

## Should physical features discrimination be prohibited?

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## Introduction

There has been little attention given to laws in the ACT and Victoria prohibiting discrimination on the ground of physical features (**physical features discrimination**).<sup>1</sup> In the United States, laws prohibiting physical features discrimination have been the centre of considerable public controversy.<sup>2</sup> Advocates for such laws have argued that physical features discrimination, including discrimination based on unattractive features and being overweight, leads to systemic discrimination against, and injustice for, these groups.<sup>3</sup> Opponents have argued, amongst other things, that this would be a slippery slope to totalitarianism.<sup>4</sup> Apart from being of interest for its direct relevance to Australian legislatures, the question of whether to prohibit physical features discrimination is of interest because it is such a borderline case that it requires going to the core of the question: why do we prohibit discrimination on some grounds but not others? Starting from the assumption that discrimination laws on ‘traditional grounds’ (such as race, sex, disability and age) are justified, this paper considers whether they should be extended to prohibit physical features discrimination.

Drawing on other authors’ analysis, Part One develops a broad conceptual framework for considering whether the moral underpinnings of traditional discrimination laws can be applied to justify further prohibited grounds of discrimination. *First*, we should consider the extent to which the law requires discriminators to act against their objectives. If discrimination laws prohibit persons from rationally pursuing their objectives, this imposes a cost on them, which needs to be justified. The greater the cost, the stronger the justification needed. *Second*, we should consider the extent to which the law promotes ‘social inclusion’,

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<sup>1</sup> *Equal Opportunity Act 2010* (Vic) s 6(j); *Discrimination Act 1991* (ACT) s 7(1)(n). Based on my searches, there are no academic articles specifically on these laws.

<sup>2</sup> See, William R Corbett’s discussion of media coverage of a complaint against Citibank in ‘Hotness Discrimination: Appearance Discrimination as a Mirror for Reflecting on the Body of Employment-Discrimination Law’ (2011) 60 *Catholic University Law Review* 615; Robert Post’s discussion of public debate over a city council’s proposal to prohibit discrimination on the basis of physical features in ‘Prejudicial Appearances: The Logic of American Antidiscrimination Law’ (2000) 88(1) *California Law Review* 1, 2-6; Deborah L Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford University Press, 2010); Michael Kimmel, ‘Fired for Being Beautiful’, *New York Times*, 16 July 2013; Emily Blazon, ‘Just One Look’, *New York Times*, 21 May 2010.

<sup>3</sup> See, for example, Deborah L Rhode, *The Beauty Bias: The Injustice of Appearance in Life and Law* (Oxford University Press, 2010); Karen Zakrewski, ‘The Prevalence of “Look”ism in Hiring Decision: How Federal Law Should be Amended to Prevent Discrimination in the Workplace’ (2005) 7(2) *University of Pennsylvania Journal of Labor and Employment Law* 431.

<sup>4</sup> Michael Selmi, ‘The Many Faces of Darlene Jespersen’ (2007) 14 *Duke Journal of Gender Law and Policy* 467; Andrew Sullivan, ‘The Plump Classes Are on a Roll’, *Sunday Times* (London) 29 August 1999, 7; Enbar Toledano, ‘The Looking-Glass Ceiling: Appearance-Based Discrimination in the Workplace’ (2013) 19 *Cardozo Journal of Law and Gender* 683.

which broadly involves the removal of barriers to participation in the ‘benefits of citizenship’.<sup>5</sup> This may justify any costs imposed on discriminators by a discrimination law, because social inclusion is a value deeply embedded in our society. *Third*, we should consider whether the attribute is one of two types of attributes which, when combined with sufficient concern for social inclusion, has traditionally justified discrimination laws: attributes that are ‘immutable’, in the sense that they are not chosen and are difficult to change, and attributes that represent fundamental choices, being attributes that are highly important to the possessor of the attribute.<sup>6</sup> *Fourth*, we should consider any other social goods that would be limited, or costs that would be imposed, by prohibiting this form of discrimination, such as whether they would raise health and safety concerns, interfere with persons' private lives, or impose substantial administrative costs through dealing with false claims. These concerns may be capable of being dealt with by way of exceptions to the prohibition on discrimination, but if they cannot, a weighing exercise must ensue between the costs and benefits of the law.

