

Submission to Productivity Commission's study into Indirect
Employment in aged care.

Dr. Elsa Underhill, M.Com (Melb), PhD (UNSW), Deakin University
Victoria

29th April 2022.

I, Dr. Elsa Underhill, M.Com (Melb), PhD (UNSW), Visitor, Deakin University Victoria make the following submission to the Productivity Commission's study into Indirect Employment in aged care, in response to the Issues Paper released in March 2022. The study looks at the use of indirect employment in aged care – with a particular focus on independent contactors (including those in labour hire agencies) and workers engaged through digital platforms in residential and home-based aged care and the implications for consumers, the aged care workforce and aged care providers. This submission focuses upon the 'information requests' presented in the Issues Paper on pages 12, 21, 28 and 29).

I have conducted substantial research into labour hire employment, commencing with my doctoral thesis (UNSW) which focused upon the employment and occupational health and safety implications of labour hire employment. I have been researching insecure/precarious work and particularly its effects on health/safety, workers' compensation and labour standards amongst labour hire workers since the early 1990s. My more recent research has focused upon temporary migrant workers, especially visa 417 working holiday makers. I have published extensively on these subjects, made submissions to government enquiries, and been an expert witness for WorkSafe Victoria in several prosecutions involving injuries/deaths to labour hire workers. My research has been published and cited in international and Australian academic journals. Through my research I have surveyed and conducted focus groups of labour hire employees; I have examined worker's compensation claims of labour hire and comparable direct hire workers; and I have conducted focus groups with labour hire employers and employers that use labour hire workers (with Prof. Michael Quinlan, UNSW). My expertise in labour hire employment is drawn upon in this submission. A listing of the more directly relevant material and evidence of my expertise can be found in Appendix 1.

The Issues Paper on Indirect Employment in Aged Care notes that the workforce in age care has been the subject of several reviews, "that have highlighted the following issues:

- Staff and skills shortages that will not, in light of a growing population, meet the growing demand for aged care services
- Poor working conditions such as low pay and inconsistent working hours, forcing workers to hold multiple jobs
- High staff turnover and staff retention issues, including significant movement between organisations; and
- Lack of skill development and career progression, leading staff to move to other industries" (Productivity Commission, 2022, p. 6).

The Issues Paper also notes (at p.6) that "The Royal Commission also recommended that the proposed new Aged care Act include a non-delegable duty that organisations that provide subsidised aged care services provide safe and high quality services and that their personal care and nursing staff have the experience, qualifications, skills and training to perform the work that they are being asked to perform."

Recommendation 87 of the Royal Commission concerns employment status and related labour standards as enforceable standards. It recommends that as an ongoing condition of holding an approval to provide aged care services,

- a. approved providers: have policies and procedures that preference the direct employment of workers engaged to provide personal care and nursing services on their behalf; and
- b. where personal care or nursing work is contracted to another entity, that entity has policies and procedures that preference direct employment of workers for work performed under that contract.

This recommendation was supported by their findings that modes of engagement affect the quality of care provided, and that 'monitoring and checking the quality of care ... is far simpler when employing staff directly' (Issues Paper, p. 7).

The Productivity Commission has sought information on a number of issues related to the preferencing of direct hire employment. I address several of these below.

Issues paper (page 12): Defining key concepts and the study's scope:

For the purposes of the study, the Commission proposes to focus primarily on the use of independent contractors (including those in labour hire agencies) and platform workers among nursing and personal care workers in residential and home-based age care. Should labour hire agency workers who are directly employed by the agency also be a major focus of the analysis? If so why?

Labour hire agency workers who are directly employed by the agency should be a major focus of the analysis. The limitations associated with labour hire placements occur irrespective of whether the worker is hired as an employee or independent contractor. These include deleterious impacts on workers, and deleterious impacts on aged care recipients.

