered were to either purchase an apartment in his own name and rent it to his brother or to purchase an apartment through a family trust. If the interviewee were to purchase the apartment in his own name, he would be able to get a loan, something that is not available through the family trust or Special Disability Trust, neither of which can borrow funds. However, this loan might compromise his own capacity to get a loan for purchasing property of his own in the future, and he “really didn’t like the dynamic of being [his] brother’s landlord”.

The key benefit of a Special Disability Trust is that his brother would be able to purchase the apartment in his own name. However, the interviewee was unable to determine whether his brother would be eligible for first home concessions or stamp duty concessions as a result of having the house in his name in a Special Disability Trust and he was also concerned about the lack of flexibility in spending and administrative and legal costs.

Ultimately, this family opted for a family trust. The interviewee stated: “overall, [the family trust] seemed to be a more flexible, attractive option. A family trust is something that is understood by many people. The other thing about it is that it isn’t disability specific. In my family’s experience, often things designed for people with disability are of lesser quality”.

Family 4: Applied for a Special Disability Trust to purchase property for a family member with disability, but was rejected

The interviewee is in her late 60s and has two sons with intellectual disability—one with high support needs and with lower support needs. She applied for a Special Disability Trust for her son with lower support needs, who currently works 4 days per week in supported employment and lives independently with the support of home visits and assistance with cooking, cleaning and managing finances.

The purpose of establishing a Special Disability Trust was to purchase a home for this son, to provide him with long-term housing security. The application was rejected because the man was determined to be ineligible for a Special Disability Trust on the basis of not meeting the impairment or disability conditions.

The interviewee believed this was an incorrect assessment that was based on the number of hours he worked in supported employment and did not take into account the low wage he received or the extensive support he required for managing finances and financial decision making.

Although each family had different life circumstances, their common interest in Special Disability Trusts was to purchase or secure housing for a family member with disability. Special Disability Trusts were seen by these families as a possible route to housing security and independent living for their family member with

disability, particularly when supplemented by other supports, i.e. through the NDIS. Key reasons for this included:

- the security of life-long tenancy if the principal residence of the beneficiary was owned in the trust
- the security of knowing that the beneficiary's social security entitlements would not be affected by housing assets when owned in the trust
- the attractiveness of the home being in the beneficiary's name when owned in the trust.

These factors offered peace of mind to donors because of the assurance that fluctuations in disability services funding would not affect their family member's housing situation, Disability Support Pension payments could be used for income regardless of their housing situation, and because their family member would in effect be a homeowner rather than a "tenant" (for example, of another family member or of a social housing commission):

It's very much structured so that it's her house, her home.

When I looked into the Special Disability Trust, the thing that seemed really positive about it and the thing that attracted us to it [as opposed to other trust options] was that he could own the house in his name.

Several other positive and negative aspects of Special Disability Trusts were raised in these interviews, which will be discussed alongside the other project findings in the following sections.

3.2 Benefits of Special Disability Trust use

Participants in the roundtable discussion stated that one of the primary motivations for families to establish a Special Disability Trust is the social security benefits for beneficiaries, as described in Section 2 of this report. Parents and family members often want to provide what they can to their family member with disability, without compromising the person with disability's Centrelink pension. An additional motivator is the social security benefits for Special Disability Trust donors: family members with significant assets or funds, which they want to provide to a person with disability, can transfer these assets/funds and remain or become eligible for a pension or carer payment. This can be particularly useful for donors who are in the process of downsizing their housing, as they can free up funds that may impact on their social security eligibility while providing funds for the future needs of a family with disability.

The family interviews also highlighted the tax and social security benefits of Special Disability Trusts to the beneficiary. Interviewees focused on the importance of the beneficiary retaining their Disability Support Pension, but the family who had

purchased a home with trust funds mentioned some other housing-related tax benefits:

We got some stamp duty relief, lower council rates and land tax, but you have to apply for those. If [the home] were in a regular trust we would be paying different rates of tax, and these other exemptions probably wouldn't have applied.

Only one family interviewee mentioned the tax and social security benefits of Special Disability Trusts to the donors. These interviewees (parents of a son with autism) said that they wanted to set up a Special Disability Trust as soon as possible, but they had been advised by "a local centre" not to do anything until one of them is at least 66 years old. They explained that this is because their own Centrelink payments would be penalised under current gifting rules if they were to establish the Special Disability Trust before that time.

The other families did not mention benefits to donors, except in so far as they were ineligible to qualify for them. For example, the interviewee who considered establishing a Special Disability Trust for his brother, but opted to establish a Family Trust instead, commented that because of his mother's assets, she was not going to stand to benefit by donating to a Special Disability Trust.

Roundtable participants outlined some considerable limits to the tax and social security benefits of Special Disability Trusts, warning that whether one will prove to be beneficial in a particular case depends heavily on the financial position of those involved. Families and individuals with assets and funds over a certain threshold are more likely to benefit from establishing a Special Disability Trust, but given the economic disadvantage experienced by many people with disability and their families, participants noted that this is a circumscribed group.

Roundtable participants said that a Special Disability Trust is likely to be of most benefit where the beneficiary relies on the disability support pension and the amount intended to be gifted to the trust exceeds the asset test limits. The costs of administering a Special Disability Trust, including preparation of financial statements, tax returns and audit reports, are to be met by the trust fund itself. This means that the value of the trust fund should be significant enough to warrant the extra costs. Those with assets of more than \$500,000 are most likely to find a Special Disability Trust useful, while those with assets under \$375,000 are less likely to find them worthwhile. This is because an individual's Centrelink pension is reduced 50c for every dollar they hold over \$375,000 and cuts out altogether if they possess funds over \$800,000.³⁰ From 20 March 2018, the thresholds are \$253,750 and \$556,500 for an individual pensioner. In contrast, an individual can possess a

³⁰ These numbers apply to a pensioner couple and was altered on 20 March 2018.

home and up to \$657,000 in assets in a Special Disability Trust and still qualify for the Disability Support Pension.

