



## **Workers Compensation and Injury Management Bill 2021**

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## Background

Western Australia's Individualised Services (**WAI**s) is a member-based community organisation working in partnership with people, families, service providers and government agencies to promote and advance individualised, self-directed supports and services for people living with disability, including psychosocial disability.

Since our inception in 2010, we have evolved to become thought leaders in this space, providing comprehensive, intentional support with integrity, passion and authenticity at our core. By leveraging our extensive local, state, and international network, we seek to lead, influence, innovate and inform to create meaningful and lasting change, supporting people to build capacity and live their lives on their own terms.

A significant and growing area of our work is providing information and support, to people, families, and service providers, in relation to the legal considerations and obligations for people to design, develop and manage individualised support arrangements. This support extends to people who use their funding to privately/directly hire their own workers. WAI

s provides information and supports to people in areas such as Industrial Relations, Taxation, Superannuation, Workers Compensation and Work Health and Safety.

From our support to and conversations with people who are hiring their own workers, concerns and issues in relation to current workers' compensation laws have come to light over the years. As such, WAI

s is keen to ensure these issues are rectified with the pending Workers Compensation and Injury Management Bill 2021 (**Workers Compensation Bill**). WAIs primary concerns are issues arising from the definition of 'worker' and 'employer'. We wish to address these concerns with this submission and associated recommendations.

## WAI

s Recommendations

WAI

s makes the following recommendations regarding the Workers Compensation Bill and the modernised workers' compensation laws in Western Australia (Modernised Worker's Compensation Laws):

**WAI**s Recommendation: The purpose of the Modernised Workers' Compensation Laws be to provide a workers' compensation scheme for every Western Australian worker, including all disability support workers.

**WAI**s Recommendation: The large and growing cohort of disability support workers in Western Australia who are sole traders / independent contractors need to be clearly and explicitly covered in the Modernised Workers' Compensation Laws so they are provided the same coverage as disability support workers who are employees.

**WAI**s Recommendation: Disability support workers in every Support Worker Engagement Pathway - including engagement through a disability services support provider, direct engagement, disability support worker search engine, and a labour hire agency – need to be included in the definition of 'worker' in the Workers Compensation Bill.

**WAI**s Recommendation: In line with the upcoming changes to the *Industrial Relations Act 1979* (WA) (**Industrial Relations Act**) and the *Minimum Conditions of Employment Act 1993* (WA) (**Minimum Conditions of Employment Act**), and to ensure that the Modernised Workers' Compensation Laws are transparent with a clear definition of 'worker', it is recommended that the intended coverage of disability support workers working for private householders be explicitly included in the drafting of the Workers Compensation Bill and the Modernised Workers' Compensation Laws.

**WAI**s Recommendation: In line with the WorkCover WA (**WorkCover**) recommendation for relevant consultation, people with disabilities and their families in Western Australia should be consulted about the

particular wording in the Modernised Workers' Compensation Laws regarding the coverage of disability support workers who work for people with disabilities and / or their families who are private householders.

**WAIIS Recommendation:** When drafting the definition of 'worker' in the Modernised Workers' Compensation Laws, consideration needs to be given to the community need (including people with disabilities and / or their families) for people be able to understand exactly who is a 'worker', and the related obligations and liability - without needing to refer to and analyse numerous sources of possibly conflicting authority and guidance from WorkCover and the ATO.

**WAIIS Recommendation:** The sections relevant to the definition of 'worker' and 'employer' in the Modernised Workers' Compensation Laws, as well as policy and guidance materials, must be provided in formats accessible for all people with disabilities and / or their families, including Easy Read format.

**WAIIS Recommendation:** Disability support workers who are 'defined' as being sole traders / independent contractors (for example in a support worker contract) need to be covered under the Modernised Workers' Compensation Laws.

**WAIIS Recommendation:** WorkCover provide publicly available information / guidance about potential workers' compensation insurance liability for clients of search engine agencies like Mable – especially for situations where people with disabilities and / or their families are in substance employers and not contractees.

#### **Purpose of the modernised worker's compensation legislation**

As discussed below, there are a range of issues in relation to the proposed definition of 'worker' and 'employer' in the Workers Compensation Bill, which will likely result in significant risk of:

- people with disabilities and / or their families being unintentionally non-compliant with the modernised workers' compensation laws in Western Australia (**Modernised Workers' Compensation Laws**) and subject to relevant penalties; and
- a substantial, growing cohort of disability support workers in Western Australia not being covered by workers' compensation insurance.

To eliminate / mitigate this risk, it is WAIIS' position that the fundamental purpose of the Modernised Workers' Compensation Laws be in line with the purposes of the current legislation<sup>1</sup> and also the workers' compensation legislation in New South Wales, Victoria and South Australia.<sup>2</sup> This means establishing a worker's compensation scheme that covers every worker in this state, including all disability support workers.

**WAIIS Recommendation:** The purpose of the Modernised Workers' Compensation Laws be to provide a workers' compensation scheme for every Western Australian worker, including all disability support workers.

