

Practitioner Toolkit

Physical Features and Discrimination

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Damien Opolski has over 30 years' experience in the employment services sector, including many years as an employment consultant. He's done around 10,000 job seeker interviews! He's contacted each State and Territory anti-discrimination jurisdiction to see what the local legislation says...

Do you ever see job ads that say things like this?

- “No visible tattoos or facial piercings”
- “Must project a trendy image”

...and ask yourself: “Can they ask for that?”

Federal legislation (Age Discrimination Act 2004, Australian Human Rights Commission Act 1986, Disability Discrimination Act 1992, Racial Discrimination Act 1975, and Sex Discrimination Act 1984) specifically protects people against discrimination based on age, disability, race and ethnicity, and gender. The Australian Human Rights Commission Act 1986 contains some additional attributes:

- criminal record
- marital status
- political opinion
- social origin
- religion
- sexual orientation
- trade union activity

The Federal laws tend not to cover ‘physical features’ – things like height/weight/size and other ‘bodily characteristics’ such as hairstyle/facial hair, tattoos and piercings.

For this we need to look at the individual State/Territory legislation. Here’s what we found:

nmesa
national employment services association

Victoria and Australian Capital Territory

Victorian and ACT anti-discrimination legislation both include ‘physical features’ as protected attributes, meaning that a job seeker who can perform the inherent requirements of the job can be found to have been discriminated against if they are denied an opportunity on the basis of:

- Height
- Size
- Weight
- Other bodily characteristics (which have been broadly defined to include tattoos, piercings and other forms of self-expression such as hairstyle/facial hair/make-up).

There are some exceptions to this – for example if the job involved acting or being in a theatrical production then the employer can specify a certain ‘look’, and a performer may need to satisfy a particular ‘look’ in order to perform the inherent requirements of the job. Horse racing is based on a handicapping system which determines the weight that a horse must carry in a race. Given that the



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maximum weight a horse would carry is approximately 70kg, a person who weighed 100kg would not be able to perform the inherent requirements of the jockey role.

But broadly speaking, a recruiter in Victoria or the A.C.T. cannot specify a particular 'image'. Here's an example used on both the Victorian and A.C.T anti-discrimination web site that describes discrimination based on physical features:

"A fast food company will only recruit people with a certain 'look', that is, a specific height, weight and build."

Personal hygiene is *not* a 'physical feature'.

See:

[The Equal Opportunity Act 2010 \(Vic\)](#)

[ACT Discrimination Act 1991](#)

New South Wales

'Physical features' are *not* protected attributes in NSW legislation, meaning that it is not unlawful to discriminate on the basis of 'physical features' when recruiting.

Recruiters do need to be conscious of other discriminatory practices. For example:

- A recruiter who specifies that a particular gender *cannot* have e.g. facial piercings, jewellery, tattoos, or short/long hair, must apply that requirement to *all* genders.
- If a physical feature is consistent with a medical condition or ethnic/cultural practice then the recruiter must ensure that the reason for non-consideration isn't the disability or ethnicity. An example often given to help explain this is the Maori, where facial tattoos may be a cultural custom. A recruiter needs to ensure that non-consideration is based on the tattoos rather than the fact that the person is Maori.
- Recruiters also need to consider jewellery that may reflect religious significance – including bangles worn by Sikh men and crucifixes worn by Christians.

See: [NSW Anti-Discrimination Act 1977](#)

Tasmania

The Tasmanian Anti-Discrimination Act lists 22 'prescribed attributes' which include political and religious activity – but *don't* include physical features. This effectively means that recruiters can specify physical features subject to the types of considerations we've listed in the NSW section.

See: [Anti-Discrimination Act 1988 \(Tasmania\)](#)



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Western Australia

The Western Australian Act does not specify 'physical features' as a prescribed attribute. This effectively means that recruiters can specify physical features subject to the types of considerations we've listed in the NSW section.

See [Equal Opportunity Act 1994](#)

Queensland

The Queensland Act does not specify 'physical features' as a prescribed attribute. This effectively means that recruiters can specify physical features subject to the types of considerations we've listed in the NSW section.

The Anti-Discrimination Queensland web site has an excellent [FAQ](#) for you.

See: [Anti-Discrimination Act Queensland 1991](#)

South Australia

South Australia is similar to NSW, WA, Queensland, Tasmania and NT in that 'physical features' are not specified in SA anti-discrimination law. This effectively means that recruiters can specify physical features subject to the types of considerations we've listed in the NSW section.

The South Australian Government's Equal Opportunity Commission web site has a very informative [FAQ](#) that looks at everything from jewellery, beards, tattoos and dress.

See: [Equal Opportunity Act 1984](#)

Northern Territory

The N.T. is similar to NSW, WA, Queensland, Tasmania and SA in that 'physical features' are not specified in the Act. This effectively means that recruiters can specify physical features subject to the types of considerations we've listed in the NSW section.

See: [NT Anti-Discrimination Act](#)