

Indirect employment in aged care

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Commission

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ABOUT ACSA

Aged & Community Services Australia (ACSA) is the leading aged care peak body supporting around 500 church, charitable and community-based, not-for-profit organisations. Not-for-profit organisations provide care and accommodation services to about one million older Australians.¹

ACSA represents, leads, and supports its members to achieve excellence in providing quality affordable housing and community and residential care services for older Australians.

Aged care providers make a significant \$17.6 billion economic contribution to Australia, representing 1.1% of GDP by producing outputs, employing people and through buying goods and services. The direct economic component is akin to the contribution made by the residential building construction and sheep, grains, beef, and dairy cattle industries.²

ACSA members are important to the community and the people they serve and are passionate about the quality and value of the services they provide, irrespective of their size, service mix or location.

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¹ Australian Government, Department of Health, Report on the Operation of the *Aged Care Act 1997*, December 2016.

² Deloitte Access Economics, Australia's aged care sector: economic contribution and future directions, Aged Care Guild, June 2016, page 24.

INDIRECT EMPLOYMENT IN AGED CARE

BACKGROUND

The Productivity Commission has been tasked by the Australian Government³ with examining employment models in aged care, and the *'effects that policies and procedures to preference the direct employment of aged care workers would have on the sector.'* This stems from Recommendation 87⁴ of the Royal Commission into Aged Care Quality and Safety⁵ (the Royal Commission) that recommended the Australian Government require as an ongoing condition of holding an approval to provide aged care that approved providers preference the 'direct employment' of workers engaged to provide personal care and nursing services, and additionally where a provider contracts for care or nursing services from another provider, that provider also preferences 'direct employment' of workers.

This recommendation stems from the Royal Commission's view that 'indirect employment' arrangements risk eroding the quality of care, accountability for the care provided, and pay and conditions for workers.⁶ Commissioner Briggs considered 'direct employment' as the best model to achieve the proposed reforms and deliver quality care.

The Productivity Commission's Issues Paper (the Paper) looks at 'indirect employment' in aged care (particularly in home care) with a focus on independent contractors and digital platforms, and for the purpose of the study focusses on personal care workers and nurses.

It is to these important matters that we are pleased to respond, noting our responses will also primarily focus on nurses and personal care workers in the home care environment.

³ The Australian Government's response to Recommendation 87 of the Royal Commission was to task the Productivity Commission with undertaking a study to examine employment models in aged care, and the effects that policies and procedures to preference the direct employment of aged care workers would have on the sector. A final report will be provided to the Government in September 2022.

⁴ [Aged Care Royal Commission Final Report: Recommendations](#)

⁵ [Royal Commission into Aged Care Quality and Safety](#)

⁶ Indirect employment in aged care - Issues Paper. Australian Government Productivity Commission, 2022, p4

EXECUTIVE SUMMARY

Historically providers have generally limited themselves to using labour hire agencies to supplement their nursing and personal care workforce in response to short-term needs. Generally, these workers have been employees of the labour hire agency.

Any consideration of preferencing direct engagement must not negatively impact on provider's ability to engage labour hire workers (in an environment of chronic worker shortage) whether they are 'employees' of a labour hire firm or independent contractors.

Where workers are either employed directly by an approved provider or where they are employees of a labour hire firm contracted by an approved provider, the approved provider is accountable for the quality of care provided. Where it is less clear is where a consumer, exercising their consumer directed choice, directly engages an independent contractor or platform worker (who is not an employee of the platform host). We recommend this matter be considered by the Productivity Commission as part of their review, as it requires greater clarity.

Where an aged care provider is likely to employ independent contractors is the engagement of allied health professionals to deliver specialised health services. This arrangement has traditionally worked well. Any proposed change towards preferencing direct engagement, must consider potential negative impacts on the ability of providers to contract independent allied health professionals.

Currently nurses and personal care workers who are employed on an agency/subcontractor basis currently account for just one per cent of the workforce⁷. We expect this percentage number to rise in a consumer centric environment that promotes consumer directed choice. The Department of Health's proposed Support at Home (SaH) Program⁸ will likely open up the market further to new service providers driving a growth in independent contractors and platform workers.

