



The peak body for arts & disability

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Department of Social Services

National Disability Employment Strategy:

Submission by Arts Access Australia

1. Introduction

This is a submission by Arts Access Australia, the national peak body for arts and disability. Our members include each of the arts and disability organisations in the States and Territories (those organisations are set out in Annexure 'A'). Collectively, we represent a broad membership to advance equality for Australians with disability as artists, arts workers and arts leaders, including creating pathways to employment, professional practice and leadership.

The majority of our individual members are artists and arts workers with disability who are forging a professional career in the arts. We value all types of participation in the arts and we are committed to promoting the value of the arts for people with disability for employment, enterprise, social inclusion, cultural identity, health and wellbeing outcomes. We are also committed to breaking down the barriers to participation in the arts, and removing inequity, improving financial and artistic independence and removing the significant disadvantages that people with disability face in the arts in Australia.

This submission and our recommended priorities have been informed by input from each of the organisations in Annexure 'A' and by listening to the collective voice of artists with disability and the organisations that support them from across Australia.

We welcome the opportunity to contribute to the public discussion on the National Disability Employment Strategy (**Strategy**) to identify new initiatives and ways to improve existing programs to increase employment outcomes and break down barriers that people with disability may face in finding and keeping a job, and to contribute to the important discussion on how the Australian government can make meaningful changes to the way supports to jobseekers with disability are delivered. There are important considerations that must be kept front of mind when looking at employment as it relates to artists, screen practitioners and arts workers with disability, and we are pleased to be able to provide our views on the four priority areas of the Strategy, as those areas relate to and affect artists, screen practitioners and arts workers with disability, including identifying key issues and examples of good practice.

In particular, given the characteristics of the arts and cultural sector, how professional artists and arts workers are engaged, how they undertake work and the income earning opportunities that are available in the sector, we are concerned to ensure that the Strategy is not limited to "employment" (in the legal sense, of an employer/employee relationship under a "contract of service"). We urge you to expand the focus and actions of the Strategy to improve people with disability's access to real opportunities for meaningful

work and to earn real incomes. Accordingly, we strongly support the proposed Employment Strategy vision, set out in the Consultation Paper, of an

inclusive Australian society where all people have access to **meaningful work opportunities**.¹ (emphasis added)

The Making Art Work report² released by the Australia Council for the Arts reveals that artists with disability are less likely to find a professional career in the arts than artists without disability. **Nearly 60% of all arts and cultural organisations** do not currently employ (or do not know if they employ) a person with disability.³ Artists with disability are more likely to be unemployed than artists without disability (about one-third versus one-quarter), and to spend longer in unemployment. Further, when they do find employment they can expect to earn **42% less than the income of other artists**.⁴

Artists with disability are under-represented, earn less than their counterparts without disability, experience unemployment at higher rates, and are more likely to identify a lack of access to funding as a barrier to their professional development.

Artists with disability are calling for 'real money' and 'real jobs'. Above all, commitments to and investments in meaningful actions to resolve wage disparity and provide greater equality of opportunities for people with disability working in the arts in Australia must be a priority.

We note that the Consultation Paper states that the Strategy will focus on the following four priority areas⁵:

1. **Lifting employer engagement, capability and demand:** providing employers with the tools and abilities to confidently hire, support and develop more people with disability.

¹ Department of Social Services, National Disability Employment Strategy Consultation Paper, April 2021, p. 6, found at <https://engage.dss.gov.au/national-disability-employment-strategy/national-disability-employment-strategy-consultation-paper>, accessed 15 May 2021.

² Throsby D & Petetskaya K 2017, Making Art Work: An Economic Study of Professional Artists in Australia, available at <https://www.australiacouncil.gov.au/workspace/uploads/files/making-art-work-throsby-report-5a05106d0bb69.pdf>, accessed 27 May 2021.

³ DADAA Inc and Arts Access Australia 2012, Art Works: Employment in the arts for people with disability, found at <http://www.dadaa.org.au/wp-content/uploads/2017/01/Art-Works-Full-Report-Web.pdf>, accessed 27 May 2021.

⁴ See note 2.

⁵ See note 1.

2. **Building employment skills, experience and confidence of young people with disability:** ensuring young people with disability are supported to obtain meaningful work and careers of their choice.
3. **Improving systems and services for jobseekers and employers:** making it simpler for job seekers with disability and employers to navigate and utilise government services, and driving better performance from service providers.
4. **Changing community attitudes:** changing people’s perception and expectation about the capability of people with disability in the workplace.