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<sup>1</sup> Workers' Compensation and Injury Management Act 1981 (WA), section 3 – 'Purposes'

<sup>2</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 47, Paragraph 107 (September 2013)

## Why the Workers Compensation Act is being amended

The Government of Western Australia (**Government**), in response to extensive community consultation with relevant stakeholders, including WAIS,<sup>3</sup> has recognised a need to modernise Western Australia's workers' compensation laws.<sup>4</sup> This includes specific focus on the *Workers' Compensation and Injury Management Act 1981 (WA)* (**Workers Compensation Act**), which has been classified by WorkCover as being a:

'...complex and highly prescriptive statute which is difficult to understand and apply,'<sup>5</sup>

and

'...a source of confusion and frustration for scheme participants'.<sup>6</sup>

In order to address the shortcomings of the Workers Compensation Act, WorkCover has recommended that the modernised piece of legislation being proposed through the Workers Compensation Bill, should:

- enhance readability and consistency in the legislation, and introduce plain language and contemporary drafting conventions;<sup>7</sup> and
- include a clear definition of 'worker',<sup>8</sup> because this provides the fundamental threshold for people to get access to entitlements and for employers to make sure they have the insurance required by law.<sup>9</sup>

## Why the modernisation of worker's compensation legislation in Western Australia is important for people with disabilities and / or their families

In Western Australia there are a significant number of people with disabilities and / or their families who hire their own disability support workers. This is evidenced by the large number of relevant programs and information available to support this group of employers – including those from the Western Australian Department of Communities and WAIS.<sup>10</sup> There is also a sizeable group of support workers in Western

<sup>3</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) Appendix 4

<sup>4</sup> Government of Western Australia WorkCover WA, 'Modernising WA's Workers Compensation Laws' (September 2021) viewed 18 October 2021 at <<https://www.workcover.wa.gov.au/resources/modernising-was-workers-compensation-laws/>>

<sup>5</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 7, Paragraph 1 (September 2013)

<sup>6</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 9, Paragraph 2

<sup>7</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 7 and pg 11, Paragraph 4 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 10, Paragraph 6

<sup>8</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 11, Paragraph 29 (September 2013)

<sup>9</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 11, Paragraph 29

<sup>10</sup> See for example: MyCareSpace, 'NDIS Self Management: How to Hire Your Own Support Worker with an ABN' viewed 20 October 2021 at <<https://mycarespace.com.au/resources/ndis-self-management-how-to-hire-your-own-support-worker-with-an-abn>>; My Place, 'A Guide to Engaging your own Support Workers' viewed 20 October 2021 at [https://www.myplace.org.au/downloads/MyPlace\\_EngagingBooklet\\_Web.pdf](https://www.myplace.org.au/downloads/MyPlace_EngagingBooklet_Web.pdf); Government of Western Australia Department of Communities Disabilities Services, 'Self-management' viewed 21 October 2021 at <<http://www.disability.wa.gov.au/wa-ndis/wa-ndis/information-linkages-and-capacity-building/resources/self-management/>>, which includes the following WAIS resources and materials: 'Engaging your own support workers: Employee'; 'Engaging your own support workers: Employee or independent contractor?'; 'Engaging your own support workers: Independent contractor'; 'Engaging your own support workers: Type of employees'; 'Hiring your own support workers: Checklist for hiring contractors (Easy Read)'; 'Hiring your own support workers: Checklist for hiring employees (Easy Read)'; 'Hiring your own support workers: Is my worker an employee or contractor? (Easy Read)'; 'Hiring your own support workers: Types of employees fact sheet (Easy Read)'

Australia who provide disability support services as sole traders / independent contractors for private householders that are people with disability and / or their families.<sup>11</sup>

People with disabilities and their families cannot easily access nor afford legal services to interpret complex pieces of legislation, which are difficult to read.

The current drafting of the Workers Compensation Act in relation to 'worker' is particularly difficult to navigate and apply given the lack of:

- a) clarity in relation to who is a 'worker',<sup>12</sup> and whether or not this includes sole traders / independent contractors,<sup>13</sup> making it difficult for people to assess the required level of workers' compensation coverage and to meet their statutory obligations;<sup>14</sup>
- b) a definition for 'employer', requiring a legal analysis of the evidentiary criteria of employment,<sup>15</sup> analysis that is according to WorkCover is - 'not without its difficulties',<sup>16</sup>
- c) in relation to a person (e.g. a disability support worker) who is employed by a private householder (such as a person with a disability and / or their family) to provide personal services:
  - (i) alignment with the current proposal by the Government to modernise Western Australian employment laws, which will remove the exclusion for persons employed directly by people with a disability and / or their families to provide care in a private home, so that this type of employee will be covered by the Industrial Relations Act) and the Minimum Conditions of Employment Act; and
  - (ii) clarity / guidance about workers' compensation insurance obligations in relation to a situation where disability support workers are engaged by private householders,<sup>17</sup> as there is of yet a lack of easily accessible, publicly available WorkCover guidance about this subject.<sup>18</sup>

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<sup>11</sup> Francis Flanagan. 'Theorising the gig economy and home -based service work' Journal of Industrial Relations (2018); Citing Australian Government Department of Employment, '(Job outlook: Aged and disability carers' (2018) <<http://joboutlook.gov.au/Occupation.aspx?search=Industry&Industry=Q&code=4231>>; University of New South Wales Centre for Social Impact, 'How is the Disability Sector Faring: A Report from National Disability Services' Annual Market Survey' (February 2019) pg 5

<sup>12</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 11, Paragraph 30; Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 15, Paragraph 46

<sup>13</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 43, Paragraph 81; Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 47, Paragraph 2

<sup>14</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 43, Paragraph 93; Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 15 Paragraph 36

<sup>15</sup> See for example: Australian Government Australian Tax Office, 'Taxation Ruling TR 2005/16' [at Paragraph 6-7] viewed October 18 at