Conventional wisdom states employers get better engagement with employees than they do with contract workers. Employees are believed to be better engaged, better trained, have more commitment to quality outcomes, and that they deliver continuity of care. However, the Paper notes that this is anecdotal with little 'direct evidence' this is the case.

If the Productivity Commission considers recommending 'preferencing direct employment' this must be backed by evidence. ACSA cannot find any robust evidence to support preferencing direct employment or otherwise. Research should be undertaken to determine if there is direct correlation between direct employment and quality of care or service delivery outcomes for consumers.

A stated benefit of the employment relationship is that employers can ensure nurses and personal care workers receive appropriate training and development, helping to ensure they have the skills and aptitude required to deliver quality care. Research is needed to understand the skills and training levels attained by employees, verses that attained by independent contract

⁷ IBID, p15

⁸ Ageing and Aged Care Support at Home Program Overview, Australian Government Department of Health, Jan 2022

workers. If research were to indicate that independent contract workers and platform workers consistently demonstrate less training and development attended, consideration should then be given to what should be done to address this.

In engaging an independent contractor or platform worker (who is not an employee of the platform) how is the consumer to be assured of the quality of service they will receive and what will be their recourse if they are not happy with the quality of care or services delivered? This needs to be considered.

For workers themselves, the ability to work as an independent contractor may provide them with a range of benefits such as the ability to choose their hours of work, to be able to supplement income, to determine the work they will perform etcetera. This level of control is likely to provide positive motivations to the worker. But this comes with risk. An independent worker must negotiate their contractual arrangement directly with the consumer and if they are a platform worker also with the platform host. The Paper notes that in some overseas countries protections for independent workers are being addressed, through having 'distinct categories' in place⁹ rather than restricting the use of these workers. This is something we recommend be considered in Australia, so that independent workers are provided minimum protections.

The ability to engage contractor workers has been shown to be beneficial during the pandemic where we have seen increased workforce pressures on an already over-stretched workforce. The ability to engage a surge workforce must not be diminished, particularly in the current environment.

Providers must be able to engage contractors to undertake time limited work to address fluctuations in workforce demand or where specialist skills are required.

We support the consumer's right to directly engage an independent contractor, but where they do so they should bear the risk.

Where a consumer directly engages a platform worker, the platform provider should be held to the same standard of accountability for quality of service delivery as an approved provider.

An approved provider should only be held accountable for the quality of services delivered by a worker where they have an employment or contractual relationship with that worker.

⁹ IBID, p20

THE COMMISSION'S PROPOSED APPROACH

The Paper notes that 'direct employment' is not a term that is widely used in industrial relations in Australia.

It notes that employees are typically engaged directly by employers or through labour hire agencies where workers are typically employees of the agency, with most workers in aged care employees of an aged care provider.¹⁰

Workers employed through digital platforms can be either independent contractors or employees (typically casual).

The Paper notes the employment relationship is complicated where the consumer engages their support worker directly through a digital platform but where the worker is 'paid' by an approved aged care provider¹¹ through the consumer's home care package funds. The complication lies in determining who the employer is in these circumstances and therefore who has ultimate responsibility for the quality of the care or support provided (the consumer themselves or the approved provider)?

According to the Paper nurses and personal care workers who are employed on an agency/subcontractor basis account for just one per cent of the workforce.

Question: Should labour hire agency workers who are directly employed by the agency also be a major focus of the analysis? If so, why?

NO, our view is that the study should focus on looking at independent contractors and platform workers; as workers who are employees of an agency will have all the benefits, conditions and protections that come with being employed.

DIGITAL PLATFORMS

The emergence of digital platforms follows the move to a more open, consumer driven environment.

Digital platforms connect consumers with workers, with the former posting a job and then selecting a worker that meets their needs. The terms of the arrangement are negotiated between the consumer and the worker.¹² Platform hosts generally charge a percentage fee to both the consumer and the worker.