This submission responds to, specifically, the fourth area of focus – “**Changing community attitudes**”.

We also provide feedback on the vision and priority areas, as they relate to the arts sector, and our ideas and suggestions about actions and initiatives to create positive change for artists and arts workers with disability, that are outside the scope of the priority areas, but which are essential if there is to be meaningful change in the work and income opportunities and career development of people with disability in the arts and cultural sector.

2. Role of government

In addition to encouraging (and even incentivising) Australian businesses to implement strategies to deliver real change in work and income earning opportunities for people with disability, it is essential that government at all levels (and especially the Australian Government) leads by example. Any strategies and actions included in the Strategy (such as, inclusive procurement policies, accessible information and employment targets) must be implemented across the Commonwealth public sector, throughout all entities that are subject to the Public Governance, Performance and Accountability Act 2013 (PGPAA) (that is, all portfolios, Departments of State, Parliamentary Departments, agencies, statutory authorities, and corporate Commonwealth entities).

We recognise that, under section 21 of the PGPAA, the “accountable authority” of a “non-corporate Commonwealth entity” must govern the entity in a way that is not inconsistent with the policies of the Australian government. It is important to note that this obligation does not extend to any “corporate Commonwealth entity” unless the Finance Minister has issued a “government policy order under section 22, specifying a policy of the Australian government that is to apply to that entity. We do not think that the general obligation under section 21 is sufficient to ensure that all Commonwealth entities implement the national disability employment strategy, are held accountable for the plans and actions

that they pursue in order to lead by example, and are required to report regularly on their progress.

We urge the Department to use its best efforts to ensure that a rule, to give effect to obligations on “the Commonwealth” and all “Commonwealth entities” (as those terms are defined in the PGPAA) to take the lead on implementing the Strategy by example, is made under section 101(1) of the PGPAA (as a rule authorised under section 102(1) (a) and (b), to ensure or promote the proper use and management of public resources; and to ensure or promote proper accountability for the use and management of public resources).

It is also important that:

- (a) the Strategy is fully implemented by each of the governments of the States and Territories, throughout each of their respective public sectors, under any similar directions or instructions issued pursuant to relevant legislation (analogous to the PGPAA) governing the management and reporting obligations of each of their public sectors, and
- (b) the Australian Government drives that implementation, and accountability for progress and improvements, through Disability Reform Ministers’ meetings.

Whilst it is not entirely clear to us that the Australian Local Government Association (**ALGA**) is a formal member of the Disability Reform Ministers’ meetings⁶, we note that the President of the ALGA signed and endorsed the Statement of Continued Commitment: National Disability Strategy 2010-2020⁷ issued by the Disability Reform Ministers’ meeting on 4 December 2020. Again, we urge the Department to use its best efforts to obtain the agreement of the ALGA, consistent with its public commitment to

continue to implement existing activities, and develop new activities ... (and to) continue taking a unified, national approach to improving the lives of people with disability and to achieving the vision of the (National Disability) Strategy, that of an inclusive Australian society,

to commit to doing everything necessary and within its power to ensure that each of the members of the ALGA fully implement the Strategy throughout each of their respective

⁶ See <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-council>, and the list of Ministers responsible for disability policy – as at April 2021, found at <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-council/disability-reform-council-membership>, accessed 29 May 2021.

⁷ See https://www.dss.gov.au/sites/default/files/documents/11_2020/pdf-final-statement-continued-commitment-nds-signatures-4dec2020.pdf, accessed 29 May 2021.

Local Government Authorities, under directions or instructions issued pursuant to relevant legislation, by-laws, regulations or instructions that are binding (analogous to the PGPA) and that govern the management and reporting obligations of each of their Local Government Authorities. Again, it is important that the Australian Government drives that implementation, and accountability for progress and improvements, through Disability Reform Ministers' meetings (or such other relevant forums in which the Commonwealth and the ALGA, or their individual members, participate).