<<https://www.ato.gov.au/law/view/document?DocID=TXR/TR200516/NAT/ATO/00001&PiT=9999123123595>>

<sup>16</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 11, Paragraph 30

<sup>17</sup> See for example: Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 12, Paragraph 33

<sup>18</sup> See for example: Department of Western Australia Work Cover WA, 'Covering your workers' viewed 21 October 2021 at <<https://www.workcover.wa.gov.au/employers/understanding-your-rights-obligations/covering-your-workers/>>

WAI S agrees with the statement of WorkCover in its ‘Review of the Workers’ Compensation and Injury Management Discussion Paper’:<sup>19</sup>

*Knowledge of coverage is important for both employers and workers. Employers need to ensure insurance is in place for ‘workers’ however defined, and the correct premiums are paid. Workers need to know whether they are covered by the scheme or have insurance responsibility for any workplace injury they may suffer.*

For these reasons, WAI S supports in principle the proposed changes to the Workers Compensation Act and the development of Modernised Workers’ Compensation Laws.

However, the proposed definition of ‘worker’ and ‘employer’ in the Workers Compensation Bill still do not adequately address the outstanding issues with current workers’ compensation legislation for:

- people with disabilities and / or their families who, as private householders employ support workers to provide support in and around their home; and
- disability support workers who are sole traders / independent contractors.

**Current types of legal relationships between disability support workers and people with disabilities and / or their families**

Due to the various funding models and parties involved in coordinating care for people with disabilities and / or their families, and the expansion of the disability support market due to the advent of the National Disability Insurance Scheme, there are a wide and expanding range of pathways that a person with disabilities and / or their families may use to engage their support workers<sup>20</sup> (**Support Worker Engagement Pathway(s)**).

We have included those Support Worker Engagement Pathways that WAI S is aware of in the table below:<sup>21</sup>

Type of Support Worker Engagement Pathway	Example of Relevant Organisation	Type of Legal Relationship
Engagement with support from a Disability Services Support Provider	MyPlace <sup>22</sup>	<p>a) Person with a disability / their family has a contract <b>for</b> service with a disability services support provider (<b>Provider</b>) (contractor / contractee relationship)</p> <p>b) Provider has a contract <b>of</b> service (employer /</p>

<sup>19</sup> Government of Western Australia WorkCover WA, ‘Review of the Workers’ Compensation and Injury Management Discussion Paper’ (September 2013) pg 43, Paragraph 82

<sup>20</sup> See: Government of Western Australia Department of Communities Disabilities Services, ‘Finding a service provider’ viewed 21 October 2021 at <[http://www.disability.wa.gov.au/wa-ndis/wa-ndis/service\\_provider\\_search\\_tool/](http://www.disability.wa.gov.au/wa-ndis/wa-ndis/service_provider_search_tool/)>; Government of Western Australia Department of Communities Disabilities Services, ‘Self-management’ viewed 21 October 2021 at <<http://www.disability.wa.gov.au/wa-ndis/wa-ndis/information-linkages-and-capacity-building/resources/self-management/>>

<sup>21</sup> WAI S has developed a suite of materials in relation to the types of legal relationships that people with disabilities/their families may be in with the support workers they engage. These materials are available at:

<https://waindividualisedservices.org.au/resources/engaging-your-own-supports/>

<sup>22</sup> See: MyPlace, ‘Welcome to My Place’ viewed 4 November 2021 at <<https://www.myplace.org.au>>

		employee relationship) with a support worker who provides disability support to the person with a disability
Direct engagement (through a personal connection / job ad)	Not applicable	<b>Possibility 1:</b> Person with a disability / their family, a private householder(s) enters into a contract <b>of</b> service (employer / employee relationship) with a support worker to provide personal care for the person with a disability – support services may be performed in the home of this person
		<b>Possibility 2:</b> Person with a disability / their family enters into a contract <b>for</b> service (independent contractor / contractee relationship) with a support worker to provide personal care to the person with a disability – support services may be performed in the home of this person
		<b>Possibility 3:</b> Person with a disability / their family <u>purports to enter</u> into a contract <b>for</b> service (independent contractor / contractee relationship) with the support worker but actually, according to relevant employment criteria <sup>23</sup> are in a contract <b>of</b> service (employer / employee relationship) – services may be provided in the home of the person with a disability

<sup>23</sup> See: Fair Work Commission, 'Unfair dismissals benchbook: Independent contractors' viewed 7 October 2021 at <<https://www.fwc.gov.au/unfair-dismissals-benchbook/coverage/people-excluded/independent-contractors#field-content-2-heading>> for a list of relevant criteria, which notably is not exhaustive: PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at Paragraph. 34, [(2003) 122 IR 215]; [2011] FWA FB 8307 (Lawler VP, O'Callaghan SDP, McKenna C, 2 December 2011) at Paragraph. 30, [(2011) 215 IR 235]; Abdalla v Viewdaze Pty Ltd t/a Malta Travel PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at Paragraph. 34, [(2003) 122 IR 215]