Another motivation for establishing a Special Disability Trust is to protect a person with intellectual disability from financial abuse, as the administrative requirements involve regular oversight and auditing. However, some roundtable participants warned that this oversight may focus on Centrelink compliance rather than protection from financial misuse, and so may be overstated. They said it very much depends on the degree to which the trustee engages with the person with disability and their family and understands their needs, which makes the choice of trustee very important.

The family interviews focused on peace of mind that their family member with disability's financial affairs would be managed as smoothly and well as possible, avoiding potential disputes or other difficulties with other members of the family. One interviewee stated that he would prefer to establish a Special Disability Trust for his son now, rather than in his will, because otherwise "you're assuming that your family will do the right thing". Another said that she "doesn't want to lay this responsibility on our other children".

3.3 Barriers and disincentives to Special Disability Trust use

Project participants identified a general lack of information about and expertise in Special Disability Trusts as the primary obstacle to greater uptake. There is minimal information available in the community about the trusts, and people usually hear about them by word of mouth only. Centrelink has a 'do it yourself' template available for establishing a Special Disability Trust, but most people require a lawyer because of the complexity of the legislation and compliance rules.

Roundtable participants stated that very few lawyers, accountants and financial planners have experience in Special Disability Trusts or even know about them. This was supported in the family interviews. For example, one interviewee stated that Special Disability Trusts are

...so complex for a layperson. Local centres don't know anything about them. I need it [information] in terms I can understand. [...] The government did a good thing in setting them up, but they haven't explained it, and they haven't promoted it.

Another interviewee discussed how Special Disability Trusts are viewed as an area requiring 'specialised' legal advice, which poses a significant barrier for families who are just looking for what he felt should be basic points of information. He wanted to know if his brother would be eligible for the first home buyer's grant or stamp duty concessions if purchasing a home within a Special Disability Trust and was unable

to find the answer to his question despite seeking advice from a number of institutions (e.g. Centrelink, the Special Revenue Office and DSS websites.).

One interviewee mentioned that many families are not aware of Special Disability Trusts or the benefits they could offer:

I'm constantly amazed at the number of high net worth individuals that you meet that could use a special disability trust and don't know they exist.

The financial literacy of people with disability and carers is another key barrier to uptake and use of Special Disability Trusts, and planning for the future more generally amongst people with disability and their families. As one interviewee stated:

If you weren't very financially literate and you came to this in your late 70s, you would find it a very complex issue.

Roundtable participants noted that many people with disability and families are in crisis over current housing and care arrangements and are not in a position to be consulting lawyers and financial planners about future planning, even if they have the funds to pay legal fees.

The financial disadvantage experienced by people with disability and their carers is a further barrier which was raised by stakeholders in the roundtable discussion as perhaps the key reason why uptake of Special Disability Trusts is not higher. Many parents of adult children with disability struggle with providing for their own retirement and care costs; they may not have sufficient savings or super set aside for themselves, let alone a family member with severe disability. This point is well supported by literature analysing the link between disability and poverty in contemporary society. Financial disadvantage is exacerbated for those who have a lifelong disability and their family members.³¹

Project participants identified restrictive spending rules and lack of flexibility in how the funds in a Special Disability Trust can be used as a major disincentive for people with disability and families to opt for this mechanism. As described in section 3.2 of this report, spending rules stipulate that the bulk of assets held in a Special Disability Trust must be used for costs directly related to a person's disability. Day-to-day living expenses and expenses related to, for example, recreation and leisure, clothing and furniture are excluded beyond the discretionary spending allowance. Roundtable participants and one interviewee participant suggested families may need to set up a second trust to cover these expenses, but warned that for some, the costs associated with running two trusts are prohibitive.

³¹ Zaidi, A & Burchardt, T 2005, 'Comparing incomes when needs differ: equivalisation for the extra costs of disability in the UK', *Review of Income and Wealth*, vol. 51, no. 1, pp. 89–114; Saunders, P, Naidoo, Y & Griffiths, M 2007, *Towards new indicators of disadvantage: deprivation and social exclusion in Australia*, Social Policy Research Centre, Sydney.

The family interviews also indicated that the limited uses to which the funds can be applied have discouraged some families from going through the expensive and complex process of establishing a Special Disability Trusts in the first place:

There are significant restrictions put on what it can be used for. I think more people would create [a Special Disability Trust] for their son or daughter if the uses were freed up a bit.

The project also found that the following aspects of the Special Disability Trust structure and rules pose barriers or disincentives for people with disability and families:

- Eligibility restrictions

Participants in the roundtable discussion and the interviews argued that the definition of a “severe disability” for the purposes of a Special Disability Trust is too restrictive and precludes people who may have support needs related to decision making and financial management and their families from benefiting from one.

The 7 hours per week work test prevents many people with disability from accessing Special Disability Trusts. Many people with disability work more than 7 hours per week in open employment, but still require further financial support. One stakeholder noted in the roundtable discussion that elsewhere in social security legislation, the comparable open employment working hour limit is 15 hours per week. Centrelink eligibility restrictions and changes also have flow-on impacts on Special Disability Trust eligibility.

- Administrative costs

There are a number of costs associated with Special Disability Trusts, including legal fees, establishment fees, and annual accounting and auditing fees. Further, as not many accounting and auditing firms have experience with Special Disability Trusts, fees may be higher than they should be. For one interviewee, the administrative costs of the Special Disability Trust were a key disincentive to establishing one for his brother, as his family’s financial situation meant that it would not be worthwhile:

...any benefit we could receive through the stamp duty concessions would have been dwarfed by the legal and financial administration costs that we realised we would have to pay yearly.