Platform hosts often undertake a range of basic functions such as worker screening checks, require a relevant police clearance, qualifications, undertake reference checks etcetera. The key

¹⁰ IBID, p9

¹¹ [Approved provider status](#)

¹² IBID, p17

point being that generally the consumer directly engages the worker as an independent contractor and these workers have no employment relationship with the platform.¹³

Question: To what extent do aged care providers use agency workers, independent contractors and platform workers for personal care and nursing roles?

Historically providers have generally limited themselves to using Labour hire agencies to supplement their nursing and personal care workforce in response to short-term needs to fill gaps in rosters, backfill leave, cover shortfalls during winter periods etcetera. Generally, these workers have been employees of the labour hire agency.

Providers have generally limited their use of labour hire staff due to the cost differential involved and the break in workforce continuity that occurs when using contractor staff.

Notwithstanding these, the availability of labour hire staff is vital to the sector, particularly so in an environment of chronic worker shortages and a pandemic.

Any consideration of preferencing direct engagement must not negatively impact on provider's ability to engage labour hire workers whether they are 'employees' of the labour hire firm or independent contractors.

Question: What types of tasks do independent contractors and platform workers in caring roles undertake? Are these different to the tasks undertaken by employees or labour hire workers?

These types of workers generally perform the same type of work as employees of aged care providers and employees of aged care labour hire agencies, what is different is the governance arrangements of the workers.

In the home and community setting they would perform the same care and support tasks as attended by employees of Commonwealth Home Support Program (CHSP) providers and Home Care Package (HCP) program providers, including social supports; domestic assistance; transport support; shopping support; maintenance and gardening tasks and personal care.

As will be discussed elsewhere, accountability of the approved provider for the quality of care delivered is less clear where a consumer directly engages an independent contractor or platform worker.

It is not our experience that providers would generally engage independent contractors or platform workers for nursing or direct care tasks, the need for additional staff would generally be filled through contracting with labour hire agencies who would (generally) employ their workers, although this may have changed during the current pandemic.

Where an aged care provider is likely to employ independent contractors is the engagement of allied health professionals (typically physiotherapists, podiatrists, occupational therapists, speech pathologists etcetera) to deliver specialised health services. This arrangement has traditionally worked well, and we expect it to continue to do so.

¹³ IBID, p17

Any proposed change towards preferencing direct engagement, must consider potential negative impacts on the ability of providers to contract independent allied health professionals.

Question: Is the use of agency workers, independent contractors, and platform workers likely to increase in the future? If so, why?

As the Paper notes, currently nurses and personal care workers who are employed on an agency/subcontractor basis currently account for just one per cent of the workforce¹⁴. We expect this percentage number to rise in a consumer centric environment that promotes consumer directed choice.

The Department of Health's proposed Support at Home (SaH) Program¹⁵ may open the market further to new service providers driving a growth in independent contractors and platform workers.

The SaH program proposes a model which brings together three separate programs¹⁶ into one unified home care program which purports to provide older Australians greater choice in who delivers their care with services available from a 'service list'.

The Department's SaH paper¹⁷ indicates that consumers will also be able to purchase (at their own cost) services beyond those subsidised by the Commonwealth. They will also be able to self-manage their care (including using multiple service providers) if they wish.

We believe these factors will drive a growth in independent contractors and platform workers, including micro companies and sole workers.

REGULATION OF INDIRECT EMPLOYMENT IN AGED CARE

The Paper notes that the use of agency workers, independent contractors and digital platform workers likely bring a range of benefits to clients, workers, and providers¹⁸.

It also notes there are some downsides, including:

- Independent contractors may not have the same protections that are available to employees (for example through the Fair Work Act 2009¹⁹);

¹⁴ IBID, p15

¹⁵ Ageing and Aged Care Support at Home Program Overview, Australian Government Department of Health, Jan 2022

¹⁶ IBID, p2

¹⁷ IBID, p11

¹⁸ IBID, p19

¹⁹ Noting that the Fair Work Act does offer independent contractors protection from adverse action, coercion, and abuse of freedom of association

- Accountability for service quality; there is potential confusion about who retains accountability for the quality of service provision where a consumer engages directly with a platform worker²⁰ or independent contractor.