<p>Engagement through a Disability Support Worker Search Platform</p>	<ul style="list-style-type: none"> <li>• Mable<sup>24</sup> <b>(Search Platform Agency)</b></li> </ul>	<p><b>Possibility 1:</b></p> <p>a) Person with a disability / their family is in a contract <b>for</b> service with a Search Platform Agency (contractor / contractee relationship)</p> <p>b) Support Worker is in a contract <b>for</b> service (contractor / contractee relationship) with a Search Platform Agency</p> <p>c) Person with a disability / their family is in a contract <b>for</b> service (independent contractor / contractee) with the support worker they engage through the search platform - support services may be performed in the home of this person</p>
		<p><b>Possibility 2:</b> Person with a disability / their family <u>purports to</u> enter into a contract for service (independent contractor / contractee) with the support worker but actually, according to relevant employment criteria,<sup>25</sup> are in an contract <b>of</b> service (employer / employee relationship) – services may be provided in the home of the person with a disability</p>

<sup>24</sup> Mable, 'Provide independent support on Mable' viewed 7 October at < <https://mable.com.au/provide-support/>>; Mable, 'About us' viewed 7 October at <<https://mable.com.au/our-story/>>; Mable, 'Choose the type of support that you want' viewed 7 October 2021 at <<https://mable.com.au/our-story/>>; Mable, 'Support worker safeguards' viewed 7 October 2021 at <https://mable.com.au/our-story/>; Mable, 'Frequently asked questions' viewed 7 October 2021 at < <https://mable.com.au/faqs/>>

<sup>25</sup> See: Fair Work Commission, 'Unfair dismissals benchbook: Independent contractors' viewed 7 October 2021 at <<https://www.fwc.gov.au/unfair-dismissals-benchbook/coverage/people-excluded/independent-contractors#field-content-2-heading>> for a list of relevant criteria, which notably is not exhaustive: PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at Paragraph. 34, [(2003) 122 IR 215]; [2011] FWA FB 8307 (Lawler VP, O'Callaghan SDP, McKenna C, 2 December 2011) at Paragraph. 30, [(2011) 215 IR 235]; Abdalla v Viewdaze Pty Ltd t/a Malta Travel PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at Paragraph. 34, [(2003) 122 IR 215]

Engagement through a Labour Hire Agency	<ul style="list-style-type: none"> <li>• HireUp<sup>26</sup></li> <li>• Humdrum<sup>27</sup></li> </ul> (each, a <b>Labour Hire Agency</b> )	<b>Possibility 1:</b> <ol style="list-style-type: none"> <li>a) Person with a disability / their family in a contract <b>for</b> service (contractor / contractee relationship) with Labour Hire Agency</li> <li>b) Support Worker in a contract <b>of</b> service (employer/employee) with a Labour Hire Agency who provides personal care to the person with a disability</li> </ol>
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**Table 1: Type of Support Worker Engagement Pathways**

Whatever the type of Support Worker Engagement Pathway, or relevant legal relationship, the support workers engaged by a person with a disability and / or their family are:

- workers;
- doing disability support work;
- with the same kinds of risk of occupational injury / harm as all other disability support workers; and
- the same need for mandatory insurance cover to make sure they have the necessary protection in case of occupational injury / harm.

**WAIIS Recommendation:** Disability support workers in every Support Worker Engagement Pathway - including engagement through a disability services support provider, direct engagement, disability support worker search engine, and a labour hire agency – need to be included the definition of ‘worker’ in the Workers Compensation Bill and so covered by workers’ compensation insurance that is procured by their employers.

**Proposed definition of ‘worker’ in the Workers Compensation Bill**

A revised definition of ‘worker’ has been proposed in the Workers Compensation Bill – as well as related sections intended to clarify and explain scope of the definition. The relevant sections include the following:

- Section 5 – Definition of a ‘worker’;
- Section 12 - Meaning of “worker” and “employer” [New provision, cf WCIMA s. 5(1) *employer, worker*]; and
- Section 14 - Labour hire arrangements [New provision, cf WCIMA s. 5(1) *employer*].

As per the WorkCover, ‘Review of the Workers’ Compensation and Injury Management Final Report’ (**Final Report**), WAIIS agrees in principle with the WorkCover recommendations that the proposed domestic worker exclusion in the modernised workers’ compensation legislation not apply to disability support workers who work for private householders.<sup>28</sup>

<sup>26</sup> Hireup, ‘Who uses Hireup’ viewed 7 October 2021 at <<https://help.hireup.com.au/hc/en-us/articles/360015802992-Who-uses-Hireup->>; Hireup, ‘Is Hireup different to a traditional support provider?’ viewed 7 October 2021 at <https://help.hireup.com.au/hc/en-us/articles/115003011791-Is-Hireup-different-to-a-traditional-support-provider->; Hireup, ‘How does Hireup work?’ viewed 7 October 2021 at <https://help.hireup.com.au/hc/en-us/articles/360015747612-How-does-Hireup-work->; Hireup, ‘Who is the legal employer of Hireup support workers?’ Viewed 7 October 2021 at <<https://help.hireup.com.au/hc/en-us/articles/360015981752-Who-is-the-legal-employer-of-Hireup-support-workers->>

<sup>27</sup> See: Humdrum, ‘Our Services’ viewed 7 October 2021 at <<https://humdrum.community/supportworkers>>

<sup>28</sup> Government of Western Australia WorkCover WA, ‘Review of the Workers’ Compensation and Injury Management Final Report’ (June 2014) pg 56, Paragraph 140

In principle, WAiS understands the WorkCover recommendation that in relation to the Modernised Workers' Compensation Laws:

- contractors who:  
*'provide quotes for work, provide tools of their trade and rectify defects at their own expense'*  
be excluded;<sup>29</sup>

and

- contractors who:  
*'with or without an ABN who provide personal manual labour or service to one or more businesses (rather than supply others' labour), provide some tools and equipment to perform their work, and are paid by the hour or at piece rates'*  
be included.<sup>30</sup>

However, in practice people with disabilities and / or their families, in this case, will still be required to distinguish these kinds of contractors and make a decision about whether to procure workers compensation insurance.