- Bureaucratic red tape

People with disability and their families already have to negotiate high levels of administration and bureaucracy in their day-to-day lives to access basic services. Administering a Special Disability Trust and negotiating spending rules is time consuming. Establishing a Special Disability Trust requires working with Centrelink,

where call wait times are often long and difficulties in finding someone to discuss this specialised area are common. Interviewees stated:

The [auditing and reporting] system is a mess. Once you've completed the report, you send it in the post. Then you get vast amounts of automated letters. You have to ring them to get the letters to stop. Even if they have confirmed receipt of the report, you have to call to stop them. Form A – the form for advising them about donations – is almost impossible to find on the website. You're supposed to refresh that every time a new donation is made.

Never ending forms, after 40 years already of negotiating them!

- Negotiating family relationships

Finally, establishing a Special Disability Trust, like all future planning issues and options for people with disability and their families, can be highly relationally complex. This is not necessarily a barrier or disincentive to establishing a Special Disability Trust, but it is something that families must take into account in their planning. Participants in the roundtable discussion stressed the importance of the person with disability being included in decision making processes about their financial future – both in the establishment and operation of the trust. They also stressed that other family members interests should also be considered. Some stakeholders stated that directing the majority of family assets to a Special Disability Trust risks disadvantaging parents in their retirement, as well as other family members such as siblings. The trustee of a Special Disability Trust is often a family member or friend. It is an unpaid role (if the trustee is an immediate family member), but an important and sometimes demanding one—the trustee needs to engage with the person with disability and/or carer at least every six months to understand their needs, engage with the person with disability in decision making and protect them from financial abuse.

3.4 Other options

Roundtable participants suggested that Special Disability Trusts can be a useful mechanism to assist families to transfer assets to people with disability and minimise social security penalties while doing so, but there are other mechanisms such as family trusts that may provide similar things in a more flexible manner, depending on the family or individual's situation. This was supported by the interviews. One of the interviewees found the family trust mechanism to be easier to understand and more well-known amongst lawyers and financial planners than the Special Disability Trust mechanism. He decided that the family trust was more suitable for his family's situation, because it was more flexible and less administratively burdensome than the Special Disability Trust.

One roundtable participant stated that to circumvent the spending restrictions associated with a Special Disability Trust, families could set up two trusts, a Special Disability Trust and a more flexible form of trust – but warned that establishment and

auditing costs will increase accordingly with this option. One of the families interviewed had adopted this strategy, and found it a useful way to gain more flexibility in the use of trust assets:

I would say that you need to have two trusts for a person with intellectual disability because there's the constraints on what you can spend the special disability trust funds on, which means you really need a separate trust for the things that don't fit in the boxes.

Findings from the roundtable discussion and family interviews indicated that Special Disability Trusts may cater best to people with disability living alone with supports. However, the cost of care in independent living is high, and it remains unclear whether people can combine or pool finances in Special Disability Trusts to live together. The legislative review indicated that there does not appear to be anything in the legislation that explicitly prevents the pooling or sharing of trust assets, but there were no examples of arrangements like this in the experience of roundtable or interviewee participants. Instead, one interviewee discussed how it was *not* possible for her daughter to share ownership of her home, because it was purchased within a Special Disability Trust:

I don't know how a married couple could go about buying a home in an SDT, I guess only one of them could do that even if they are both eligible. My daughter has recently got into a relationship and is looking at getting engaged and her fiancé will be living with her in her house. In normal circumstances, a couple might decide that he would buy into the house, well there's no way he can, he has to be her tenant forever. [My daughter] and her partner don't have any choice, they have to be that way forever.

It would require specialised legal advice to determine whether shared ownership or pooling of housing assets is indeed expressly prohibited by the Special Disability Trusts legislation, but the experts who participated in the roundtable discussion indicated that it is certainly prohibited to do so in practice. This restricts the usability of the mechanism for people with disability who do not have the individual assets to purchase a home themselves but could buy (or rent) a home with a friend, family member or spouse.

Further, the situation of the family quoted above indicates that the Special Disability Trust mechanism was designed with inaccurate assumptions about the circumstances and family relationships of people with disability. When the beneficiary of a Special Disability Trust is deceased, for example, all assets (including a family home) must be disseminated back to the donors of the trust, even if the beneficiary's spouse or children are still living in the principal residence of the beneficiary.

Other issues related to addressing the housing needs of people with disability through Special Disability Trusts raised by participants in this research included housing affordability, housing supply and the NDIS. These issues will be discussed further in the next sections of this report.

4 The future of Special Disability Trusts

This section of the report considers the future role of Special Disability Trusts in light of the research findings concerning how they work and how they are currently used by Australians with disability and their families. It focuses on three key themes that emerged as central to considering the future uptake and use of Special Disability Trust in the interviews and roundtable discussion:

- the availability of information and support for families to help them negotiate Special Disability Trust processes and other future financial planning options
- the actual and potential intersections and complementarities between NDIS support and Special Disability Trust assets, and
- the opportunities available to review and reform Special Disability Trust and guidelines to maximise their usefulness.

4.1 Special Disability Trust pathways: information and support

Participants in this research identified information provision and raising community awareness of future planning options as the most important way to enable people with disability and their families to establish Special Disability Trusts. They indicated that people with disability and their families often feel anxious, confused and out of their depth when considering the future. These findings are supported in the literature, which also finds that these feelings often intensify rather than mitigate with time for older parents and carers.³²

Information and awareness raising is needed around all future planning options,³³ but with regards to Special Disability Trusts, participants argued that a targeted education and awareness campaign is needed. This campaign needs to consider who would most benefit from Special Disability Trusts, and the different State/Territory legal and policy environments for Special Disability Trusts.

