

The Senate

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Community Affairs Legislation  
Committee

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Aged Care and Other Legislation  
Amendment (Royal Commission Response  
No. 1) Bill 2021 [Provisions]

June 2021

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# Abbreviations

ACFA	Aged Care Financing Authority
Aged Care Act	<i>Aged Care Act 1997</i>
Commissioner	Aged Care Quality and Safety Commissioner
Explanatory memorandum	Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021, Explanatory memorandum
HSU	Health Services Union
LASA	Leading Aged Care Services
Minister	Minister for Health and Aged Care
NDIS	National Disability Insurance Scheme
OPAN	Older Person's Advocacy Network
Quality and Safety Commission Act	<i>Aged Care Quality and Safety Commission Act 2018</i>
Quality of Care Principles	Quality of Care Principles 2014
Secretary	Secretary of the Department of Health
Statement of compatibility	Statement of Compatibility with Human Rights





# **List of Recommendations**

## **Recommendation 1**

**1.41 The committee recommends that the bill be passed.**



# Chapter 1

## Chair's report

### Purpose of the bill

- 1.1 The Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021 was introduced into the House of Representatives on 27 May 2021.<sup>1</sup>
- 1.2 The bill seeks to make amendments to the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (Quality and Safety Commission Act) to implement three measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety (Royal Commission) and, in the case of restrictive practices, in response to the *Independent review of legislation provisions governing the use of restraint in residential aged care*.<sup>2</sup>
- 1.3 The purpose of the bill is to:
  - further strengthen legislation on the use of restrictive practices in aged care;
  - empower the Secretary of the Department of Health to conduct assurance reviews to ensure the arrangements for the delivery and administration of home care are effective; and
  - remove the requirement for having an Aged Care Financing Authority committee.<sup>3</sup>

### Key provisions of the bill

#### *Amendments relating to restrictive practices*

- 1.4 Schedule 1 of the bill is to amend the Aged Care Act and the Quality and Safety Commission Act to further strengthen legislation on the use of restrictive practices (previously referred to as restraint) in relation to recipients of aged care of a kind specified in the Quality of Care Principles 2014 (Quality of Care Principles).<sup>4</sup>

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<sup>1</sup> *House of Representatives Votes and Proceedings*, No. 119, 27 May 2021, p. 1894.

<sup>2</sup> Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021, Explanatory memorandum (Explanatory memorandum), p. 1.

<sup>3</sup> Explanatory memorandum, p. 1.

<sup>4</sup> Explanatory memorandum, p. 9.

- 1.5 The amendments to the Aged Care Act introduce the term ‘restrictive practice’, and align its definition with the definition of restrictive practices applied under the National Disability Insurance Scheme (NDIS).<sup>5</sup>
- 1.6 The amendments to the Aged Care Act set out the requirements that the Quality of Care Principles must provide for relating to the use of restrictive practices. The Quality of Care Principles will outline the limited circumstances in which a restrictive practice can be used in relation to a care recipient. The amendments clarify the current requirements in primary legislation, and enable delegated legislation to provide the detail of such requirements.<sup>6</sup>
- 1.7 The amendments to the Quality and Safety Commission Act expands the ability of the Aged Care Quality and Safety Commissioner (Commissioner) to respond to breaches of approved providers’ responsibilities in relation to restrictive practices. This enables the Commissioner to issue a written notice to approved providers not complying with their responsibilities, and also to apply for a civil penalty if an approved provider does not comply with the written notice.<sup>7</sup>

#### *Amendments relating to home care assurance reviews*

- 1.8 Schedule 2 of the bill amends the Aged Care Act to allow the Secretary of the Department of Health (Secretary) to conduct reviews to assure the arrangements for the delivery and administration of home care are effective and efficient.<sup>8</sup> This enables the Secretary, or appropriate delegate, to issue notices to approved providers that are corporations to collect information in relation to an assurance review. Failure to comply with these notices or provide reasonable assistance will incur civil penalties.<sup>9</sup>

#### *Amendments relating to the Aged Care Financing Authority (ACFA)*

- 1.9 Schedule 3 of the bill removes the requirement for the Aged Care Financing Authority (ACFA) committee. Once this requirement is removed, ACFA will be abolished and a new advisory body will be established to provide advice to Government on aged care financing issues. A separate instrument will repeal the Committee Principles 2014, which set out ACFA’s functions and governance arrangements.<sup>10</sup>

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<sup>5</sup> Explanatory memorandum, p. 10.