Making this analysis can be complex which will retain and perpetuate the current uncertainty and confusion about when workers compensation is required and carries the substantial risk that people with disabilities and / or their families may make an error, be non-compliant with the legislation, and liable for relevant penalty. To mitigate this risk, there needs to be a carve out in the Modernised Workers' Compensation Laws so that all disability support workers, including those working as any type of contractor, are covered by statutory workers' compensation insurance.

**WAiS Recommendation:** The Modernised Workers' Compensation Laws need to be drafted so that all disability support workers, including those working as any type of contractor, are covered by statutory workers' compensation insurance.

#### **Issues with the proposed definition of 'worker' and 'employer' in the Workers Compensation Bill**

There are a number of issues in relation to the proposed definition of 'worker' and 'employer' in the Workers Compensation Bill, including the following:

- Issue 1: Drafting in relation to private householder disability support workers;
- Issue 2: Lack of clarity and ease of understanding about who is a 'worker' and an 'employer' – especially in relation to sole traders / independent contractors;
- Issue 3: A large cohort of disability support workers who are sole traders / independent contractors will not be protected by the proposed, Modernised Workers' Compensation Laws;
- Issue 4: Disability support workers misidentified as 'sole traders / independent contractors' who are actually employees will not be protected by the Modernised Workers' Compensation Laws; and

<sup>29</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 54, Table 2

<sup>30</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 50, Paragraph 124

- Issue 5: WorkCover not providing information / guidance about Search Platform Agencies do not provide workers' compensation insurance for sole traders / independent contractors.

### **Issue 1: Drafting in relation to private householder disability support workers**

As provided above, WAiS agrees in principle with the recommendations from WorkCover in the Final Report that workers' compensation arrangements be preserved in the Modernised Workers' Compensation Laws for disability support workers working for private householders.<sup>31</sup>

However - contrary to the statements of WorkCover regarding the need for readable and plain English drafting, and a clear definition of worker<sup>32</sup> - the current drafting of 'worker' in the Workers Compensation Bill does not provide any explicit reference to the agreed coverage for private householder disability support workers; or any direct indication that this will be addressed in relevant regulations.

There is also currently no guidance / proposed publicly available drafting from WorkCover about how workers' compensation arrangements will be put in place for support workers who work for private householders under the Modernised Workers' Compensation Laws.<sup>33</sup>

In response to the following statement in the Final Report,

*'Further consultation with the sector will be required on the particular wording in the development of regulation',<sup>34</sup>*

it is noted that WAiS has not yet been consulted about the proposed wording of any relevant regulations.

**WAiS Recommendation:** In line with the upcoming changes to the Industrial Relations Act and Minimum Conditions of Employment Act, and to ensure that the Modernised Workers' Compensation Laws are transparent with a clear definition of 'worker', it is recommended that the intended coverage of disability support workers working for private householders be explicitly included in the drafting of the Workers Compensation Bill and the Modernised Workers' Compensation Laws.<sup>35</sup>

This will make certain that the agreed inclusion is mandated by Parliament and not subject to the authorisation of the relevant Minister, or dependent on the policy priorities of a current state government.

<sup>31</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 56, Paragraph 140, R:10

<sup>32</sup> Management Discussion Paper' pg 7 and pg 11, Paragraph 4 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 10, Paragraph 6; Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 11, Paragraph 29 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 11, Paragraph 29

<sup>33</sup> See for example: Government of Western Australia WorkCover WA, 'Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Information Sheets' (August 2021), 'Information Sheet 2: Definition of a Worker' viewed 29 October 2021 at <<https://www.workcover.wa.gov.au/wpcontent/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf>>

<sup>34</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 56, Paragraph 140

<sup>35</sup> See: Industrial Relations Legislation Amendment Bill 2021 (WA); Government of Western Australia, 'Department of Mines, Industry Regulation and Safety, 'Proposed extension of coverage of state employment laws to domestic employees' viewed 29 October 2021 at <[https://www.commerce.wa.gov.au/sites/default/files/atoms/files/proposed\\_extension\\_of\\_coverage\\_of\\_state\\_employment\\_laws\\_to\\_domestic\\_employees\\_fact\\_sheet.pdf](https://www.commerce.wa.gov.au/sites/default/files/atoms/files/proposed_extension_of_coverage_of_state_employment_laws_to_domestic_employees_fact_sheet.pdf)>

**WAIS Recommendation:** In line with the WorkCover recommendation for relevant consultation,<sup>36</sup> people with disabilities and their families in Western Australia should be consulted about the particular wording in the Modernised Workers' Compensation Laws regarding the coverage of disability support workers who work for people with disabilities and / or their families who are private householders.