Part Two of this paper outlines relevant features of the psychological literature on physical features discrimination, which will feed into consideration of whether it should be prohibited. A consistent finding is that attractive and thin people are rated more favourably and advantaged, including in the contexts where discrimination is prohibited,<sup>7</sup> and that these effects are disproportionately felt by women.<sup>8</sup> These biases lead to attractive and thin people having greater confidence and achievements, which in turn lead to further advantages.<sup>9</sup> There is reason to believe this may contribute to a phenomenon whereby attractive and thin people are in higher socio-economic classes.<sup>10</sup> But physical features discrimination does not just favour the thin and attractive. Rather, people will be favoured on a variety of physical features, including ones that are easily chosen, such as haircuts and tattoos. And because of social judgements based on appearance, people change some of their physical features to better suit a particular image. Finally, it is worth considering how the appreciation of a physical features, in the arts and elsewhere, can lead to a wide range of socially valued

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<sup>5</sup> Hugh Collins, ‘Social Inclusion: A Better Approach to Equality Issues?’ (2005) 14 *Transnational Law and Comparative Problems* 897, 913.

<sup>6</sup> See Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015), 56-60; and discussion at page 14 - 17.

<sup>7</sup> See Judith H Langlois et al, ‘Maxims or Myths of Beauty? A Meta-Analytic and Theoretical Review’ (2000) 126(3) *Psychological Bulletin* 390; Rebecca Puhl and Kelly D Brownell, ‘Bias, Discrimination, and Obesity’ (2001) 9(12) *Obesity Research* 788; and discussion in Part Three.

<sup>8</sup> See discussion of studies at Part 3D.

<sup>9</sup> See Langlois, above n 7; Markus M Mobius and Tanya S Rosenblat, ‘Why Beauty Matters’ (2006) 96(1) *The American Economic Review* 222.

<sup>10</sup> See discussion in Part 2.A(iv).

experiences, for both the viewer and those being viewed (as this may be a counter weight against prohibiting physical features discrimination laws).

Part Three outlines some aspects of the experience of Victoria and the ACT with physical features discrimination laws, including interpretation of these laws and their societal impact. Important issues of interpretation include:

- physical features discrimination is prohibited regardless of whether it is the result of conscious or unconscious mental processes (**conscious/unconscious discrimination**)
- the term ‘physical features’ includes chosen physical features
- while attractiveness is not a physical feature, discrimination on the ground of attractiveness will sometimes be discrimination on the ground of physical features.

Despite the psychological literature showing that physical features discrimination is common, based on my searches,<sup>11</sup> after over 23 years of physical features discrimination laws in Victoria and about 2 years in the ACT,<sup>12</sup> there has only been one finding of physical features discrimination,<sup>13</sup> and at least 45 decisions where the claim of physical features discrimination was not made out.<sup>14</sup> On the other hand, there have been a substantial amount of complaints

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<sup>11</sup> The following searches were performed: Noteup on Austlii on s 6 of the *Equal Opportunity Act 2010* (Vic) with the terms “physical features”; Noteup of s 7 of the *Discrimination Act 1991* (ACT) with the term “physical features”; searches within all ACT and Victorian Case law with the search terms “physical features’ and ‘discrimination’”; All cases referred to in Rhode, above n 2, were reviewed; Searches of LawNow on s 7 of the *Discrimination Act 1991* (ACT) and s 6 of the *Equal Opportunity Act 2010* (Vic) with the term “physical features”.

<sup>12</sup> Amended by the *Discrimination Amendment Act 2016* (ACT), s 20.