Some participants suggested that the most helpful financial planning tool would 'map' the options available to people with disability and their families by:

- indicating which mechanisms would most benefit people in specific 'model' circumstances

³² Bigby, C & Ozanne, E 2004, 'Comparison of Specialist and Mainstream Programs for Older Carers of Adults with Intellectual Disability: Considerations for Service Development', *Australian Social Work*, vol. 57, no. 3, pp. 273, 274.

³³ For a discussion of alternative legal mechanisms to aid future planning, including wills and estate planning, powers of attorney, guardianship, and various trust forms, see Carney, T & Keyzer, P 2007, 'Planning for the future: Arrangements for the assistance of people planning for the future of people with impaired capacity', *QUT Law and Justice Journal*, vol. 7, no. 2, pp. 265-273.

- providing information about the asset threshold and personal circumstances of people most likely to benefit from Special Disability Trusts
- providing information about who would not be likely to benefit from Special Disability Trusts and the barriers and shortcomings of Special Disability Trusts as well as the benefits (most current guides do not include this information)
- including a list of lawyers, financial planners and other professionals who are experienced in Special Disability Trusts and other future planning mechanisms
- suggesting that individuals consult with an expert about which options might be best for their specific circumstances.

Participants suggested that service providers and disability and carer advocacy organisations are a good place to start in disseminating information about Special Disability Trusts, as they often act as gateways and information referral sources. Participants also stated it is important to ensure that community legal centres and specialist disability legal centres have information about Special Disability Trusts or know to whom to refer clients who approach them about establishing one. For example, two of the interviewees had significant difficulties finding someone to advise them about whether a Special Disability Trust was right for them, and one had significant difficulty ascertaining basic points of fact from relevant government offices about Special Disability Trust tax concessions. Given the fees associated with setting up Special Disability Trusts, participants also suggested that subsidised or lower-cost legal services need to be made available to families on lower incomes to increase their access to legal advice.

A couple of participants questioned why we would want to promote the uptake of Special Disability Trusts given that they are suitable for only a circumscribed group of people. People with disability and their families need a variety of support services to assist them in planning for the future and mainstream financial planning services are not enough. Participants stressed that people with disability and their families need specific financial and legal advice as well as information tailored to their needs and concerns. Participants suggested that the focus should instead be on promoting active future planning and providing resources to families to help them plan for the future housing and care needs of their family member with disability and explore all options available to them.

4.2 Special Disability Trusts and the NDIS

Each of the families interviewed in this research who were considering establishing a Special Disability Trust wanted to combine NDIS supports with private housing to achieve independent living situations for their family members with disability. With the exception of the family who had already purchased a home within a Special Disability Trust, transitioning from unsatisfactory congregate care or group home arrangements, parents' homes and unstable housing situations was a major priority for all the families. The interviewees anticipated that transferring or bequeathing what assets they had to a Special Disability Trust would help their family member

with disability transition to stable and appropriate independent living arrangements. In particular, the hope of these families was that with the NDIS offering individual rather than block funding arrangements, more people with disability would be able to access the support they need to live independently in the community, particularly if they had secure accommodation.

Roundtable participants also noted that there may be opportunities to combine an NDIS package of supports with the funds held in a Special Disability Trust, which could then focus on meeting the accommodation needs of the beneficiary. Roundtable participants agreed that for people who would benefit from Special Disability Trusts (those with significant equity to transfer between generations), they are a useful mechanism for minimising the costs of this transfer. However, the benefits would be maximised if there were more flexible and suitable forms of accommodation for people with disability available, which could be purchased or rented with funds from a Special Disability Trust.

Roundtable participants stated that there are many significant barriers to people with disability acquiring suitable housing, with the biggest challenges being housing availability and housing affordability. They warned that mechanisms to enable the transfer of money from family members will not by themselves overcome these challenge. Special Disability Trusts do not create options that do not otherwise exist. As Wiesel et al. note, a shortfall in supply of affordable housing remains the biggest barrier to independent living.³⁴ There is an estimated unmet need in affordable housing for between 83,000 – 122,000 NDIS participants at full rollout of the scheme in 2019.³⁵

Roundtable participants also suggested that if people could pool assets from different trusts to share housing, more people would be able to access suitable housing and independent living options. This suggestion is supported by evidence—sharing to reduce the costs of housing has been identified as a key enabler of housing access in previous research.³⁶ This indicates that serious consideration should be given to whether the Special Disability Trust mechanism can be reformed to allow home ownership by more than one trust. The housing aspirations of the families who participated in this research and their expectations of the positive role that NDIS support would play in achieving these housing aspirations highlight the importance of this review and potential reform process happening sooner rather than later.

³⁴ Wiesel, I, Laragy, C, Gendera, S, Fisher, K. R, Jenkinson, S, Hill, T, Finch, K., Shaw, W & Bridge, C 2015, Moving to my home: housing aspirations, transitions and outcomes of people with disability, AHURI Final Report No.246. Melbourne: Australian Housing and Urban Research Institute, <<https://www.ahuri.edu.au/research/final-reports/246>>.

³⁵ Wiesel, I & Habibis, D 2015, NDIS, housing assistance and choice and control for people with disability, AHURI Final Report 258, Australian Housing and Urban Research Institute, Melbourne, <<https://www.ahuri.edu.au/research/final-reports/258>>.

³⁶ Ibid.