For example, over several decades, a large body of global research and evidence, amounting to many hundreds of independent peer-reviewed scientific studies (including a significant number undertaken in Australia) have examined the association between job insecurity, precarious work arrangements and occupational health and safety (OHS). These include studies focusing on casuals, temporary work, labour hire/agency labour, part-time and fixed-term contract employees and self-employed subcontractors. There is often overlap with these categories, and some workers move between status within short time-frames, such as being an employee with an agency for one shift, and then an independent contractor with another agency for a second shift on the same or the next day. These studies have overwhelmingly found a significant relationship between job insecurity – a common characteristic of agency work – and negative OHS outcomes. These negative health outcomes include:

1. Higher incidence/frequency of injuries, including fatalities
2. Poorer physical and mental health (including susceptibility to bullying and drug use);
3. Poor knowledge of and access to regulatory employment rights and less willingness to raise OHS concerns.ⁱ

These findings are relevant to all agency workers, irrespective of whether they are hired as employees or independent contractors.

Research has identified factors such as poor supervision, poor knowledge of workplace specific equipment and other idiosyncrasies, and lack of training associated with labour hire work – irrespective of whether the worker was an employee or an independent contractor.

Likewise, the recent experience of agency workers placed at multiple aged care homes, and transmitting covid-19 across those sites, did not distinguish between whether those workers were employees or held an ABN.ⁱⁱ

The high level of multiple job holding identified in the Issues Paper, and its implications for the development of care and quality standards required in the aged care sector, occurs irrespective of whether the worker is an employee or independent contractor hired by an agency.

To limit the analysis to labour hire workers hired as independent contractors is to draw a false line based on a lack of understanding of how labour hire arrangements operate.

Issues paper (page 21): Regulation of indirect employment in aged care

What are the implications for aged care recipients of using agency workers, independent contractors, or platform workers to provide government subsidised care?

Who is responsible for the quality of care provided in these circumstances?

Does the situation differ if the worker is engaged as an independent contractor rather than as an employee of an agency or a platform?

Who is currently accountable for lapses in work health and safety or quality of care when care is delivered by agency workers, independent contractors or platform workers?

Is there any evidence that the existing regulatory framework is deficient in scope, implementation or enforcement?

The blurring of responsibilities resulting from tiered subcontracting, whether through labour hire agencies or through independent contracting arrangements (platform based or more traditional processes) is well established in international research, and evidenced through complex legal cases. This blurring of responsibilities is not industry specific, and occurs in aged care as it does in other industries.

As acknowledged by the Royal Commission into Aged Care Quality and Safety, the consequences of a failure to have clear lines of responsibility in aged care can have devastating and potentially fatal consequences for aged care recipients.

Regulatory failure arises from gaps or flaws in legislative coverage, as well as limitations in regulatory oversight/enforcement.ⁱⁱⁱ Changes in work arrangements, and particularly independent contracting and labour hire arrangements, present more complex inter-organisational chains of responsibility and increase demands on regulator/inspectorate resources. They also reduce the capacity of organisations to control the working environment, and supervise their workforce, which impacts

directly upon aged care recipients. Problems that have been identified include poorer knowledge of and ability to exercise legislative rights amongst agency and other precarious workers, fractured/disputed regulatory obligations and more problematic regulatory oversight and stretched inspectoral resources. Research on temporary workers has found they are significantly less likely to have access to complaint mechanisms, health services, statutory entitlements to protections/benefits, return to work pathways, and representation.^{iv} These issues are compounded for independent contractors that do not have a direct employer with responsibilities. A Swedish study found temporary workers were less likely to raise safety issues than permanent workers and when they did raise concerns they were less likely to be treated seriously. The lack of protection for workers in aged care flows through to a lack of protection to aged care recipients. Workers need protection to voice their concerns about care and quality standards in aged care, without risking their economic security.

Issues Paper (page 28): What are the pros and cons of agency workers, independent contractors and platform workers in aged care for:

Aged care recipients (in terms of quality of care and consumer choice)

Aged care workers (in terms of employment conditions and worker preferences)

Aged care providers (in terms of job creation and availability of workforce, flexible and innovative models of care, accountability of aged care providers for the care delivered on their behalf, costs of providing care and viability of aged care providers?)