The funding that Australian governments, at every level, provide to arts and cultural organisations can also be used as a lever, to encourage those organisations to improve work opportunities, and develop career paths, for artists and arts workers with disability. We recommend that the Strategy includes action to be taken by the public sector bodies within the Commonwealth and each of the States and Territories with responsibility for allocating public money to fund arts and cultural organisations, projects or activities (for example, the Commonwealth Office of the Arts, the Australia Council for the Arts, and Screen Australia) to tie any public funding to achievable, effective, and measurable actions to improve people with disability's access to real opportunities for meaningful work and to earn real incomes in the arts. There must also be actions included to ensure that funded organisations or activities provide all necessary reporting to be able to measure the implementation of the recommendation, and identify and measure the benefits that are generated.

We note that the Consultation Paper makes no reference to, and does not seek any feedback on, the setting of targets as part of the Strategy. We believe that a strategy without measurement of performance, and comparison of actual performance against required, budgeted or expected targets is pointless. All actions in the Strategy must set measurable targets, and include processes for monitoring and evaluating performance against those targets.

Specifically, we urge the Department to set targets for employment and other work opportunities for all people with disability at the national level, and in each of the States and Territories. Targets must not only include participation rates, but also focus on removing income disparity, issues affecting equitable access to project funding, as well as developing management and leadership skills and development, to ensure that people with disability have real agency in connection with and participation in disability led initiatives to address work, income and career development issues.

3. Employment in the arts sector has unique issues

The Consultation Paper (correctly, in our view) notes that different ways of working or opportunities to earn a real income (including self-employment and the gig-economy) poses challenges and opportunities for people with disability⁸. However, we do not consider that these different ways of working, particularly self-employment and freelance models, are a “changing nature” of work, “non-standard” or “becoming more prevalent” in the arts sector. The employment patterns for those who work in creative industries “display unique characteristics in comparison to the general Australian population”.⁹

Research in 2005 found that both “creative” artists (**82%**) and “performing” artists (**64%**) worked freelance or self-employed more frequently than the general population (**19%**). Additionally, only **9%** of “creative” artists and **14%** of “performing” artists have permanent salary or wages, compared to **58%** of the general public¹⁰. Whilst it is unclear how the “creative” and “performing” classifications were formed, nonetheless the data is useful, in that work patterns are compared against the general population. Similarly, in the UK, a recent survey (focussing specifically on the impact of the pandemic on disabled people and organisations in arts & culture) found that the vast majority of respondents are freelance with only **7%** reporting being in full time salaried work.¹¹

It is clear from this, and other data, that these ways of earning an income (self-employment; freelance) are the typical career paths of working artists, with or without disability.

This type of career path has been described as a “protean career”, the features of which include

work characterised as a series of periods with paid employment in their field and paid employment outside their field, and periods of unemployment, linked by learning and retraining. Elements include high mobility, low job

⁸ See note 1, p. 3

⁹ Julie van den Eynde, Adrian Fisher and Chris Sonn Working in the Australian Entertainment Industry: Final Report, Victoria University, 2016, p.12, found at https://crewcare.org.au/images/downloads/WorkingintheAustralianEntertainmentIndustry_Final_Report_Oct16.pdf, accessed 27 May 2021

¹⁰ Bridgstock, R. “Australian artists, starving and well-nourished: What can we learn from the prototypical protean career?” Australian Journal of Career Development, (2005) 14(3), p. 42

¹¹ UK Disability Arts Alliance 2021 Survey Report, May 2021, found at <https://www.weshallnotberemoved.com/2021survey/>, accessed 27 May 2021.

security, transferable skills, knowledge and abilities, several occupational roles and income generated from multiple sources.¹²

Non-arts work is a critical form of income for many artists, so that they are able to earn a living when there is not sufficient opportunities to earn their living by practising their art, or their arts practice simply does not produce sufficient income to live.

People with disability experience workplace discrimination that is widespread, ongoing and systemic. Disability discrimination in work is the most frequent type of disability related complaint to the Australian Human Rights Commission.¹³ However, whilst discrimination at the workplace, or in work, is a significant, and widespread issue, there are significant barriers for most artists and arts workers, because of the nature of the ways in which they work.

Having regard to the particular characteristics of the ways in which artists and arts workers earn incomes, the structure of the arts sector and the practices of arts and cultural organisations, we are making specific recommendations dealing with

- (a) non-employment career paths in the arts
- (b) lifting business engagement
- (c) leadership
- (d) mental health and well-being, and
- (e) protection from discrimination.

We recognise that some of our recommendations may apply, or can be easily adapted to apply, to other sectors beyond the arts. To the extent that it possible, we encourage the Department to do so.