<sup>6</sup> Explanatory memorandum, p. 10.

<sup>7</sup> Explanatory memorandum, p. 12.

<sup>8</sup> Explanatory memorandum, p. 17.

<sup>9</sup> Explanatory memorandum, p. 17.

<sup>10</sup> Explanatory memorandum, p. 20.

## *Commencement*

- 1.10 Should the bill be passed, the changes will commence on the day the Act receives Royal Assent. Schedule 1 and 3 are due to commence on 1 July 2021 and Schedule 2 on the day after the Act receives assent.<sup>11</sup>

## **Financial implications**

- 1.11 The financial impact of the changes introduced by this bill is \$20.2 million over five years from 2020–21.<sup>12</sup>

## **Legislative scrutiny**

- 1.12 The Senate Standing Committee for the Scrutiny of Bills and the Parliamentary Joint Committee on Human Rights had not reported on their consideration of the bill at the time this report was prepared.
- 1.13 The Statement of Compatibility with Human Rights (statement of compatibility) in the Explanatory memorandum notes that the bill engages with a number of human rights, including the right to not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of a person; the right to an adequate standard of living; the right to protection from exploitation, violence and abuse; the right to health; and the right to privacy.<sup>13</sup>
- 1.14 The statement of compatibility explains that the bill is consistent with human rights as 'it advances protections for older Australians and strengthens the protection of care recipients by implementing measures to ensure greater protections from exploitation, violence, abuse and cruel, inhuman or degrading treatment'.<sup>14</sup>
- 1.15 Further, the bill ensures the inclusion of civil penalties is consistent with human rights criminal process guarantees.<sup>15</sup>

## **Conduct of the inquiry**

- 1.16 Pursuant to a resolution of the Senate agreed to on 13 May 2021, the provisions of the bill have been referred to the committee on 27 May 2021 for inquiry and report by 11 June 2021.<sup>16</sup>

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<sup>11</sup> *The Aged Care and Other Legislation Amendment (Royal Commission Response No.1) Bill 2021*, p. 2.

<sup>12</sup> Explanatory memorandum, p. 2.

<sup>13</sup> Explanatory memorandum, p. 4.

<sup>14</sup> Explanatory memorandum, p. 8.

<sup>15</sup> Explanatory memorandum, p. 8.

<sup>16</sup> *Journals of the Senate*, No. 99, 13 May 2021, p. 3475.

- 1.17 Details of the inquiry were placed on the committee's website. The committee wrote to relevant organisations inviting submissions to the inquiry by 4 June 2021. Submissions continued to be accepted after this date.
- 1.18 The committee received six submissions. The committee thanks all of those who contributed to the inquiry. Submitters are listed at Appendix 1.

### **Rationale for change**

- 1.19 The Final Report of the Royal Commission made 148 wide-ranging recommendations and was tabled in Parliament on 1 March 2021.<sup>17</sup>
- 1.20 The Government provided its comprehensive response to the final report on 11 May 2021. The Government agreed with the commissioners that 'strong action is needed for fundamental and ambitious reforms'.<sup>18</sup>
- 1.21 The 2021–22 Federal Budget provides a comprehensive response to the Royal Commission's final report. The proposed \$17.7 billion aged care reform package is designed to deliver sustainable quality and safety in home and residential aged care services.<sup>19</sup>
- 1.22 As outlined by the Minister for Health and Aged Care (Minister), the Hon Greg Hunt MP, the Government is committed to generational reform of the aged care system to ensure senior Australians receive the high-quality and safe aged care services they deserve.<sup>20</sup>
- 1.23 Specifically, this bill delivers the first stage of aged care reforms developed in response to the Royal Commission. The bill responds to recommendation 17, as well as supporting recommendations 118 and 27 of the Final Report.<sup>21</sup>

### *Restrictive practices*

- 1.24 In his second reading speech, the Minister explained that the Government had 'heard the calls to strengthen restrictive practice regulation, tighten requirements for the use of restrictive practices by aged-care providers' and stated that:

The bill clarifies the requirements approved providers must meet in relation to the use of restrictive practices.<sup>22</sup>

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<sup>17</sup> Royal Commission into Aged Care Quality and Safety, ['Final Report calls for fundamental and systemic aged care reform'](#), Media release, 1 March 2021.