Question: 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?

The key issue is whether a worker is an independent contractor or an employee.

For the sake of this submission, we assume 'agency' workers are employees of the host labour hire Agency and are therefore covered by all the conditions, protections, and requirements of being an employee, and therefore we will not comment on them further in answering this question.

Likewise, a platform worker may be 'employed' by the host platform, noting however that most are not. So, we will limit our response to discussing workers who are independent contractors, whether for themselves or as part of being 'listed' on a host platform.

Where independent contractors and platform workers are engaged directly by the client and where they are to be paid for through that client's Home Care Package funds (which will be managed by an approved provider) the work they are engaged to perform must fit within the Department of Health's Home Care Package [Operational Manual](#) guidelines for inclusions/exclusions for expenditure of HCP funds.

The approved provider who holds and administers the funds on behalf of the consumer, has on them, a responsibility to only disperse the funds for activities that are not prohibited in the guidelines, and that were they to disperse funds for care or services that are considered to be excluded then they may be liable for reimbursing the consumer's package out of the provider's own funds.

The question about who is responsible for the quality of care provided is clear where the worker is employed by the approved provider or where the worker is an employee of a labour hire agency contracted by the approved provider, it is the responsibility of the approved provider.

Where it is less clear is where a consumer, exercising their consumer directed choice, directly engages an independent contractor or platform worker (who is not an employee of the platform host). The Paper notes that the Royal Commission heard evidence that engagement of independent contractors by clients through a digital platform creates 'uncertainty' about who the ultimate employer of the worker is²¹, and therefore who is accountable for the quality of care and services provided.

²⁰ Noting that some platform workers may in fact be employees of the host platform

²¹ Ageing and Aged Care Support at Home Program Overview, Australian Government Department of Health, Jan 2022, p10

Where a consumer directly engages a platform worker, the platform provider should be held to the same standard of accountability for quality of service delivery as an approved provider.

We recommend this matter be considered by the Productivity Commission as part of their review.

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

In relation to responsibility and accountability for matters pertaining to work health and safety our comments would be consistent with what we have stated in the preceding question about quality of care and services delivered. Where a worker is an employee of the approved provider, or an employee of an agency contracted by the approved provider of home care package services then the approved provider is responsible for work, health, and safety matters.

Again, and like the question above, where a consumer contracts an independent contractor or platform worker (who is not an employee of the platform provider) then uncertainty is again created about who the ultimate employer of the worker is²², and therefore who is liable for matters relating to work, health and safety.

Platform providers should have the same WHS responsibilities as approved providers and again we recommend this be considered by the Productivity Commission as part of this review.

IMPACTS OF INDIRECT EMPLOYMENT IN AGED CARE

The Paper lists a range of potential impacts of indirect employment in aged care for care recipients, workers, aged care providers, and the sector²³. It notes that the availability of these workers provided an important source of workers during the current COVID-29 pandemic.

The Royal Commission argued that a key benefit of directly engaging workers as employees would be to improve the continuity and quality of care provided. The Paper notes however that the link between the two is not clear with 'scant direct evidence' available.²⁴

Additionally, the Royal Commission noted that high quality care is most likely achieved with a 'highly skilled, well rewarded and valued workforce' where the provider is legally able to direct the way in which care work is performed through an employment relationship²⁵ and yet the Paper notes that anecdotal evidence provided to the Royal Commission indicates that employee relationships are no guarantee of high-quality care²⁶.

²² Ageing and Aged Care Support at Home Program Overview, Australian Government Department of Health, Jan 2022, p10

²³ ²³ Indirect employment in aged care - Issues Paper. Australian Government Productivity Commission, 2022, p22

²⁴ IBID, p23

²⁵ IBID, p24

²⁶ IBID, p24

ACSA comments:

Conventional wisdom states employers get better engagement with employees than they do with contract workers. Employees are believed to be better engaged, better trained, have more commitment to quality outcomes, and that they deliver continuity of care. It is also stated that the employer has greater control over work performed including being able to directly prescribe the quality required, and the Royal Commission noted a range of benefits achievable with employees, as described in the paragraphs above.