3.1. Strategy must include actions addressing non-employment career paths

Most existing disability employment policies and programs are not designed to support formal and informal education pathways into the arts and cultural sector and to assist professional arts and screen practitioners to develop and sustain a career.

Meaningful ways of earning income for artists, screen practitioners and arts workers with disability means professional practice developing, creating and presenting work to local, national and international audiences, and formal and informal networking networking as a

¹² See note 10, p. 43.

¹³ Social Policy Research Centre 2018, Review of implementation of the National Disability Strategy 2010-2020: Final report (SPRC Report [4/19], p. 21 found at <http://doi.org/10.26190/5c7494b61edc4>, accessed 27 May 2021..

powerful technique for finding work, as formal recruiting techniques are discarded.¹⁴ It also means having access to formal and informal study and professional development as young people transition from school and throughout practitioners' working lives.

We believe that it is essential for the Strategy to include strategies and meaningful actions to:

- build capacity, skills, networks and confidence of people with disability to operate in freelance, self-employed and other “non-standard” employment models, and
- motivate the market to procure and commission works and services from people with disability through inclusive procurement policies, practices and platforms (particularly by the public sector) and publishing case studies, tools and information.

The importance of visible success stories, role models and mentors is highlighted throughout Australia Council arts and disability program evaluations. These themes also recur throughout the literature on arts and disability. This includes the value of role models in inspiring artists and demonstrating the capability for leadership to the wider sector; and additionally the isolating effect of a lack of role models, and pressures associated with the ‘burden of representation’. The research points to the importance of activity that profiles, celebrates and acknowledges the achievements of trail blazers and leading lights at all stages of career development. Many examples of mentoring relationship underline the importance of shifting dynamics and two-way learning that occurs in this exchange.¹⁵

We strongly support the “person centred approach” referred to in the Consultation Paper and agree that the disability employment support system “must shift focus more on jobseekers as individuals, taking into account their strengths, ability, rights and aspirations” and that the system must “provide the holistic support people need” to develop and sustain meaningful career paths and earn a sustainable income¹⁶. This is equally true for all people with disability seeking meaningful employment, but especially so for artists, screen practitioners and arts workers with disability. Studio A a social enterprise based in Sydney, providing professional pathways for artists with intellectual

¹⁴ See note 9, p.18.

¹⁵ Australia Council for the Arts Creating Pathways: Insights on Support for Artists with Disability, 2018, found at https://www.australiacouncil.gov.au/workspace/uploads/files/aca_225186_arts-and-disability-5ba339682cc18.pdf, accessed 27 May 2021.

¹⁶ See note 1, p. 14

disability,¹⁷ is one example of a successful model of a “personal-centred” approach and support for artists with disability.

We also strongly agree with the suggestion in the Consultation Paper¹⁸ that the use role models, mentoring, story-telling and case studies will help build business confidence and normalise engagement (whether as employees, fixed term contractors, sub-contractors, or otherwise) of people with disability. However, these resources must not be limited examples or case studies about people in a “traditional” employee relationship. Care must be taken to ensure that appropriate role models, stories and case studies that relate to other ways in which business can engage a person to perform work or provide services (including freelance and contract work) are identified and included in this resource.

In February 2021, the Australian Broadcasting Corporation released new commissioning guidelines to ensure more diverse faces, voices, cultures and stories are reflected and represented on Australian screens.¹⁹ The Diversity and Inclusion Commissioning Guidelines – Screen Content²⁰, covering content commissioned across drama, comedy, children’s, factual and entertainment programs, seek to address under-representation in five key areas by outlining reasonable and proportionate measures to provide greater access and opportunity to those under-represented people and perspectives, and to increase participation of diverse talent, on and off screen. People living with a disability is one of the five key areas targeted under the Guidelines.

The Guidelines require all outside production companies who seek a commission from the ABC for relevant screen content to identify the measures the production company is taking to:

- identify and diversify on screen talent in:
 - main cast (scripted leads, presenter, narrator, host)
 - supporting cast (semi-regular cast or featured guest roles, guest presenters, panellists, experts, regular contributors, musicians), and
 - background roles (extras, cameo performers, one off contributors, vox pops, participating audience members)

¹⁷ See <https://www.studioa.org.au>

¹⁸ See note 1, p. 10.