<sup>13</sup> *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

<sup>14</sup> *Mondio Mario v Toyota Motor Corp Aust Ltd* [1999] VCAT 653; *Judd v Department of Transport and Regional Services & Anor* [2000] VCAT 2495; *Roulston v State of Vic & Anor* [2000] VCAT 820; *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849; *Jamieson v Benalla Golf Club Inc* [2000] VCAT 2303; *Petrus v State of Victoria* [2000] VCAT 1286; *Kenyon v Australian Cooperative Foods* [2001] VCAT 1981; *Menzies v Waycott & Anor* [2001] VCAT 415; *Ruddell v DHS* [2001] VCAT 1510; *Nason v RVIB & Ors* [2002] VCAT 403; *Prolisko v Arthur Knight Management Pty Ltd (Anti-Discrimination)* [2005] VCAT 1868; *AB v Adult Multicultural Education Services (Anti Discrimination)* [2006] VCAT 1862; *Prolisko v Knight (Anti Discrimination)* [2006] VCAT 2046; *Helman v Karingal (Anti Discrimination)* [2007] VCAT 423; *Csizmadia-Estok v Bendigo Bank (Anti Discrimination)* [2006] VCAT 1566; *Bendigo Bank Ltd v Csizmadia-Estok* [2007] VSC 112; *Sagris v Chubb Security Australia Pty Ltd*; *Morros v Chubb Security Australia Pty Ltd (Anti-Discrimination)* [2008] VCAT 2334; *Ellis v Victoria Police (Anti-Discrimination)* [2009] VCAT 907; *Morros v Chubb Security Personnel Australia (Anti-Discrimination)* [2009] VCAT 1845; *Tarpey v State of Victoria – Department of Education and Early Childhood Development & Ors (Anti-Discrimination)* [2009] VCAT 410; *Grah v RMIT University and Ors (Anti-Discrimination)* [2011] VCAT 1229; *Belyea v Brodie (Anti-Discrimination)* [2012] VCAT 1978; *Pham v Jones & Anor (Anti-Discrimination)* [2012] VCAT 1161; *Pham v Drakopoulos & Ors (Anti-Discrimination)* [2012] VCAT 1198; *Pham & Anor v Clark & Anor (Anti-Discrimination)* [2012] VCAT 801; *Kuyken v Lay (Human Rights)* [2013] VCAT 1972 (16 police officers brought cases that turned on the issues decided in this case, and the other 15 cases are not listed here); *Jovancevski v United Voice (Anti-Discrimination)* [2013] VCAT 25; *Karan v Hotondo Building Pty Ltd (Human Rights)* [2014] VCAT 510; *Kelly v Secretary Department Health and Human Services (Human Rights)* [2015] VCAT 1541; *Dirckze v Holmesglen Institute (Human Rights List)* [2015] VCAT 1116; *Djime v Kearnes (Human Rights)* [2015] VCAT 941; *Djime v Kearnes (No. 2) (Human Rights)* [2015] VCAT 2055; *Dirckze v*

and inquiries regarding physical features discrimination to the Victorian Equal Opportunity and Human Rights Commission in the last 3 financial years, which suggests, despite the lack of reported cases, a significant number of persons know about these laws and they are having an impact on Victorian society.

Part Four applies the conceptual framework in Part One, drawing on the analysis from Parts Two and Three, to consider whether physical features discrimination should be prohibited. First, it argues for a prohibition on immutable physical features discrimination, because much immutable physical features discrimination is irrational and there ought be serious concerns for social inclusion of persons with some immutable physical features, such as the overweight and persons with immutable physical features that render them unattractive, especially if they are women. There are some valid concerns that a prohibition on immutable physical features discrimination may affect the public's ability to appreciate beauty, invade the private realm, and affect health and safety, but these can be dealt with by way of exceptions in the law. Second, it argues against a blanket prohibition on discrimination on the ground of 'chosen' physical features. 'Chosen' physical features are considered those that are not immutable – they are either chosen (eg a tattoo) or could be easily changed (eg unshaven legs, but not a mole). It is argued that this form of discrimination is often rational, does not raise the same concerns for social inclusion, and will generally not be the result of a fundamental choice. Third, however, it argues for a narrower prohibition in relation to chosen physical features, being a prohibition on discrimination on the ground of physical features that represent attributes already protected by discrimination law (**protected attributes**). For example, discrimination on the basis of a Sikh person's haircut. This form of discrimination is commonly irrational, triggers serious concerns for social inclusion, and choosing to represent protected attributes should be recognised as a fundamental choice. Without fully exploring the issue, this paper acknowledged that some Australian discrimination laws already prohibit this form of discrimination, but only to a limited extent.