However, the Paper notes that this is anecdotal with little 'direct evidence' this is the case.

If the Productivity Commission considers recommending 'preferencing direct employment' this must be backed by evidence. ACSA has not been able to locate such evidence.

Research should be undertaken to determine if there is direct correlation between direct employment and quality of care or service delivery outcomes for consumers.

Any proposed regulatory change on this front must consider the impact of the proposed change including understanding potential unintended consequences of regulatory change.

We should exercise caution in assuming independent contractors and quality of care are mutually exclusive.

What is important is having a sector where there are requirements and processes in place that ensure independent contractors and platform workers (who are not employees of the platform) are accountable for the quality of the care and services they deliver. Platform providers who receive government funding to deliver aged care services must be held to the same quality and service requirements as approved providers.

This may include consideration of the following: registration requirements for these types of workers, a requirement to meet relevant Codes of Conduct etcetera, and oversight of them by the relevant regulator.

Consideration of the impacts of the proposed Support at Home Program, which is likely to further open the market to new providers, and which allows consumers to engage multiple providers, also needs to occur when considering preferencing direct employment outcomes.

SKILLS AND LABOUR SHORTAGES

The aged care sector is experiencing significant worker shortages and it is argued that agency staff, independent contractors and platform workers can be used to address this.

The Paper notes that many allied health staff are employed as independent contractors, suggesting contracting arrangements can be used to source specialist skills²⁷.

The Paper goes on to note that there may be less incentives for employers to invest in training and development for on-demand workers relative to employees. The Senate Select Committee

²⁷ IBID, p 25

on Job Security finds that many platform workers ‘have access to some training but must access it in their own time and at their own cost’²⁸.

ACSA comments:

A stated benefit of the employment relationship is that employers are able to ensure nurses and personal care workers receive appropriate training and development, helping to ensure they have the skills and aptitude required to deliver quality care.

There are readily identifiable benefits to the employer and to the consumer of having a well-trained and committed workforce. It is in fact in the employer’s interest, particularly in an increasingly competitive and consumer-centric environment, to invest in their workforce.

The Paper recognises that independent workers must address their own training and development needs, funding this out of their contracted income (along with a range of other costs – as described elsewhere). This is not to say that there would not be many independent contract workers who attend their own development needs well, but rather there are financial and time costs and pressures associated with self-directed and self-funded development.

Research is needed to understand the skills and training levels attained by employees vis-a-vis the level attained by independent contract workers. If research were to indicate that independent contract workers and platform workers consistently demonstrate less training and development attended, consideration should then be given to what should be done about this to address any identified deficit, as we believe this type of worker will become more prevalent in the future in aged care.

WAGES, EMPLOYMENT CONDITIONS AND WORKER PREFERENCES

The Report lists a range of negative impacts of indirect work on workers, including job and wage insecurity, lack of support, working outside of scope, and health impacts²⁹.

Independent workers must negotiate their remuneration with their host organisation and platform workers typically must negotiate fees and hours of work with clients directly. The Paper indicates that whether independent contractors and platform workers are actually paid more or less than employees covered by an award remains ‘in dispute’.

However, some workers clearly value the flexibility that independent contracting work provides, for example through being able to choose hours of work, tasks to be performed etcetera. Independently contracted and platform work also provide an ability for workers to top-up their income, which is an advantage in a sector with chronic underemployment³⁰.

²⁸ IBID, p26

²⁹ IBID, p26

³⁰ IBID, p27

Question: 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, accountability of aged care providers for the care delivered on their behalf etcetera)*

ACSA comments:

For Consumers:

Improved consumer choice and the option to 'self-direct' care will be important characteristics of a reformed aged care environment. The proposed Support at Home program will likely further open the market to new providers, some of whom will be independent contractors and platform workers. This trend is consistent with changes to employment practices in other areas of society.

Aged care consumers will benefit from this greater choice and will be able, should they so choose, to engage who they like to provide them care and support. Under the proposed Support at Home Program, they would be able to select multiple providers to meet their assessed needs.