¹⁹ ABC media release, “ABC launches diversity and inclusion commissioning guidelines for screen content”, 15 February 2021, found at <https://about.abc.net.au/press-releases/abc-launches-diversity-and-inclusion-commissioning-guidelines-for-screen-content/>, accessed 28 May 2021.

²⁰ Found at https://www.abc.net.au/tv/independent/doc/ABC_DandI_Commissioning_Guidelines_2021.pdf, accessed 29 May 2021.

- ensure representation of people from under-represented groups in senior production and key creative decision-making roles, and
- build career pathways for people from under-represented groups in production and crew roles²¹.

As a means of to create a meaningful links between industry programs (such as internships, attachments, and shadow programs) and inclusion in creative and production teams to build an industry that is more inclusive and representative of the Australian population, the ABC also expects production companies to identify genuine career development opportunities for individuals from under-represented communities through existing attachment schemes, industry incentives or other innovative measures.²²

We encourage the Department to highlight this initiative as an exemplar of how business can engage effectively and positively with business and the disability arts sector, to identify and implement reasonable and proportionate measures to provide greater access, diversity and opportunities to work and develop career paths to people with disability (and other under-represented groups).

3.2. Lifting business engagement and capability

The Consultation Paper notes 93% of large businesses and 89% of medium sized businesses say they are open to engage people with disability. However, the reality is that only approximately one third of businesses show behavioural commitment to doing so.²³

Businesses lack knowledge, confidence and experience to engage and support a person with disability, with only half having confidence in their businesses' ability to support people with a disability. More than 53% believe their workplace culture is not supportive of people with disability.²⁴

This lack of knowledge, confidence and experience may be explained, at least in part, by the lack of action to develop and implement a Disability Action Plan, or, more fundamentally, a lack of interest or concern to identify and remedy any business practices which may result in discrimination against a person with disability.

Less than 40% of arts and cultural organisations have a Disability Action Plan (whether under Part 3 of the Disability Discrimination Act 1992, or the relevant, analogous legislation directed to eliminating, as far as possible, discrimination against persons on the ground of disability) in place.⁵ Only 23 arts and entertainment organisations have given a

²¹ ibid. pp.7-8.

²² ibid. p. 9.

²³ See note 1, p. 8.

²⁴ ibid.

copy of their action plan to the Australian Human Rights Commission, under section 67 of the Disability Discrimination Act 1992.²⁵ We expect that other sectors of the economy, and businesses seeking to engage workers, would have similar levels of commitment to, and engagement with Disability Action Plans.

This lack of business engagement with Disability Action Plans, at least in relation to work issues, may be explained by the lack of public information about how a Disability Action Plan relates to work issues, or may create a more positive environment in which people with disability are more able to work (and which is a more appealing work environment). Whilst information from the Department acknowledges that implementing a Disability Action Plan can

provide employment opportunities to people with disability and a broader labour base for businesses to recruit from, and has the potential to increase the diversity and experience of your employees,²⁶

other sources of information that businesses are likely to seek out do not. For example, information from the Australian Human Rights Commission makes no mention of work or employment. The sole focus is on access for people with disabilities, “including access to the goods, services and facilities provided by businesses”. Eliminating discrimination in the provision of “goods, services and facilities” makes good business sense and an Action Plan will assist a business to “increase ... market share and enhance the image of (the) business”.²⁷

Having a Disability Action Plan (and the work necessary to develop the plan) will build business capability and confidence to engage people with disability in the business. This is particularly the case if information about Disability Action Plans and their benefits to business includes working in the business and specifically addresses issues effecting employment or engagement of people with disability. We recommend that, in addition to or as part of the recommendation (on page 10 of the Consultation Paper) to “develop and

²⁵ Australian Human Rights Commission, Register of Disability Discrimination Act Action Plans, found at <https://humanrights.gov.au/our-work/disability-rights/register-disability-discrimination-act-action-plans>, accessed 29 May 2021.

²⁶ Department of Social Services, Disability Action Plan – Framework for business, found at <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/general/disability-action-plan-framework-for-business?HTML>, accessed 28 May 2021.