## **Issue 2: Lack of clarity and ease of understanding about who is a 'worker' and an 'employer' – especially in relation to sole traders / independent contractors**

It is recognised by WorkCover that:

*The extended definition of worker [in the current Workers Compensation Act] is a source of confusion for workers and employers about their legal rights and obligations and is difficult to apply to contemporary work arrangements.<sup>37</sup>*

WorkCover has also confirmed that the lack of plain drafting, readability and a clear definition of a 'worker' is required in the new workers' compensation legislation.<sup>38</sup>

As per the Discussion Paper and the WorkCover WA, 'Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Information Sheets' (**Workers Compensation Information Sheets**),<sup>39</sup> there appears to be an express intention that sole traders / independent contractors need to be distinguished from 'workers' and so not covered by the Modernised Workers' Compensation Laws.

In contrast however (as discussed above) - and confusingly - in the Final Report WorkCover recommends that some kinds of contractors be excluded from coverage under the Modernised Workers' Compensation Laws while other kinds of disability support worker be included.<sup>40</sup>

Additionally, the proposed definition of 'worker' in the Workers Compensation Bill has been drafted with the intention of addressing the current lack of clarity about whether someone is a 'worker' or a 'contractor'.<sup>41</sup> The definition proposed is based on the Australian Tax Office (**ATO**) determination of employee versus contractor, whereby a person would be a 'worker' for the purposes of the proposed new workers' compensation legislation in Western Australia pursuant to section 12 below.<sup>42</sup>

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<sup>36</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 56, Paragraph 140

<sup>37</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 46, Paragraph 101

<sup>38</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 7 and pg 11, Paragraph 4 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 10, Paragraph 6; Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 11, Paragraph 29 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' (September 2013) pg 11, Paragraph 29

<sup>39</sup> See Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 11, Paragraph 29 (September 2013) Para 109 to 113, pgs 47 to 48; Government of Western Australia WorkCover WA, 'Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Information Sheets' (August 2021), 'Information Sheet 2: Definition of a Worker' viewed 29 October 2021 at <<https://www.workcover.wa.gov.au/wpcontent/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf>>

<sup>40</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 54, Table 2

<sup>41</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 48, Paragraph 108

<sup>42</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 50, Paragraph 119

**12. Meaning of “worker” and “employer” [New provision, cf WCIMA s. 5(1) *employer, worker*]**

(1) In this section —

*PAYG withholding* has the meaning given in the *Taxation Administration Act 1953* (Commonwealth) Schedule 1 Part 2-5;

*person* includes the State, or an agency or instrumentality of the State, as well as the Crown, or an agency or instrumentality of the Crown, in any of its other capacities.

(2) An individual is a *worker* for the purposes of this Act if payment of salary, wages, commission, bonuses or allowances to the individual is subject to PAYG withholding as a payment to the individual as an employee.

This requires a person with a disability and / or their family needing to understand the application of the *Taxation Administration Act 1953* (Cth) (**Taxation Administration Act**), as well as, and in particular, related ATO guidance.

The related ATO guidance is based on common law/case law and requires an analysis of six factors that, taken together, determine whether a worker is an employee or contractor for tax or super purposes. This requires an analysis and understanding of each factor, as well, as the ability to then put them together to make a determination. WAiS experience is that applying the reality of a working relationship to each factor can be very nuanced and, in many instances, not clear cut.

Thus users of the proposed workers’ compensation legislation in Western in Australia would be required to undertake what can be a complex analysis of the ATO guidance in relation to employee/contractor to understand the current drafting of the definition of ‘worker’ in the Modernised Workers’ Compensation Laws.

**WAiS Recommendation:** When drafting the definition of ‘worker’ in the Modernised Workers’ Compensation Laws, consideration needs to be given to the community need (including people with disabilities and / or their families) for people be able to understand exactly who is a ‘worker’, and the related obligations and liability - without needing to refer to and analyse numerous sources of possibly conflicting authority and guidance from WorkCover and the ATO.

Additionally, to ensure that the Modernised Workers’ Compensation Laws:

- a) are compliant with the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**) for which Australia is a signatory,<sup>43</sup> specifically *Article 9 - Accessibility* which requires the following:<sup>44</sup>

*1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:*

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<sup>43</sup> Australian Government Department of Social Services, ‘Disability and Carers: UN Convention on the Rights of Persons with Disabilities’ viewed 6 November 2021 at < <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/international-participation-in-disability-issues>>

<sup>44</sup> See United Nations Department of Economic and Social Affairs, ‘Disability: Article 9 – Accessibility’ viewed 6 November 2021 at <<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-9-accessibility.html>>

... b) Information, communications and other services, including electronic services and emergency services.

2. States Parties shall also take appropriate measures:

... f) To promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;

...g) To promote access for persons with disabilities to new information and communications technologies and systems...

- b) achieve the readability and clarity recommended by WorkCover,<sup>45</sup> so that all members of the community are able to comply with their legal obligations,

WAiS strongly recommends the the definition of ‘worker’ and ‘employer’, and all relevant sections in the Modernised Workers’ Compensation Laws,<sup>46</sup> as well as related policy and guidance documents, be provided in formats accessible for all people with disabilities and / or their families. The relevant definitions, sections and guidance documents should also be drafted in Easy Read format.

This is in accordance with the current guidance of the Australian Government Digital Transformation Agency:<sup>47</sup>

*Easy Read is a way to present information for people who are not familiar with English, or who have low literacy or learning disability [our emphasis]. Easy Read’s unique layout and style presents information so it’s easy to understand. The content can explain complex information about law, policy or obligations.*

**WAiS Recommendation:** The sections relevant to the definition of ‘worker’ and ‘employer’ in the Modernised Workers’ Compensation Laws, as well as policy and guidance materials, must be provided in formats accessible for all people with disabilities and / or their families, including Easy Read format.