<sup>18</sup> Department of Health, *Australian Government response to the final report of the Royal Commission into Aged Care Quality and Safety*, p. i.

<sup>19</sup> Department of Health, *Australian Government response to the final report of the Royal Commission into Aged Care Quality and Safety*, p. i.

<sup>20</sup> The Hon Greg Hunt MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 27 May 2021, p. 6.

<sup>21</sup> The Hon Greg Hunt MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 27 May 2021, p. 6.

1.25 Specifically, the amendments to the Aged Care Act will provide that the Quality of Care Principles set out matters in relation to restrictive practices and it is intended that approved providers will only be able to consider use of restrictive practices:

- as a last resort to prevent harm after alternative best practice strategies have been explored, applied and documented, except in an emergency;
- after considering the likely impact of the use of the practice on the care recipient;
- to the extent necessary and proportionate to the risk of harm to the aged care recipient or other persons;
- where the restrictive practice is the least restrictive form, and for the shortest time, necessary to prevent harm to the care recipient or other persons;
- if informed consent to the use of the practice is given;
- in accordance with the Charter of Rights and the Aged Care Quality Standards; and
- if care recipients are monitored whilst the restrictive practice is in use and the use and effectiveness documented.<sup>23</sup>

### Issues raised by submitters

1.26 Inquiry participants were broadly supportive of the proposed legislative and policy changes in relation to the use of restrictive practices.<sup>24</sup> For example, COTA Australia stated:

Establishing a new definition of ‘restrictive practice’, replacing the wording ‘chemical and physical restraint’, is a welcome change as it provides for a broader range of harmful actions and circumstances and aligns with the definition applied in the National Disability Insurance Scheme.<sup>25</sup>

1.27 Similarly, Leading Aged Services Australia (LASA), a national association for providers of aged care services, expressed its support for the alignment of restrictive practices in residential aged care with the NDIS requirements.<sup>26</sup>

1.28 However, LASA and other submitters warned that funding for staff training and additional resources would be needed to implement these changes.<sup>27</sup>

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<sup>22</sup> The Hon Greg Hunt MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 27 May 2021, p. 6.

<sup>23</sup> Explanatory memorandum, p. 11.

<sup>24</sup> See, for example, Older Person's Advocacy Network (OPAN), *Submission 2*, pp. 1–2; LASA, *Submission 3*, p. 4; Law Council of Australia, *Submission 4*, p. 5.

<sup>25</sup> COTA Australia, *Submission 1*, p. 1.

<sup>26</sup> LASA, *Submission 3*, p. 4.

- 1.29 Other issues raised by submitters included matters relating to the appointment of substitute decision makers for restrictive practices<sup>28</sup> and the use of restrictive practices in emergency situations.<sup>29</sup>

### *Home Care Assurance Reviews*

- 1.30 The amendments to the Aged Care Act to allow the Secretary to conduct assurance reviews are aimed at providing transparency for consumers and increased program oversight for the Government.