This is a positive for consumers, but it is not without risk.

In engaging an independent contractor or platform worker (who is not an employee of the platform) how is the consumer to be assured of the quality of service they will receive and what will be their recourse if they are not happy with the quality of care or services delivered? How will the consumer assure themselves of the level of training the independently contracted worker has, or the currency of their qualifications etcetera?

Where the worker directly engaged by a consumer is a platform worker (but not an employee of the platform) it is unclear in these circumstances who the employer is, is it the consumer themselves or the platform host and therefore who is responsible for the quality of services delivered?

We support the consumer's right to directly engage an independent contractor, but where they do so they should bear the risk.

Where a consumer directly engages a platform worker, the platform provider should be held to the same standard of accountability for quality of service delivery as an approved provider.

Consideration will need to be given to how consumers are to be provided protections where they engage workers who are truly independent.

For workers:

For workers themselves, the ability to work as an independent contractor may provide them with a range of benefits such as the ability to choose their hours of work, to be able to supplement

income, to determine the work they will perform etcetera. This level of control is likely to provide positive motivations to the worker.

But like consumers, this comes with risk.

An independent worker must negotiate their contractual arrangement directly with the consumer and if they are a platform worker also with the platform host, and they do not have the strength of collective bargaining. They must make their own provisions for superannuation, insurances etcetera and these must come out of the contractual rates they are able to negotiate. They are also responsible for their own training and development, and there is the risk of insecure income.

The Paper notes that in some overseas countries protections for independent workers are being addressed, through having 'distinct categories' in place³¹ rather than restricting the use of these workers. This is something we recommend be considered in Australia, so that independent workers are provided minimum protections.

For providers:

Providers overall prefer to engage workers as employees as this brings a range of benefits, many of which are identified in the Paper.

The benefits to providers of being able to contract labour hire staff is discussed elsewhere.

The ability to engage contractor workers has been shown to be beneficial during the pandemic where we have seen increased workforce pressures on an already over-stretched workforce.

Additionally, the ability to engage a supplementary workforce capacity must not be lost, as response strategies to the current workforce challenges will take some years to reach fruition.

Providers must be able to engage contractors to undertake time limited work to address fluctuations in workforce demand or where specialist skills are required.

The question of accountability of providers for care delivered on their behalf is a complex one. Where an approved provider directly employs a worker or where they engage a contract worker through a labour hire agency it is clear they are accountable for the quality of services delivered.

Where it becomes less clear is where the consumer engages an independent contract worker directly and where the approved provider has no direct engagement relationship with that contracted worker, who then is accountable? The Paper notes responsibility in such circumstances has not been tested in law³².

An approved provider should only be held accountable for the quality of services delivered by a worker where they have an employment or contractual relationship with that worker.

³¹ IBID, p20

³² IBID, p21

PREFERENCING DIRECT EMPLOYMENT IN AGED CARE

The Paper notes that regulating the use of independent contractors is likely to have impacts on other care sectors, including NDIS where the use of independent contractors is more prevalent than in aged care (reported to be 17 per cent in 2019³³).

ACSA comments:

Any consideration given by the Productivity Commission in relation to the preferencing of direct engagement in aged care needs to consider unintended consequences.

Preferencing direct employment of nurses and personal care workers (through restricting the use of independent contractors) may significantly reduce the ability of providers to respond to temporary surges in demand; meet specialised care needs; respond to consumer choice regarding preferred service delivery times; respond to requests from consumers for specific workers to attend them etcetera. These would all be negative outcomes for consumers.

If an unintended consequence of restricting the use of independent contractors was to increase costs associated with delivering services (for example through having to cover roster staff capacity to enable quick responses to requests for service supports), then this will negatively impact on the costs experienced by consumers and / or negatively impact provider viability.

In relation to the use of independent contractors and platform workers in the disability sector we recommend the Productivity Commission engage directly with the disability sector to understand the impact on consumers, workers, and providers of disability services the use of independent contractors has had.

³³ IBID, p28



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