Responses to these questions are interrelated. Quality care for aged care recipients is dependent, in part, upon aged care providers being able to offer skilled, caring workers (including sufficient time to care). This requires aged care providers to investment in the skills of the workforce, with certainty that funds spent on training and upskilling their workforce will provide a return to the organisation. This will only occur when aged care providers directly employ their workers, and employ them for sufficient hours to reap a return on the training. The development of internal labour markets offering career paths to aged care workers will also contribute to greater job satisfaction and higher retention rates. Likewise, flexible and innovative models of care require a stable workforce that can understand and apply those models. The capacity of providers to invest in training and development however, will be constrained when competing organisations choose to prioritise low skill, low wage workers without penalty. This vicious circle has to be broken in order to promote quality care.

Aged care providers will not invest in the skills and training of workers placed with them but employed by others, such as labour hire agencies; and most labour hire agencies do not invest in the skills of their workforce because those workers are casuals and can be easily replaced if their performance does not meet required standards.

Aged care workers, like workers in other industries, are disadvantaged when working for agencies, platforms, or when offered no choice but to work as an ABN independent contractor. The vulnerability of agency workers has been recognised by State governments that now require licensing of labour hire agencies (Queensland, Victoria and now South Australia); and the Victorian Government has

accepted key recommendations to protect platform workers following an enquiry into platform work. These State level actions point to the need for wider recognition of inherent risks to workers hired through agencies (whether through online platform or other modes of hire).

A wide range of studies of labour hire workers, both in Australia and internationally, have found^v:

1. Agency workers receive a lower hourly rate of pay than directly hired workers, and the casual loading, when paid, does not cover that gap;
2. Agency workers would overwhelmingly prefer to be employed directly than by an agency;
3. Australian and international evidence shows that organisations used labour hire agency workers primarily to reduce costs and increase flexibility. The burden of these objectives is borne by agency workers; and
4. As noted earlier, agency workers are more likely to be injured, and injured more severely, than directly hire workers. They are also less likely to be offered employment post-injury at work.

Together, these characteristics create a disincentive to labour hire workers in aged care to invest in their own skills and training when the only job opportunities on offer are short hour, low paid agency jobs. The aged care sector needs to offer more full-time direct employment in order to attract workers with appropriate skills and training to ensure quality care.

Issues Paper (page 29):

What are the potential impacts of preferencing the use of direct employment of personal carers and nurses in aged care?

Preferencing the direct employment of personal carers and nurses in aged care would be expected to minimise many of the problems for workers and quality care identified above. It should also reduce the problem of multiple job holding and underemployment identified in the Issues Paper. Organisations will have an incentive to invest in the skills of their workforce because they will reap the return on that investment. When organisations have invested in the skills of their workforce, they have an incentive to retain those workers and to offer them sufficient working hours to promote retention. Care recipients will benefit from a more skilled and better trained workforce, and from on-going relationships with those workers that are critical to well-being. The aged care sector will become increasingly attractive to a wider share of the workforce, in contrast to its current reputation as low paid, short hour, last resort work.

APPENDIX 1: EVIDENCE OF EXPERTISE DR. ELSA UNDERHILL.

Government agency and Industry Reports including significant consideration of effects of insecure/precarious work