4.3 Previous government reviews of Special Disability Trusts

There has been little ongoing systematic policy review of Special Disability Trusts to date. However, in 2008 the Commonwealth Senate Standing Committee on Community Affairs released its report, *Building Trust; Supporting families through disability trusts*, which was critical of the effectiveness of the scheme.³⁷ It found that:

- Eligibility requirements for Special Disability Trusts are overly restrictive, and many people, including people with intellectual disability and mental illness, were not able to qualify.
- The concessional limit on trust assets is too low, preventing proper future planning.
- The tax arrangements are poor, specifically, the application of capital gains tax to the sale of a beneficiary's primary residence and the high rate of tax applied to trust earnings act as major disincentives for families.
- Special Disability Trusts were very restricted in their usage (for example, no income can be derived), which is potentially a barrier to beneficiaries leading as independent lives as possible.
- Special Disability Trusts are complex to establish, requiring 'guesswork' as to future needs, and they are costly to implement.
- The ongoing need for auditing Special Disability Trusts increases their administrative costs.
- There is a lack of information targeted at those who may benefit most.

The Committee made a number of recommendations for review and reform of the Special Disability Trust mechanism intended to address these shortcomings. The full list of the Committee's recommendations in the *Building Trust* report is included in Appendix A.

The Federal Government responded to the Senate Report in May 2009, promising to consider some of the recommendations made further, and rejecting others.³⁸ For example, it agreed to consider the Committee's recommendations regarding eligibility rules to make it easier for people with intellectual disability and/or mental

³⁷ Senate Standing Committee on Community Affairs, *Building Trust; Supporting families through disability trusts* (October 2008) p. vii
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>.

³⁸ Australian Government, Response to the Report by the Senate Standing Committee on Community Affairs: Building trust: Supporting families through Disability Trusts (May 2009)
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2008-10/disability_trusts/index>

illness to be eligible as beneficiaries for a Special Disability Trust. With regards to the Committee's recommendation to increase the concessional asset limit of the trust, the government noted that as the principal residence of the beneficiary is exempt as an assessable asset, Special Disability Trust assets can already exceed \$1 million and remain within the current concessional limit. It rejected the recommendation to index the gifting concession limit annually (the concessional limit of trust assets in indexed annually), arguing that this would be an anomaly in the context of other gifting provisions related to social security and would therefore have broader implications for gifting rules.

In response to the Committee's recommendation to expand the allowable use of funds in the trust to encompass all day-to-day living expenses, the government noted that the Disability Support Pension can be used for those open purposes, and "any substantial opening up of the beneficiary eligibility criteria and allowable uses of Special Disability Trust funds may raise issues relating to the equity of income support for people with disability".³⁹ It did, however, agree to consider a level of discretionary spending as part of the Trust.

The Disability Investment Group (DIG) further stressed the need for reform of Special Disability Trusts in its report *The way forward: A new disability policy framework for Australia*, released in December 2009.⁴⁰ The DIG was established in April 2008 to explore innovative funding ideas from the private sector, which would help people with disability and their families access greater support and plan for the future, and was comprised of Australians with experience and knowledge in philanthropic investment. The DIG report – which is considered a key milestone in the establishment of the NDIS – acknowledged that Special Disability Trusts have "shortcomings", stating firstly that Special Disability Trusts "are a way of transferring assets rather than a way of promoting savings", and secondly that because they are individual trusts "they are expensive to establish and maintain as they need auditing, and they are likely to pay retail rather than low-cost wholesale fund management fees".⁴¹ It recommended that further reforms to make the trusts more accessible to people with disability and their families should be considered, arguing that changing Special Disability Trust arrangements could promote savings and asset transfers in low-cost ways, increase the available pool of private savings and supplement government funded support.⁴²

A number of changes were made to the social security and taxation legislation that governs Special Disability Trusts in the 2009-10, 2010-11 and 2011-12 budgets as a result of the government's consideration of the *Building Trust* report's

³⁹ Ibid, p. 4.

⁴⁰ Disability Investment Group, *The way forward: A new disability policy framework for Australia* (December 2009)

<<https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/disability-investment-group/the-way-forward-a-new-disability-policy-framework-for-australia>>.

⁴¹ Ibid, p. 34.

⁴² Ibid, p. 34.

recommendations, the recommendations of the DIG report, and continued debate in parliament. These changes included measures such as:

- A beneficiary of a Special Disability Trust is now able to work up to 7 hours a week at or above the relevant minimum wage.
- The types of care and accommodation expenses that can be met from Special Disability Trust funds was broadened and clarified to include the beneficiary's medical expenses, including private health fund membership, and maintenance expenses of the Trust's property.
- Trust funds may now be spent on discretionary items for the beneficiary not related to the beneficiary's care and accommodation up to the limit described in the first section of this report.
- The unexpended income of a Special Disability Trust is now taxed at the beneficiary's personal income tax rate, rather than the highest marginal tax rate.
- The sale of a residence owned by a Special Disability Trust and used by the beneficiary as their main residence is now exempt from capital gains tax.⁴³

In 2011 the Senate Standing Committee on Community Affairs looked briefly again at Special Disability Trusts as part of a broader inquiry into Ageing and Disability. The committee acknowledged the changes in Special Disability Trust rules and guidelines since 2008, including new employment rules and expanding how trust money may be spent (such as the 2011 amendments noted above which included a trust being able to undertake a level of discretionary spending, currently at around \$11,000 per annum for things such as 'wellbeing', 'social inclusion', 'recreation' and similar), and that there would be further changes to capital gains tax issues.⁴⁴ However, the committee expressed concern at the continued low uptake of Special Disability Trusts.⁴⁵

In 2011, the Productivity Commission released the report of its inquiry into Disability Care and Support.⁴⁶ The report noted previous DIG observations that Special Disability Trusts were expensive to maintain and establish. It also noted submissions that argued that Special Disability Trusts were not viable for small amounts of capital and that uptake remained low. In line with the findings from this project and particularly comments from roundtable participants, the Productivity Commission found that:

⁴³

<https://www.dss.gov.au/sites/default/files/documents/01_2015/8_special_disability_trusts_questions_and_answers_0.pdf>.