- 1.31 In his second reading speech, the Minister explained how it will contribute to the continuous improvement of home care policy:

This builds on our existing work to improve transparency of the aged-care sector and fosters community confidence in the costs of the care they receive.<sup>30</sup>

### **Issues raised by submitters**

- 1.32 COTA Australia expressed support for greater oversight of home care providers through home care assurance reviews:

It is pleasing that the assurance reviews will provide greater transparency for consumers through the capacity of the Secretary to prepare and publish reports on assurance reviews including any recommendations and conclusions.<sup>31</sup>

- 1.33 Similarly, the Health Services Union (HSU) expressed their support for the assurance reviews. However, the HSU is of the view that the bill 'does not go far enough to achieve these objectives in practice' and recommended that assurance reviews be carried out on a regular basis and be published.<sup>32</sup>

- 1.34 LASA acknowledged that quality assurance reviews are important to support the effective and efficient administration of home care services. However, LASA expressed concerns that 'it should not take priority over the delivery of home care services' and recommended that:

... provision be made in the draft legislation for providers to have a right for response to an issued notice, in negotiating a reasonable timeframe for the provision of information.<sup>33</sup>

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<sup>27</sup> See, for example, LASA, *Submission 3*, p. 4; Uniting Care Australia, *Submission 5*, p. 3; Health Services Union (HSU), *Submission 6*, p. 3.

<sup>28</sup> See, for example, LASA, *Submission 3*, p. 4; OPAN, *Submission 2*, p. 2.

<sup>29</sup> Law Council of Australia, *Submission 4*, p. 6.

<sup>30</sup> The Hon Greg Hunt MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 27 May 2021, p. 7.

<sup>31</sup> COTA Australia, *Submission 1*, p. 2.

<sup>32</sup> HSU, *Submission 6*, p. 3.

<sup>33</sup> LASA, *Submission 3*, p. 13.



### *Aged Care Financing Authority*

- 1.35 The Government agreed to establish an advisory group to replace ACFA which will commence operations from July 2021 to ensure the government continues to receive advice on financing issues of the aged care sector. As mentioned earlier in the report, the new advisory body will be established to provide advice to Government on aged care financing issues. As such the bill repeals the requirement for the minister to establish the ACFA committee.<sup>34</sup>

### **Issues raised by submitters**

- 1.36 COTA Australia noted that since its establishment ACFA 'has published well respected and widely well received annual reports providing important longitudinal data about the aged care system'.<sup>35</sup>
- 1.37 COTA Australia and LASA recommended that the Government ensures that independent annual reports continue to be delivered within the new arrangements starting from July 2021.<sup>36</sup>

### **Committee view**

- 1.38 The Government established the Royal Commission into Aged Care Quality and Safety to ensure that the oldest and most vulnerable Australians receive care that supports and respects their dignity, and recognises the contribution they have made to society. The Government welcomed the final report of the Royal Commission and has founded its response on the principles of respect, care and dignity.
- 1.39 The Government is committed to deliver a \$17.7 billion package of support and a once in a generation reform to aged care. Overall, the reform to aged care will empower senior Australians to have more control and choice over the care services they need.
- 1.40 The bill provides the first stage of aged care reform in response to the Royal Commission and introduces a number of urgent amendments to ensure senior Australians receive the high-quality and safe aged-care services they deserve. It is a very significant first step to setting the foundations for key structural and governance change across the aged care system.

### **Recommendation 1**

- 1.41 The committee recommends that the bill be passed.**

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<sup>34</sup> The Hon Greg Hunt MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 27 May 2021, p. 7.

<sup>35</sup> COTA Australia, *Submission 1*, p. 3.

<sup>36</sup> COTA Australia, *Submission 1*, p. 3; LASA, *Submission 3*, p. 13.

**Senator Wendy Askew**  
**Chair**

## **Additional comments by Labor Senators**

- 1.1 The changes proposed in this Bill will strengthen legislation on the use of restrictive practices and restraints in aged care. These changes are welcome and, as the Royal Commission into Aged Care Quality and Safety (the Royal Commission) identified, much needed.
- 1.2 However, Labor Senators note that they do not agree with this Report's characterisation of the Government's response to the Royal Commission's Final Report as 'a once in a generation reform to aged care'.
- 1.3 Labor Senators note that the Government's response to the Royal Commission's Final Report falls short of solving a number of key issues within the aged care sector, raised by the Royal Commission. They also note that it fails to deliver enduring improvements and reforms for the long term. The Government's response to the Royal Commission:
  - It fails to deliver meaningful recognition and support for the workforce. It did not contain anything to improve the wages for overstretched, undervalued aged care workers.
  - It failed to implement appropriate checks, balances and transparency measures around the use of public funding. This includes ensuring the \$3.2 billion commitment to increasing the Basic Daily Fee actually goes to improving care and nutritional outcomes for aged care residents.
  - It fails to clear the Home Care Package waitlist of 100,000.
  - It ignores the recommendation to require a nurse to be on duty 24 hours a day, 7 days a week, in residential aged care homes.
  - It fails to deliver the full recommendation of 215 mandatory care minutes per aged care resident per day.
- 1.4 The self-congratulatory language used, by the Government and contained in this Report, to describe the Government's response to the Royal Commission is inaccurate and it does not assist in improving the urgent needs of those using the aged care system.
- 1.5 Labor Senators support the recommendation of the committee report that the Bill be passed.