1. Underhill, E., Worland, D., & Fitzpatrick, M. (1997). *Self-employment in the Victorian construction industry: An assessment of its impact on individual workers and the industry*. Melbourne: Workplace Studies Centre, Victoria University and Incolink (the Redundancy Payment Central Fund Limited).
2. Gallagher, C., Underhill, E., & Rimmer, M. (2001). *Review of the Effectiveness of OHS Management Systems in Securing Healthy & Safe Workplaces*. Sydney: National Occupational Health & Safety Commission.
3. Underhill, E. (2002). *Extending Knowledge on Occupational Health & Safety and Labour Hire Employment: A Literature Review and Analysis of Victorian Worker's Compensation Claims*. Melbourne: WorkSafe Victoria.
4. Underhill, E. (2004). *Working under labour hire arrangements: The experience and views of Victorian labour hire employees*. Melbourne: Report for the Victorian Trades Hall Council.
5. Underhill, E. and Quinlan, M. (2010) *Strategies for Improving the Safe Placement of Labour Hire Workers*, Report Prepared for the Queensland Division of Workplace Health and Safety, Melbourne: Deakin University.
6. Underhill, E. (2013). *A Review of Licensing Arrangements for Labour Hire Firms*. Report prepared for the National Union of Workers. Melbourne Deakin University.
7. Underhill, E., Huang, S., Yi, S., & Rimmer, M. (2018) *Information Seeking Behaviours of temporary visa workers in Victoria*, Report Prepared for IR Victoria, Melbourne, Deakin University,

Refereed articles and editorials in scholarly/scientific journals

1. Underhill, E., & Kelly, D. (1993). Eliminating traditional employment: Troubleshooters available in the building and meat industries. *Journal of Industrial Relations*, 35(3), 398-423.
2. Underhill, E. (1999). The Victorian Labour Hire Maintenance Workers' Strike of 1997. *The Economic and Labour Relations Review*, 10(1), 73-91.
3. Gallagher, C., Underhill, E., & Rimmer, M. (2003). Occupational safety and health management systems in Australia: barriers to success. *Policy & Practice in Health and Safety*, 1(2), 67-81.
4. Underhill, E. (2005). Winners or losers? Work/life Balance and Temporary Agency Workers. *Labour and Industry*, 16(2), 29-59.
5. Underhill, E. (2006). Labour hire employment and independent contracting in Australia: two inquiries, how much change? *Australian Journal of Labour Law*, 19, 306-314.
6. Underhill, E., & Quinlan, M. (2011). How precarious employment affects health and safety at work: the case of temporary agency workers. *Relations Industrielles*, 66(3), 397-421.
7. Underhill, E. Lippel, K. & Quinlan, M. (2011) Editorial: Precarious work: recent research and policy challenges, *Policy and Practice in Health and Safety*, 9(2):1-5.
8. Underhill, E. and Quinlan, M. (2011) Beyond statutory enforcement – alternative approaches to improving OHS in the Temporary Agency Sector, *Policy and Practice in Safety and Health*, 9(2):109-131.
9. Underhill, E., & Rimmer, M. (2015). Itinerant foreign harvest workers in Australia: the impact of precarious employment on occupational health and safety. *Policy and Practice in Health and Safety*, 13(2), 26-46.
10. Underhill, E., & Rimmer, M. (2016). Layered vulnerability: Temporary migrants in Australian horticulture. *Journal of Industrial Relations*, 58(5), 608-626.
11. Underhill, E., & Rimmer, M. (2017). Private governance, state regulation and employment standards: how political factors shape their nexus in Australian horticulture. *Relations Industrielles*, 72(1), 33-55.
12. Underhill, E., Groutsis, D., van den Broek, D., & Rimmer, M. (2018). Migration Intermediaries and Codes of Conduct: Temporary Migrant Workers in Australian Horticulture. *Journal of Business Ethics*, 153(3), 675-689.
13. Underhill, E., Huang, S., Yi, S., & Rimmer, M. (2019/20). Using social media to improve temporary migrant workers' access to information about their employment rights. *Journal of Australian Political Economy*, 84, 147-176.
14. Underhill, E. & Rimmer, M. (2020) Organising across borders: Mobilising temporary migrant labour in Australian food production. *Journal of Industrial Relations*, 62 (2): 278-303.