⁴⁴ For an overview of all the changes since 2006 see <<https://www.dss.gov.au/disability-and-carers/programs-services/special-disability-trusts>>.

⁴⁵ Senate Standing Committee on Community Affairs, *Disability and Ageing: lifelong planning for a better future* (July 2011) p. 35

<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13/planningoptionspeopleageingwithdisability43/report/index>.

⁴⁶ Productivity Commission, *Disability Care and Support, Productivity Commission Inquiry Report* (July 2011) <<https://www.pc.gov.au/inquiries/completed/disability-support/report>>.

Special Disability Trusts appear to be of limited use for most people with disability, bearing in mind that many families experiencing disability have lower assets and income.⁴⁷

Interestingly, the Productivity Commission report also commented that with a fully functioning NDIS, there would be much less need for measures such as Special Disability Trusts, perhaps anticipating a more robust surge in housing solutions than has been achieved in the NDIS rollout so far.⁴⁸ This comment contrasts with the findings from the roundtable discussion and interviews, which indicated participants saw an opportunity for Special Disability Trusts to complement the NDIS, rather than be phased out.

The Productivity Commission report did anticipate a key finding from this research by calling for a further review of Special Disability Trusts in the context of the NDIS, and in particular the housing options available to NDIS participants:

The Commission considers that the role of Special Disability Trusts should be reviewed once the NDIS is up and running. They should be considered against a range of options that might be more efficient in leveraging private assets for the provision of accommodation for people with disability.⁴⁹

The NDIS has not yet been fully rolled out and it may be some years before a wider range of housing and accommodation options for people with disability can be properly evaluated, but this report echoes this call for further detailed review of Special Disability Trusts in light of the housing experiences and options being explored by people with disability and their families in the NDIS context.

4.4 Opportunities for further Special Disability Trust review and reform

The reforms to Special Disability Trusts discussed in the previous section demonstrate that changes and improvements to the mechanism are possible. As one stakeholder consulted in this project noted:

The Special Disability Trust mechanism was never designed at the outset to be a facility that would suit every family circumstance but could be revised and extended, over time, to include additional groups.

⁴⁷ Productivity Commission, *Disability Care and Support, Productivity Commission Inquiry Report* (July 2011) p. 254
<<https://www.pc.gov.au/inquiries/completed/disability-support/report>>.

⁴⁸ Productivity Commission, *Disability Care and Support, Productivity Commission Inquiry Report* (July 2011) p. 254
<<https://www.pc.gov.au/inquiries/completed/disability-support/report>>.

⁴⁹ Productivity Commission, *Disability Care and Support, Productivity Commission Inquiry Report* (July 2011) p. 254
<<https://www.pc.gov.au/inquiries/completed/disability-support/report>>.

The findings from this research indicate a number of areas in which the Special Disability Trust mechanism or the information available to support Special Disability Trust use could be improved. However, the comments from the government in its consideration of the Senate Standing Committee's recommendations also indicate that adjustments to the rules and guidelines that govern Special Disability Trusts can only go so far before these adjustments would have ramifications far beyond the trusts themselves and affect other areas of law. A full examination of the potential impacts of reform is beyond the scope of this report. Therefore, the following areas for improvement should be seen as areas for further consideration and inquiry rather than firm recommendations:

1. Review eligibility requirements

This research indicated that people with intellectual disability and people with psychosocial disability and their families continue to encounter issues with meeting the disability and impairment conditions of eligibility for Special Disability Trusts. This is a major problem as these persons and groups may be most likely to benefit from having access to Special Disability Trusts and the protective elements of the financial management rules they involve.

It is possible that the difficulties encountered by people with intellectual disability and psychosocial disability in meeting the eligibility requirements is due to a broader lack of awareness and knowledge of their support needs. For example, one interviewee reported that the questions asked by a medical professional assessing her son's eligibility for the trust focused on physical support needs and did not delve into his support needs related to decision making, managing finances and negotiating new environments.

Making Special Disability Trusts more accessible for these families, therefore, may not require any change in legislation or rules, but instead further guidance on the disability conditions and how potential beneficiaries can meet them.

To align the Special Disability Trusts legislation with the new disability policy context entailed by the rollout of the NDIS, NDIS eligibility could be added as another method for meeting the eligibility conditions of the trusts (alongside eligibility for the Disability Support Pension or the primary carer's eligibility for the Carers Payment). The disability requirements to be an adult participant in the NDIS (an impairment or condition "that is likely to be permanent" and "substantially reduces your ability to participate") are similar to the conditions that must be met to be eligible for a Special Disability Trust. This would also have the result of minimising the need for additional assessments, which are burdensome for people with disability and family members.

2. Consider the discretionary spending limit further

The families interviewed in this research highlighted the spending restrictions on trust funds as a disincentive to establishing a Special Disability Trust. However, one

family with the means to do so was able to use funds held within a second more flexible trust form for other expenses of the beneficiary. This issue must also be balanced against the protective dimension of the Special Disability Trust mechanism. Interviewees also mentioned that they worried about the finances of their family member with disability being mismanaged or misused, and spending rules is one way in which this potential vulnerability is managed.

3. Clarify the potential for shared property ownership and pooling funds

A key issue raised by both roundtable participants and family interviewees was the potential to pool funds from more than one Special Disability Trust to purchase an interest in property, or the potential for more than one person to have a lawful interest in a house purchased within a Special Disability Trust.

The legislative review found that there is nothing that explicitly prohibits this in the legislation governing the trusts; however, there is no evidence that people with disability and their families have been able to do this in practice. There are reasons it would be complex to establish joint ownership as a viable option – Special Disability Trusts are *individual* trusts, and rules stipulate one beneficiary per trust and one principal residence per beneficiary. These rules aim to target the Special Disability Trust mechanism to a certain group of persons who are in most need of long-term care and accommodation financial provision and may be vulnerable to financial abuse. However, the interviews demonstrated that this can also lead to difficult situations whereby a spouse cannot share a joint interest in a property purchased within a Special Disability Trust despite co-habitation.