**Senator Nita Green**

**Senator Helen Polley**



# Additional comments by the Australian Greens

- 1.1 The Australian Greens are generally supportive of the measures in the Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021.
- 1.2 While we welcome the opportunity to have an inquiry into this Bill, we are disappointed with the short timeframe and the fact that stakeholders were asked to comment on the Bill without a copy of the draft regulations.

## Restrictive practices

- 1.3 Restrictive practices have been a serious issue in aged care for more than 20 years. As highlighted by the Royal Commission into Aged Care Quality and Safety:

The inappropriate use of unsafe and inhumane restrictive practices in residential aged care has continued, despite multiple reviews and reports highlighting the problem. It must stop now.<sup>1</sup>

- 1.4 This bill, and the associated draft regulations, improve the regulation of restrictive practices in aged care. The Greens welcome the introduction of behavioural support plans, monitoring and reporting, use of restrictive practices for the shortest time possible, and the requirement to gain informed consent for the use of any restrictive practice.
- 1.5 However, we believe the new regulations do not go far enough and do not fully implement the Royal Commission's recommendations on restrictive practices.
- 1.6 The Royal Commission recommended that restrictive practices should be prohibited unless recommended by an independent expert. While the regulations require approved health practitioners to approve the use of restrictive practices, it is unclear whether these health practitioners will need to be independent of the aged care facility and provider. As a result, aged care providers will be able to use their in-house health practitioners to approve the use of restrictive practices.
- 1.7 As noted by OPAN:

There is a risk that in residential care facilities they could have their own RNs approving restraint to make life easier for everyone at the facility.<sup>2</sup>
- 1.8 The Royal Commission also recommended that restrictive practices should only be used after alternative evidence-based strategies have been explored, applied and documented. The Greens are concerned that the regulations

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<sup>1</sup> Aged Care Royal Commission Final Report, p. 68.

<sup>2</sup> OPAN, *Submission 2*, p. 2.

qualify the need to use alternative strategies through the phase “to the extent possible”. This could leave the door open for aged care providers to somewhat explore alternative strategies.

- 1.9 The regulations also permit the use of restrictive practices in emergencies, noting the requirements do not apply if the use of restrictive practices is necessary in an emergency.

- 1.10 As noted by the Law Council of Australia:

The phrase ‘necessary in an emergency’ is broad and subjective – opinions may differ as to whether an action or intervention is necessary or the situation in question is ‘an emergency’.<sup>3</sup>

- 1.11 COTA also expressed concerns about the emergency provisions:

There is no maximum time that an “emergency” may continue before these principles apply again, leaving open the possibility of an emergency continuing for some time... COTA Australia urges the Committee to be satisfied that the ‘excuse’ of an emergency will not be allowed to become a loophole through which ongoing restrictions could occur over a prolonged period. We would submit that no more than 7 days would be the absolute maximum period that ‘emergency’ rules should apply, and we would prefer a shorter period.<sup>4</sup>

- 1.12 The Greens understand that aged care providers will be responsible for determining when an emergency has passed. We also understand that using the emergency provisions on the same person more than once will constitute a red flag for the Aged Care Quality and Safety Commission. We will be seeking clarification from the Minister about the emergency provisions during the debate on this bill.

- 1.13 Stakeholders also raised concerns that current funding arrangements do not enable a preventive approach.