²⁷ Australian Human Rights Commission, Disability Action Plans: A Guide for Business, found at <https://humanrights.gov.au/our-work/disability-rights/disability-discrimination-act-action-plans-guide-business>, accessed 28 May 2021.

promote information, tools and resources” to increase business capability and confidence, the Strategy expressly deals with ways in which to

- (f) increase awareness of the importance of and benefits able to be realised by businesses planning for, preparing and implementing Disability Action Plans
- (g) provide information specifically addressing issues in relation to engagement of people with disability to work in a business that can be included in a Disability Action Plan, and the benefits of doing so, and
- (h) encourage businesses to develop and implement Disability Action Plans in relation to employment and other work opportunities.

3.3. Leadership

These comments also relate to the possible ways in which community attitudes can be changed (as a pre-requisite for overcoming the barriers to participation faced by people with disability in their daily lives) by addressing and reducing stigma, unconscious bias and lack of understanding of disability (see below).

People with disability are less likely to be found in leadership and management roles in all sectors of our society, including in the arts and cultural sector. We believe that this must change, and that change starts at the top. If we are to see more diversity in the arts, if we are to see more opportunities for artists with disability, then we need more people with disability in positions of leadership and influence. As the peak national body for arts and disability, Arts Access Australia believes that we have a role to play in creating the opportunities for this to happen. We also believe that the Strategy needs to identify and implement specific actions that will create more, and better opportunities to develop leadership capabilities.

For artists and arts workers with disability to lead change, they must occupy positions of influence, on Boards, advisory groups and peer assessment panels – and they must be visible. There are currently not enough peer assessors with disability on national funding grant assessment panels, which has the capacity to significantly adversely affect the attitude to and assessment of funding applications made by artists and arts worker with disability, and the level of success in obtaining grant funding.

We commend, and support, the Australia Council National Arts and Disability Awards, which celebrate the work and achievements of established and emerging artists, and the significant contribution of artists with disability to the vibrancy of Australian arts. The inaugural presentation of these awards occurred in 2019, as part of a three-year strategic funding commitment by the Australia Council announced in 2018. Two awards are

presented annually – The National Arts and Disability Award (Established Artist) \$50,000 and The National Arts and Disability Award (Emerging Artist) \$20,000.

Arts Access Australia also funds and presents an award as part of the National Arts and Disability Awards that is specifically designed to recognise, celebrate and develop leaders from within, and improve the leadership capabilities of, artists and arts workers with disability.

The Council’s research highlights the importance of profiling, celebrating and acknowledging the “achievements of trailblazers and leading lights at all stages of career development”. It is critical that the recognition of these awards continues, with the continued funding beyond 2022. Moreover, it is critical to ensure that this recognition is supported by effective, properly funded programs to improve wage equality and equity of opportunities in employment for all artists and arts workers with disability, at every stage of career and professional practice development.

3.4. Strategy must address mental health and well-being

The lack of permanent employment arrangements, high levels of reliance on self-employment and freelance engagements, and the need to supplement arts income with other work means that many artists and arts workers experience high levels of “labour precarity”, that is

existential, financial, and social insecurity exacerbated by the flexibilization of labor (sic) markets ... income instability, lack of a safety net, an erratic work schedule, uncertainty about continuing, employment, the blurring of work and non-work time, and the absence of collective representation.²⁸

According to a 2015 survey of 204 Australian professional musicians that sought to detect their level of well-being job insecurity and career uncertainty posed the largest threat to musicians’ life and work outcomes. These factors were associated with lower life satisfaction, higher psychological distress, and burnout.²⁹ Research undertaken by Entertainment Assist and Victoria University in 2016 uncovered serious health and wellbeing concerns for those who work in the Australian entertainment and creative industries. The findings strongly suggest the entertainment and cultural industry is

in severe distress, and in urgent need of early prevention and intervention programs to reduce the impacts of those with health and wellbeing problems, and to prevent new occurrences.³⁰

²⁸ See note 9, p. 11.

²⁹ *ibid.* p.13.

³⁰ *ibid.*, p.1.

In May 2020, Arts Access Australia surveyed its members, identifying the key challenges they were facing. Consistent with the notion of labour precarity, 79% of respondents indicated that maintaining an ability to earn regular, certain income is a key challenge. That survey also revealed that COVID-19 has severely impacted artists and arts workers with disability, with almost 60% of survey respondents suffering an average loss of income of \$3,331 per month, with approximately 35% of respondents losing income from live performance, 26% from exhibitions, 27% from sale of artworks, and 34% from development of artwork. 47% of those who have lost income do not receive JobSeeker as they were ineligible or received another form of income support (DSP, age pension), and so also did not benefit from the (temporary) uplift in that form of Government support.