Further, the ability to pool resources from multiple trusts would increase the use and usefulness of Special Disability Trusts amongst those with low to medium assets. This could be highly complex in practice, particularly with regards to exit strategies if a person wishes to withdraw their interest in a jointly-owned property. Potential dispute processes and proceedings could represent further expenses for already stressed trust resources. However, there are other legal types (i.e. housing cooperatives and micro-boards) where these sorts of issues are managed. Further exploration of whether the legal rules governing these housing arrangements could be applied to Special Disability Trusts, or whether some of the social security and tax concessions that apply to Special Disability Trusts could be extended to these arrangements is needed.

4. Consider the need for further guidance about what a Special Disability Trust can or cannot do as a *trust* (as opposed to what beneficiaries may be able to access through other measures)

Both roundtable participants and interviewees highlighted a degree of confusion, which exists for people considering Special Disability Trusts, about what benefits the mechanism itself entitles them to. Some benefits are clear – the social security benefits, for instance – while others such as stamp duty concessions and council

and land tax exemptions are likely to require separate applications. Further, these latter concessions are not governed by Commonwealth legislation (or by the trust rules and guidelines). Each state (or local government area) administers these under their own Acts and Regulations so there may be some differences between jurisdictions.

One interviewee encountered difficulties in determining whether the First Home Owners Grant (FHOG) was available to persons purchasing a home with funds from a Special Disability Trust.⁵⁰ One of the recommendations of the Senate Standing Committee in its *Building Trust* report was that when a Special Disability Trust is used to purchase a first home for the trust beneficiary, the FHOG should apply and be payable to the trust. The Government response to this report rejected this recommendation because extensive amendments to the laws governing a trust type would result in it no longer preserving the essential legal nature of a trust and particularly the relationship between beneficiary and trustee that defines a trust. The FHOG is only applicable to 'natural persons', and a trust is not a natural person (it is a legal relationship).⁵¹

The Government did note that just because the trust cannot receive the grant does not mean that the beneficiary cannot receive the grant:

The 'natural person' requirement of the Scheme does not necessarily preclude a beneficiary of a Special Disability Trust from accessing the grant. Where beneficiaries are able to acquire property in their own name, they may apply for the grant themselves, or if subject to a power of attorney or a financial management/administration order, the grant may be applied for by the person holding the power of attorney on behalf of the beneficiary or managing their affairs under the financial management/administration order.⁵²

However, it does appear the grant cannot be accessed by the beneficiary if the house is to be purchased by or within the trust. Given that the interviewees in this project cited one of the major benefits of the Special Disability Trust being that a home was owned 'in the beneficiary's name', there needs to be more and clearer guidance on this issue available to avoid confusion.

⁵⁰ Note that each state administers the First Home Owners Grant under their own Acts and Regulations so there may be some differences between jurisdictions. In New South Wales, the applicable Act is the *First Home Owner Grant (New Homes Act) 2000* (NSW).

⁵¹ See for example *First Home Owner Grant (New Homes Act) 2000* (NSW), s 8,

⁵² For example, under the NSW legislation: *First Home Owner Grant (New Homes Act) 2000* (NSW), a person under a legal disability can apply for a grant through a guardian: s 16(1).

5 Conclusions

This report provides an overview of the Special Disability Trust mechanism, the key reasons why people may want to establish a Special Disability Trust, and the barriers they face in doing so. The research found that Special Disability Trusts can offer stability and security to families by enabling the transfer of assets to family members with disability without negative impact on the social security entitlements of either the family or the beneficiary. Special Disability Trusts may be used in different ways, either on their own, or to complement other financial provisions. Special Disability Trusts can give families confidence they have made provisions for their relative, whose assets will be managed responsibly. When used to purchase or bequeath housing, the use of a Special Disability Trust has the potential to provide life-long access to a home. Maximising uptake of Special Disability Trusts among those who can most benefit from this arrangement would therefore release publicly funded housing assistance for people with disability whose families cannot provide such support.

The research also found that Special Disability Trusts will not suit the financial and other circumstances of all people with disability and their families. Due to the cost of establishing Special Disability Trusts and the nature of the tax and social security benefits they offer, families with assets of \$375,000 or more to gift to a trust are most likely to find Special Disability Trusts to be of benefit to them. The upper limit of this 'goldilocks' zone of families for whom Special Disability Trusts are effective mechanisms is more difficult to determine. This is because families with assets over a certain threshold are not eligible for the Age Pension and therefore will not benefit from the gifting concessions available through Special Disability Trusts. Regardless, a Special Disability Trust may be of significant benefit to its principal beneficiary by allowing them to retain eligibility for the Disability Support Pension.

In conducting this research, it has become clear that the existing figures on Special Disability Trust uptake are misleading. We are unsure of the true extent to which Special Disability Trusts have been set up or the potential monetary value of the Trusts that do exist. This discrepancy arises because some families have included directions for a Special Disability Trust in their will to be established during settlement of their estates, and because some families may have established 'shell' Special Disability Trusts containing only a nominal amount of funds for the time being, with more assets to be allocated to the trust in the future. In addition, it is unclear how many Special Disability Trusts have provisions related to housing or accommodation as these details are not public information.

The research found that the original provisions for Special Disability Trusts were not intended to be static and there is considerable scope for improvement, particularly in terms of broadening eligibility criteria, relaxing the spending rules so families do not have to establish a second trust to meet other spending needs, and investigating innovative uses of trust funds for private housing solutions, including allowing

joint/shared ownership in property. However, these measures may have flow-on consequences for how the mechanism is targeted and the level of financial oversight they can offer to those who may be vulnerable to financial abuse. In the case of shared property ownership options, they may even have flow-on effects for other areas of law, so there is a need for further close (section by section) legal clarification on issues like pooling resources between trusts.