- 1.14 UnitingCare noted:

These principles have not yet, however, been translated into adequate funding or staffing of aged care services. There is currently very limited capacity to undertake the workforce expansion and development that is essential to underpin understanding of an individual’s full range of needs, and effective de-escalation of behaviour.<sup>5</sup>

- 1.15 The Health Services Union also noted the Bill will not achieve its intentions without addressing structural issues, such as staff training:

The Bill provides no requirement for staff to be adequately trained in the use of restrictive practices, nor does it detail how approved providers will ensure staff receive adequate training. Additionally, the Bill makes no

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<sup>3</sup> Law Council of Australia, *Submission 4*, p. 15.

<sup>4</sup> COTA Australia, *Submission 1*, p. 1.

<sup>5</sup> UnitingCare, *Submission 5*, p. 3.

mention or connection to the number of staff or skills mix of staff. Adequate training and staffing are directly linked to the delivery of high-quality care and therefore can minimise use of restrictive practices.<sup>6</sup>

- 1.16 The Greens share these concerns and recognise the difficulties in implementing the new regulations without addressing structural workforce issues. We understand that a senior practitioner sitting under the Aged Care Quality and Safety Commission will be providing training, advice and education to the sector on the use of restrictive practices. We will be seeking clarification from the Minister about this process during the debate on the Bill.
- 1.17 The Greens will be closely monitoring the implementation of the new regulations to ensure that we are moving towards the phasing out of restrictive practices in aged care. Following the conclusion of the Royal Commission into Violence, Abuse, Neglect, and Exploitation of People with Disability, we expect the Government will re-visit and update the regulations in light of any findings about restrictive practices. We also expect the Government will review the operation of the new regulations when drafting the new Aged Care Act.

### **Home care assurance reviews**

- 1.18 This Bill allows the Secretary to conduct home care assurance reviews to inform continuous improvement of home care. The Greens understand that the Government plans to undertake 500 home care assurance reviews in the first 12 months with a focus on unjustified administration charges and overheads. Given there are around 928 home care providers operating in Australia, not all providers will undergo assurance reviews. We welcome the fact that the results of the reviews will be published on the Department's website.
- 1.19 The Health Services Union noted concerns that the bill does not go far enough to increase home care provider transparency and accountability. The Bill does not specify how often the Secretary is required to carry out assurance reviews and the publication of reports is at the Secretary's discretion.<sup>7</sup>
- 1.20 COTA also noted concerns that Section 86 of the Aged Care Act may result in restrictions on the disclosure of information in the assurance reviews:

We suggest the Committee seeks assurances that the content of 'assurance review' reports will not be hindered by Section 86 and that the Parliament should not feel it necessary to provide the Secretary with specific powers to ensure that the maximum appropriate amount of information from assurance reports is made public.<sup>8</sup>

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<sup>6</sup> Health Services Union, *Submission 6*, p. 2.

<sup>7</sup> Health Services Union, *Submission 6*, p. 3.

<sup>8</sup> COTA Australia, *Submission 1*, p. 2.

- 1.21 The Greens share these concerns and will be seeking assurances that current provisions in the Aged Care Act will not be used to block the publication and release of information relating to home care assurance reviews.
- 1.22 While we welcome these attempts to improve transparency of home care fees, we call on the Government to introduce more serious changes to improve transparency and accountability across the entire aged care sector.

### **Aged Care Financing Authority**

- 1.23 This Bill abolishes the Aged Care Financing Authority (ACFA). The Greens understand a new group reporting to the new National Aged Care Advisory Council will replace ACFA. We note the important role that ACFA played in producing independent reports on the financial performance of the sector.
- 1.24 We call on the Government to ensure there will be no gap between the dismantling of ACFA and the introduction of the new group that will provide advice on financing issues in aged care. We also expect that the Government will continue to fund and publish independent annual reports on the financial performance of the aged care sector.

**Senator Rachel Siewert**



# Appendix 1

## Submissions

### *Submissions*

- 1 COTA Australia
- 2 Older Person's Advocacy Network
- 3 Leading Age Services Australia
- 4 Law Council of Australia
- 5 UnitingCare Australia
- 6 Health Services Union