Comments from respondents included:

I can't afford anything and the Government leaving the DSP recipients off the supplement fortnightly payment has signalled to the rest of Australia that we don't matter.

I'm finding basic costs of living too hard so my engagement as audience has dwindled to almost nil over the past five years. I think many artists who are on low incomes may not recover.

Many creative programs and community access have had to close their doors in result to COVID 19 with limited financial support which has caused heightened anxiety and uncertain future.

For artists and arts workers with disability the stresses of the identified "labour precarity" are further exacerbated by very real, and significant concerns associated with having to negotiate and overcome the many systemic, attitudinal, environmental and other barriers that hinder their full and effective participation in society on an equal basis with others. We endorse the comments in the Consultation Paper³¹ that for many people with disability it is difficult to prioritise finding or keeping work, or performing contracted obligations when also trying to meet basic needs such as housing, food, health, mental well-being or dealing with additional stress and anxiety.

To help with the management of issues concerning mental health and well-being, stress or anxiety (which we recognise are issues that are not likely to be limited to those working in the arts and cultural sector), the Strategy must:

- (a) consider and include ways in which people can access mainstream services to be supported in recognising and managing their mental health and well-being, as a critical part of their work journey, and

³¹ See note 1, p. 18.

- (b) ensure that any streamlined sources of information about disability employment³² includes sources of information about and support for recognising and managing mental health and well-being.

3.5. Addressing disability discrimination against people who are not employees or already contracted

There are limited protections for discrimination for people with disability who are not “employees”, or already in an existing contract arrangement to provide their services.³³

Section 15 of the Disability Discrimination Act 1992 makes it unlawful for an **employer** to discriminate against a person on the ground of the other person’s disability:

- (i) in the arrangements made for the purpose of determining who should be offered **employment**
- (j) in determining who should be offered **employment**, or
- (k) in the terms or conditions on which **employment** is offered.

Section 35 also makes it unlawful for a person to harass another person who:

- (a) is an **employee** of that person, and
- (b) has a disability;

in relation to the disability.

We note that section 4(1) includes a definition of “employment”, as including “work under a contract for services” – that is an independent contract arrangement. Further, section 18A of the Acts Interpretation Act 1901 provides where a word in an Act is given a particular meaning, **other parts of speech** and grammatical forms of that word have corresponding meanings. There are eight parts of speech in the English language: noun, pronoun, verb, adjective, adverb, preposition, conjunction, and interjection. The part of speech indicates how the word functions in meaning as well as grammatically within the sentence.

“Employment”, as used in the Disability Discrimination Act 1992, is a noun. “Employee” is also a noun. It is not an “other part of speech”, but the same (whereas “employ”, as a verb, is an “other part of speech”). This means that the reference to an “employer” in

³² ibid. p. 16.

³³ Australian Human Rights Commission 2016, Willing to work: National Inquiry into Employment Discrimination against Australians with disability and older Australians, found at https://www.humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf, accessed 27 May 2021.

section 15, and the reference to “employee” in section 35 does not include (a person who is engaging another person to perform work under a contract for services in the case of section 15), nor does it include a person who is offering to perform work under a contract for services in the case of section 35). This restricted interpretation is also supported by the inclusion of section 17 (discussed below).

Similarly, under the Fair Work Act 2009, unlawful workplace discrimination occurs when an **employer** takes adverse action against a person who is an **employee** or **prospective employee** because of that person’s physical or mental disability³⁴. Adverse action taken by an employer includes doing, threatening or organising:

- dismissing an **employee**
- injuring an **employee** in their employment
- altering an **employee’s** position to their detriment
- discriminating between **one employee** and **other employees**
- refusing to **employ** a prospective employee
- discriminating against a **prospective employee** on the terms and conditions in the offer of employment.³⁵

Section 17 of the Disability Discrimination Act 1992 deals with unlawful discrimination against “contract workers”. If section 15 prevents discrimination in connection with offering a contract for services, or the terms and conditions of such a contract, section 17 adds nothing, and is not needed. Under the section it is unlawful for a principal to discriminate against a contract worker on the ground of the contract worker’s disability:

- (a) in the terms or conditions on which the principal allows the contract worker to work
- (b) by not allowing the contract worker to work or continue to work
- (c) by denying the contract worker access, or limiting the contract worker’s access, to any benefit associated with the work in respect of which the contract with the employer is made, or
- (d) by subjecting the contract worker to any other detriment.