Chapters in books

1. Underhill, E. (1991). Unions and contract workers in the New South Wales and Victorian Building Industries. In M. Bray & V. Taylor (Eds.), *The Other Side of Flexibility: Unions and Marginal Workers in Australia* (Vol. Monograph No.3, pp. 115-142). Sydney: ACIRRT, University of Sydney.
2. Underhill, E. (2005). The importance of having a say: Labour hire employees' workplace voice. In M. Baird, R. Cooper & M. Westcott (Eds.), *Reworking Work ARAANZ 05* (Vol. 1, pp. 527-536). University of Sydney: Association of Industrial Relations Academics of Australia and New Zealand.
3. Underhill, E. (2006). "We only supply fully fit workers to suit our clients' need" - Injured labour hire workers and their return to work experience. In B. Pocock & C. Provis (eds), *21st Century Work: High Road or Low Road? Refereed Proceedings of the 20th ARAANZ Conference*, Adelaide.
4. Underhill, E. (2006). The role of employment agencies in structuring and regulating labour markets. In C. Arup, P. Gahan, J. Howe, R. Johnstone, R. Mitchell & A. O'Donnell (Eds.), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets*. Sydney: Federation Press.
5. Underhill, E. (2007). Temporary agency workers and the contribution of workplace unfamiliarity to workplace injuries. In E. Rasmussen (ed.), *Diverging Employment Relations: Patterns in Australia and New Zealand? Annual ARAANZ Conference 2007*, Auckland.
6. Underhill, E., & Rimmer, M. (2009). State protection for temporary agency workers: Australian developments. In W. Bromwich, O. Rymkevich & S. Spattini (Eds.), *The modernisation of labour law and industrial relations in a comparative perspective* (pp. 173-192). The Netherlands: Kluwer Law International.
7. Underhill, E. and Rimmer, M. (2015) 'Temporary migrant workers in Australian horticulture: boosting supply but at what price?' in Pilati, M., Sheikh, H., Sperotti, F. and Chris Tilly, C. (eds.) *How Global Migration Changes the Workforce Diversity Equation*, Cambridge Scholars Publishing, Newcastle Upon Tyne, pp. 143-168.
8. Underhill, E., & Rimmer, M. (2019). *Overcoming the Challenge of Reaching an Itinerant Research Population Using a Multimethod Research Design*. London: Sage Publications Limited.
9. Underhill, E. (2022) 'The decline of unions and worker representation'. In P. Brough, M. Gardiner & K. Daniels (Eds.) *Handbook on Management and Employment Practices*, (pp. 855-871), Handbook Series in Occupational Health Sciences, Springer Link, Switzerland.

Submissions and evidence given to government inquiries, courts and tribunals

1. Underhill, E. (2003) Expert submission and cross examination on outsourcing maintenance at BHP Western Port, Australian Industrial Relations Commission, Melbourne.
2. Underhill, E. (2004) Invited to give evidence to Victorian Parliamentary Committee Inquiry into Labour Hire Employment in Victoria, Melbourne.
3. Underhill, E. (2004) Submission on labour hire workers' OHS to Maxwell Review of the Victorian Occupational Health and Safety Act.
4. Underhill, E. (2009, 2010, 2011, 2017) Expert reports prepared in connection with prosecution undertaken by WorkSafe Victoria (details are confidential).
5. Underhill, E. (2015) Submission to the *Productivity Commission Inquiry into the Workplace Relations Framework*, Melbourne
6. Underhill, E. (2015) Expert submission and cross examination on casual employment and OHS before the Fair Work Commission case, conversion of casual employees to permanent employment.
7. Underhill, E. and Rimmer, M. (2016) Submission to Senate Enquiry Senate Education and Employment Committee Inquiry into the impact of Australia's temporary work visa programs on the Australian labour market and on the temporary work visa holders.
8. Underhill, E. (2016) Invited to consultations for the *Victorian Inquiry into the Labour Hire Industry and Insecure Work*, Melbourne.
9. Underhill, E. (2017) Invited to consultations with the *Migrant Worker Taskforce (Fels)*, Melbourne.
10. Quinlan, M. and Underhill, E. (2021) *Submission to Senate Select Committee on Job Security*, Canberra.
11. Underhill, E. (2021) Expert witness in Application to establish a minimum wage for piece workers in the Horticultural Award, Fair Work Commission.