### **Issue 3: A large cohort of disability support workers who are sole traders / independent contractors will not be protected by the proposed, Modernised Workers’ Compensation Laws**

Across Australia, there has been a substantial and marked growth in the disability support services sector and overall number of disability support workers.<sup>48</sup> For example, 2019, 23% of disability support workers were sole traders / independent contractors – up from 12% in 2017.<sup>49</sup> This significant expansion of the sector is projected by the federal Department of Employment to continue into the foreseeable future.<sup>50</sup>

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<sup>45</sup> Government of Western Australia WorkCover WA, ‘Review of the Workers’ Compensation and Injury Management Discussion Paper’ pg 7 and pg 11, Paragraph 4 (September 2013); Government of Western Australia WorkCover WA, ‘Review of the Workers’ Compensation and Injury Management Final Report’ (June 2014) pg 10, Paragraph 6

<sup>46</sup> Including but not limited to: See: Section 5 – Definition of a ‘worker’; Section 12 - Meaning of “worker” and “employer” [New provision, cf WCIMA s. 5(1) *employer, worker*]; Section 14 - Labour hire arrangements [New provision, cf WCIMA s. 5(1) *employer*]; Section 17 - Employer liable for compensation [WCIMA s. 18]; and Section 205 - Requirement for employers to be insured [WCIMA s. 160(1)]

<sup>47</sup> Australian Government Digital Transformation Agency, ‘Style Manual: Easy Read’ (2021) viewed August 2021 at <<https://www.stylemanual.gov.au/format-writing-and-structure/content-formats/easy-read>>; See also the Easy Read guidance for writing government and legal documents provided by the New Zealand Ministry for Social Development Office for Disability Issues, ‘A guide to making Easy Read information’ (2021) viewed August 2021 at <<https://www.odi.govt.nz/guidance-and-resources/a-guide-to-making-easy-read-information/#About-this-guide>>

<sup>48</sup> See: ABC News, ‘Disability support staff in great demand as advocates warn tens of thousands more are needed’ (9 April 2021)

<sup>49</sup> University of New South Wales Centre for Social Impact, ‘How is the Disability Sector Faring: A Report from National Disability Services’ Annual Market Survey’ (February 2019) pg 5

<sup>50</sup> Francis Flanagan. ‘Theorising the gig economy and home -based service work’ Journal of Industrial Relations (2018); Citing Australian Government Department of Employment, ‘(Job outlook: Aged and disability carers’ (2018) <<http://joboutlook.gov.au/Occupation.aspx?search=Industry&Industry=Q&code=4231>>

In line with the national trend, the number of disability support workers who are sole traders / independent contractors in Western Australia is growing quickly. This is evidenced by the increasing number of businesses that exist to support this sector of the market – including the ‘Mable’ client / sole trader support worker matching search engine.<sup>51</sup>

WorkCover has confirmed that it intends for disability support workers to be included in the Modernised Workers’ Compensation Laws, as provided in the Workers Compensation Information Sheets dated August 2021.<sup>52</sup>

*Q. Will carers working for people with a disability be covered as workers?*

*A. It is intended that carers will be covered as workers in regulations; however the regulations will need to clarify the circumstances as there are various engagement models in operation.*

Based on national trends detailed in the University of New South Wales Centre for Social Impact, ‘How is the Disability Sector Faring: A Report from National Disability Services’ Annual Market Survey’,<sup>53</sup> it is likely that up to a quarter of disability support workers in Western Australia may be excluded from the coverage of the proposed Workers Compensation Act if WorkCover does not explicitly include coverage for sole trader / independent contractor disability support workers in the new legislation.

Due to the issues with the current proposed drafting of the definition of ‘worker’ discussed above, there is also a risk that:

- people with disabilities and / or their families; and
- disability support workers who are sole traders / independent contractor,

may erroneously believe themselves to be covered by the Modernised Workers’ Compensation Laws when they are in fact not.

**WAIS Recommendation:** The large and growing cohort of disability support workers in Western Australia who are sole traders / independent contractors need to be clearly and explicitly covered in the Modernised Workers’ Compensation Laws so they are provided the same coverage as disability support workers who are employees.

#### **Issue 4: Disability support workers misidentified as sole traders / independent contractors who are actually employees will not be protected by the Modernised Workers’ Compensation Laws**

Through its work with the disability sector, and through consultation with its members, WAIS is aware of situations where there have been disability support workers defined as being a ‘sole trader / independent

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<sup>51</sup> Mable, ‘About us’ viewed 7 October at <<https://mable.com.au/our-story/>>; See also: Alpha Plan Management, ‘Hire Your Own Support Worker with an ABN’ (2020) viewed 29 October 2021 at <<http://www.alphandis.com.au/hire-ndis-support-worker-with-an-abn/>>; Kynd, ‘Find Disability Support Workers for your NDIS: Manage your NDIS support on your terms’ viewed 29 October 2021 at <<https://kynd.com.au/ndis-participants/>>

<sup>52</sup> Government of Western Australia WorkCover WA, ‘Workers Compensation & Injury Management Bill 2021 (Consultation Draft) Information Sheets’ (August 2021), ‘Information Sheet 2: Definition of a Worker’ viewed 29 October 2021 at <<https://www.workcover.wa.gov.au/wpcontent/uploads/2021/08/Consultation-Draft-Bill-2021-Information-Sheets.pdf>>;

ABC News, ‘Disability support staff in great demand as advocates warn tens of thousands more are needed’ (9 April 2021); University of New South Wales Centre for Social Impact, ‘How is the Disability Sector Faring: A Report from National Disability Services’ Annual Market Survey’ (February 2019) pg 5; Francis Flanagan, ‘Theorising the gig economy and home -based service work’ Journal of Industrial Relations (2018)’; Citing Australian Government Department of Employment, ‘(Job outlook: Aged and disability carers’ (2018) <<http://joboutlook.gov.au/Occupation.aspx?search=Industry&Industry=Q&code=4231>>

contractor' but who are actually an employee - pursuant to the relevant indicia of employment<sup>54</sup> of the person with a disability / their family.