“Contract worker” is not defined in the Act, and so bears the meaning determined by case law. There have been many detailed discussions by courts and tribunals about the distinction between an employee and a contractor or contract worker, including what issues should be considered and the way the issues should be decided.

The distinction between an employee and contract worker is

³⁴ Section 351, Fair Work Act 2009.

³⁵ Section 342(1), Fair Work Act 2009.

rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'.³⁶

In simple terms, the issue is whether a person works for an employer or works for themselves.

It is also important to note that section 17 is limited to circumstances where a contract for services has been entered into. Until that has happened, there is no “contract worker” to whom the provision applies.

Further, whilst section 342 of the Fair Work Act 2009 extends the concept of “adverse action” to specific actions taken by a person who has entered, or who is proposing to enter, into a contract for services with an **independent contractor** against that independent contractor,³⁷ that protection is limited to “adverse actions” under section 340 (in circumstances where the independent contractor has, has exercised, or is proposing to exercise a “workplace right”. Section 351 (which prevents, amongst other forms, disability discrimination) is expressly limited to taking “adverse action” against an **employee** because of the employee’s mental or physical disability.

This means that most arts workers and artists with disability have no right to take any action, or seek any legal redress, for any discrimination they face during any procurement or pre-contract activities, under the Disability Discrimination Act 1992 or the Fair Work Act 2009. We consider that this is a significant gap in the rights and protections that all people with disability must have under Australian law.

Mechanisms exist for people with disability to challenge discrimination that they face in connection with acquiring services³⁸ or accessing using any premises that the public is entitled or allowed to enter or use.³⁹ However, research demonstrates that people do not necessarily know about these rights (particularly in the context of discrimination that occurs before any legal relationship is formed between the parties) and do not have capacity to use them without assistance. Whilst the Standards under the *Disability Discrimination Act* are legally binding, enforcement relies on individual complaints about non-compliance.⁴⁰

³⁶ Hollis v Vabu Pty Ltd [2001] HCA 44 (9 August 2001), [(2001) 207 CLR 21, at para. 40; citing Marshall v Whittaker's Building Supply Co [1963] HCA 26 (7 August 1963), [(1963) 109 CLR 210, at p. 217.

³⁷ See note 30, items 3 and 4 of the table in that section.

³⁸ Section 24, Disability Discrimination Act 1992.

³⁹ Section 23, Disability Discrimination Act 1992.

⁴⁰ See note 13, p. 22.

4. Using the arts to change community attitudes

The visibility of work produced in the arts and cultural sector improves community attitudes and misconceptions about the capabilities, aspirations, needs and achievements of people with disability more broadly.

Disability in the arts offers excellence and artistry, as well as unique perspectives and lived experiences that challenge and redefine aesthetics. Artists with disability contribute layers of powerful expression, creativity and storytelling. Their work engenders dialogue, empathy and understanding, and can shift perceptions of disability through authentic insights. Disability in the arts is about the potential of art to change lives.⁴¹

The arts has an increasingly powerful role in promoting social cohesion and connection. Three in four Australians believe the arts are an important way to get a different perspective on a topic or issue, and two in three believe the arts help us to understand other people and cultures, and allow us to connect to others. The experiences of artists and arts leaders supported through two initiatives by the Australia Council for the Arts align with these findings, with both groups reporting a high level of audience engagement and feedback. Many also reported shifts in perceptions about disability, from people with and without disability. It is clear that arts practice informed by the experience of disability can have a transformative impact on audience experience.⁴²

We strongly believe that there is real value, and tremendous opportunity for real substantial and sustainable change in both community attitudes to people with disability and in creating and increasing meaningful work and opportunities to earn real incomes for all people with disability, if the Strategy takes into account the particular issues facing artists and arts workers with disability. It is for these reasons that we urge the Department to carefully consider, and implement each of the recommendations made in this submission.

If you require any further information, or wish to discuss any matter raised in this document, we would be pleased to meet with representatives of the Department. Please contact our Chief Executive Officer, Matthew Hall, by telephone on 0478 798 998, or by email, ceo@artsaccessaustralia.org.

⁴¹ See note 15.

⁴² ibid.

Annexure 'A'

State and Territory arts & disability organisations & members of Arts Access Australia

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