There also appears to be two key tensions or flaws in the design of Special Disability Trusts that this research found may prove to be major blocks to increased uptake amongst people with disability and their families. First, the hope of many families is that a trust can be used to secure private housing for their family member with disability. However, those people with disability who are more likely to be able to live independently in private housing do not necessarily meet the eligibility criteria for Special Disability Trusts because of its strict disability and impairment conditions. Secondly, besides from the social security concessions for beneficiaries, the major drawcard to gifting to a Special Disability Trust for family members is the tax and social security benefits they can access. However, the threshold at which Special Disability Trusts become viable or most beneficial given their associated administrative and legal costs is high enough that a significant proportion of family members who are in a position to gift assets to the trust will not be recipients of the Age Pension.

This research also found that while improving the rules and legislation that govern Special Disability Trusts may increase uptake to some extent, the potential uptake is likely to remain limited due to the financial hardship that many people with disability and their families face due to reduced income and increased expenditure over their life course.⁵³ There is, however, room to improve the potential uptake of Special Disability Trusts by the provision of clear information to help families decide what is the best mechanism to facilitate planning and transfer of assets for their circumstances. There is also room to improve support for families wishing to set up a Special Disability Trust by helping them find lawyers who have experience in establishing these mechanisms and financial advisors who have detailed knowledge in this area. In turn, greater uptake of Special Disability Trusts is likely to widen the interest and expertise in this scheme within the financial and legal sectors. Further guidance for trustees of a Special Disability Trust may also be warranted to help ensure that Trustees meet the interest of the beneficiary.

It is currently unclear how the Special Disability Trust mechanism will be affected by or will complement the NDIS, as accommodation is an unresolved issue within the NDIS. It is the hope of some families that if the NDIS provides the individualised supports needed by their family member with disability to live independently, then

⁵³ Zaidi, A & Burchardt, T 2005, 'Comparing incomes when needs differ: equivalisation for the extra costs of disability in the UK', *Review of Income and Wealth*, vol. 51, no. 1, pp. 89–114; Saunders, P, Naidoo, Y & Griffiths, M 2007, *Towards new indicators of disadvantage: deprivation and social exclusion in Australia*, Social Policy Research Centre, Sydney.

this will enable them to use their private assets for housing solutions. Depending on the extent and long-term security of their individual support packages, this scenario is likely to be possible for some families with the requisite wealth to purchase or bequeath a home outright, and information about the benefits of Special Disability Trusts could be targeted to this group.

Appendix A Recommendations of the Senate Standing Committee on Community Affairs, Building trust: Supporting families through Disability Trusts, 2008

Recommendation 1

The committee recommends that the special disability trust eligibility requirements in section 1209M of the *Social Security Act 1991* be amended to:

- remove section 1209M(b);
- include eligibility requirements which effectively enable those with intellectual disabilities or mental illnesses to become beneficiaries of special disability trusts.

Recommendation 2

The committee recommends that the asset value limit for special disability trusts in section 1209Y of the *Social Security Act 1991* be increased to \$1,000,000 and annually indexed according to a rate which reflects ordinary investment returns or the Consumer Price Index whichever is greater.

Recommendation 3

The committee recommends that the provisions relating to the special disability trust gifting concession be amended to annually index the gifting concession limit to the rate applied to the special disability trust asset value limit.

Recommendation 4

The committee recommends that, if after the adoption of the recommendations in this report there is no improvement in the uptake of special disability trusts after two years, options to expand eligibility for the gifting concession should be reviewed.

Recommendation 5

The committee recommends that the tax arrangements applying to SDTs be changed so that:

- the sale of a property that is owned by a special disability trust and used by the beneficiary as their principal place of residence be treated the same as

any other person's principle place of residence, that is, exempt of capital gains tax;

- the transfer of property and other assets to a special disability trust is exempt from capital gains tax and stamp duty;
- unexpended special disability trust income is taxed at the beneficiary's personal income tax rate.

Recommendation 6

The committee recommends that the allowable uses of special disability trusts be expanded to include all day-to-day living expenses that are met to maximise the beneficiary's health, wellbeing, recreation and independence.

Recommendation 7

The committee recommends that unexpended income from a special disability trust be able to be contributed, on a pre-tax basis, to a superannuation fund for the trust beneficiary.

Recommendation 8

The committee recommends that when a special disability trust is used to purchase a first home for the trust beneficiary, the First Home Owner Grant should apply and be payable to the trust.

Recommendation 9

The committee recommends that the government review appropriate options to provide additional assistance to families establishing and maintaining a special disability trust including low cost legal and financial advice, as well as funding for the development of long-term planning.

Recommendation 10

The committee recommends that requests for audits of a special disability trust be restricted to one external audit per financial year, unless the Secretary of the Department of Families, Housing, Community Services and Indigenous Affairs determines this restriction should be waived.

Recommendation 11

That the single trust rule in section 1209M(6) of the *Social Security Act 1991* be amended to allow two trusts for each beneficiary.

Recommendation 12

The committee recommends that Centrelink be designated as the agency responsible and accountable for ensuring that special disability trusts are promoted and understood among families caring for members with disability.

Recommendation 13

The committee recommends that the Department of Families, Housing, Community Services and Indigenous Affairs in partnership with industry bodies and peak carer organisations develop a training package for financial and legal advisers focussed on future planning for carers of people with disability, including special disability trusts.

Recommendation 14

The committee recommends that the government consider changing the name of special disability trusts, for example to disability support trusts.