As confirmed by WorkCover, the required legal analysis of whether a worker is an employee or a sole trader / independent contractor is complex<sup>55</sup> – especially for laypeople (including those with disabilities and / or their families) without the benefit of legal advice.

There is therefore a substantial risk that a large number of people with disabilities and / or their families in Western Australia could in actuality be in an employment relationship with their support workers but erroneously believe they are engaging a sole trader / independent contractor. This risk is exasperated by the current issues with the drafting of 'worker' in both the Workers Compensation Act and the Workers Compensation Bill.

The result is potential liability for people with disabilities and / or their families is likely non-compliance with the proposed legislation and so liability for resulting penalties. This includes fines for people with disabilities / their families of up to \$5000 per disability support worker for failing to maintain a current workers' compensation policy.<sup>56</sup> This risk could be significantly mitigated if disability support workers in Western Australia who are defined as being sole traders / independent contractors' (for example in a support worker contract) would be covered under the Modernised Workers' Compensation Laws.

**WAIS Recommendation:** Disability support workers who are 'defined' as being sole traders / independent contractors (for example in a support worker contract) need to be covered under the Modernised Workers' Compensation Laws.

#### **Issue 5: WorkCover not providing information / guidance about Search Platform Agencies do not provide workers' compensation insurance for sole traders / independent contractors**

There may be situations where Search Platform Agencies like Mable, which while able to cover personal accident insurance,<sup>57</sup> cannot hold liability for workers' compensation insurance under the current or proposed Modernised Workers' Compensation Laws because they are not the employer or primary contractor of the disability support workers who are signed up for their service.<sup>58</sup>

This means that for disability support workers and people with disabilities and / or their families signed up to the Mable search platform:

- for support workers who are sole traders / independent contractors, a need to source their own worker's compensation insurance to cover risk work injury / harm;<sup>59</sup> and

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<sup>54</sup> PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215]; [2011] FWA FB 8307 (Lawler VP, O'Callaghan SDP, McKenna C, 2 December 2011) at para. 30, [(2011) 215 IR 235]; Abdalla v Viewdaze Pty Ltd t/a Malta Travel PR927971 (AIRC FB, Lawler VP, Hamilton DP, Bacon C, 14 May 2003) at para. 34, [(2003) 122 IR 215

<sup>55</sup> Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Discussion Paper' pg 7, Paragraph 1 (September 2013); Government of Western Australia WorkCover WA, 'Review of the Workers' Compensation and Injury Management Final Report' (June 2014) pg 9, Paragraph 2

<sup>56</sup> WorkCover, 'Compliance Activities: Employer responsibilities and penalties for non-compliance' (October 2021) viewed 29 October 2021 at <<https://www.workcover.wa.gov.au/employers/compliance-activities/>>

<sup>57</sup> Mable, 'Provide Independent Support on Mable' viewed 7 October at <<https://mable.com.au/provide-support/>>

<sup>58</sup> See: Mable, 'About us' viewed 7 October 2021 at <<https://mable.com.au/our-story/>>; Mable, 'Support worker safeguards' viewed 7 October 2021 at <<https://mable.com.au/our-story/>>; Mable, 'Frequently asked questions' viewed 7 October 2021 at <<https://mable.com.au/faqs/>>

<sup>59</sup> Finder, 'Personal Accident Insurance' viewed 29 October 2021 at <<https://www.finder.com.au/life-insurance/personal-accident>>

- for disability support workers who are defined as being sole traders / independent contractors (e.g. in a support worker agreement) but who are actually employees, a legal requirement for their 'clients' - who are actually employers - to obtain workers' compensation insurance.

There is currently no publicly available WorkCover guidance regarding this issue, leaving Western Australian users of services like Mable exposed to a risk of no insurance coverage / non-compliance with workers' compensation laws because they have erroneously believed that:

- a) Mable has covered the necessary workers' compensation insurance as a part of the fee for the Mable service and so they have not needed to get insurance; and / or
- b) for 'clients' who are actually 'employers', the disability support worker was a sole trader / independent contractor and so as a client do not have a statutory obligation to obtain workers' compensation insurance.

This risk could be significantly mitigated if:

- as recommended above, disability support workers in Western Australia who are defined as being sole traders / independent contractors (for example in a support worker contract) are covered under the Modernised Workers' Compensation Laws; and
- WorkCover provides publicly available information / guidance about workers' compensation insurance liability for clients (who are people with disabilities and / or their families) of organisations like Mable – as well as the disability support workers they engage through the Mable search platform.

**WAiS Recommendation:** WorkCover provide publicly available information / guidance about potential workers' compensation insurance liability for clients of search engine agencies like Mable – especially for situations where people with disabilities and / or their families are in substance employers and not contractees.