ⁱ Quinlan & Underhill (2021) *Submission to Senate Select Committee on Job Security*, Canberra. See for example Francois M, & Lievin D, (1995) *Emplois Precaires et Accidentabilite: Enquete Statistique Dans 85 Entreprises*. Paris, Institut National de Recherche et de Securite; Storrie D, (2002) *Temporary Agency Work in the European Union*, European Foundation for the Improvement of Living and Working Conditions, Dublin; Silverstein B, & Foley M, (1998) Protecting contingent workers from work-related injury. Paper presented to the Ergonomics Society of Australia Conference, October 5-7, Melbourne; Park Y, & Butler R, (2001) The safety costs of contingent work: Evidence from Minnesota, *Journal of Labor Research*, 22(4):831-850; Underhill E, (2008) *Double Jeopardy: Occupational injury and rehabilitation of temporary agency workers*, PhD thesis, UNSW Sydney; Lippel K, MacEachen E, Saunders R, Werhun N, Kosny A, Mansfield L, Carrasco C, Pugliese D, (2011) Legal protections governing the occupational safety and health and workers' compensation of temporary employment agency workers in Canada: reflections on regulatory effectiveness, *Policy and Practice in Health and Safety*, 9(2):69-90, DOI: 10.1080/14774003.2011.11667762. For reviews of this research see Quinlan, M. Mayhew, P. & Bohle, P. (2001) The Global Expansion of Precarious Employment, *Work Disorganisation and Occupational Health: A Review of Recent Research*, *International Journal of Health Services*, 31(2):335-414; Virtanen M, Kivimäki M, Joensuu M, Virtanen P, Elovainio M, & Vahtera J, (2005) Temporary employment and health: a review *International Journal of Epidemiology* 34:610–622; Quinlan, M. & Bohle, P. (2008) Under pressure, out of control or home alone? Reviewing research and policy debates on the OHS effects of outsourcing and home-based work, *International Journal of Health Services*, 38(3): 489-525; Quinlan, M. & Bohle, P. (2009), Over-stretched and Unreciprocated Commitment: Reviewing research on the OHS effects of downsizing and job insecurity *International Journal of Health Services* 39(1): 1-44

ⁱⁱ For some research on this see Vuma, C. Manganyi, J. Wilson, K. & Rees, D. (2019) The Effect on Fit of Multiple Consecutive Donning and Doffing of N95 Filtering Facepiece Respirators, *Annals of Work Exposures and Health*, 63(8): 930–936; Lippel, K. (2020) Occupational health and safety and COVID-19: Whose Rights Come First in a Pandemic? Colleen M. Flood, Vanessa MacDonnell, Jane Philpott, Sophie Thériault & Sridhar Venkatapuram (eds), *Vulnerable: The Law, Policy & Ethics of Covid-19*, University of Ottawa Press, Ottawa, 473-486 <https://ruor.uottawa.ca/handle/10393/40726>

ⁱⁱⁱ See for example Quinlan M, Johnstone R & McNamara M, (2009) Australian health and safety inspectors' perceptions and actions in relation to changed work arrangements *Journal of Industrial Relations* 51(4): 559-575; Johnstone R, Quinlan M & Mayhew C, (2001) Outsourcing Risk? (2001), The regulation of OHS where contractors are employed, *Comparative Labor Law and Policy Journal*, 22(2&3): 351-93; Johnstone, R. & Quinlan, M. (2006) The OHS Regulatory Challenges of Agency Labour: Evidence from Australia *Employee Relations*, 28(3): 273-289.

^{iv} Aronsson, G. (1999) Contingent Workers and Health and Safety, *Work, Employment and Society*, 13(3): 439–459.

^v Details of these research findings can be supplied on request.