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*Holmesglen Institute* [2016] VSC 385; *Dirckze v Holmesglen Institute* [2017] VSC 18; *Sinopoli v Harrison (Human Rights)* [2017] VCAT 355.

## Part One: A partially satisfactory conceptual framework

### a. Why ask the question at all?

It has often been observed that there is no unifying theory behind discrimination law.<sup>15</sup> In 1991, Cass Sunstein wrote that civil rights theory lacks ‘a full-fledged explanation of just how to characterize a claim of discrimination and why we should eliminate it’.<sup>16</sup> Larry Alexander, in 1992, finished a lengthy article on what makes discrimination wrong with the conclusion that there are ‘whimpers and no bang’, and that determining what makes discrimination wrong is ‘usually quite complex as well as culturally and historically variable’.<sup>17</sup> Since then, no clear conceptual answer has been found to the question ‘should we eliminate discrimination on a particular ground?’<sup>18</sup>

Nonetheless, exploring the partial answers that people have provided to this question is useful for our purposes. When legislators prohibit discrimination, they are often expressing society’s moral concerns. The moral concerns underlying one ground of discrimination are often similar to the moral concerns underlying other grounds. For example, as will be discussed in this Part, some concepts of equality and social inclusion underlie most prohibited grounds of discrimination. Therefore, exploring the potential answers persons have provided to why we should prohibit discrimination on certain grounds can help provide a guiding framework for determining new prohibited grounds of discrimination.

Importantly, this framework does not claim to provide a mathematically precise answer to whether a discrimination law is justified. First, this framework does not exhaust the moral concerns that may underlie discrimination law. We cannot rule out some other new moral concern justifying a new discrimination law. Second, we must be wary of falling into the trap Edmond Burke described of allowing ‘reason’ to create ‘delusive geometrical

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<sup>15</sup> Colm O’Cinneide, ‘The Uncertain Foundations of Contemporary Anti-Discrimination Law (2011) 11 *International Journal of Discrimination and Law* 7; Cass Sunstein ‘Three Civil Rights Fallacies’ (1991) 79(3) *California Law Review* 751, 770; Larry Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies’ (1992) 141 *University of Pennsylvania Law Review* 149, 219. See also Colm O’Cinneide, ‘Justifying Discrimination Law’ (2016) 36(4) *Oxford Journal of Legal Studies* 909, reviewing Tarunabh Khaitan’s views on the ‘overall purpose, function and justification of discrimination law’, in *A Theory of Discrimination Law* (Oxford University Press, 2015), and Sandra Fredman, ‘Substantive Equality Revisited’ (2016) 14(3) *International Journal of Constitutional Law* 712, 714 on different choices of conceptions of equality being rooted in ‘values or policy’.

<sup>16</sup> Sunstein, Cass ‘Three Civil Rights Fallacies’ (1991) 79(3) *California Law Review* 751; 770.

<sup>17</sup> Larry Alexander, ‘What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes and Proxies’ (1992) 141 *University of Pennsylvania Law Review* 149, 219.

<sup>18</sup> Although see Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford University Press, 2015), Chapter 3, for a description of the approach courts and legislators have taken to this issue, which is instructive, and influential on this part.

accuracy in moral arguments.<sup>19</sup> As Burke explained, ‘The lines of morality are not like the ideal lines of mathematics’,<sup>20</sup> and there are competing policy considerations behind various proposals, which can lead to a messy weighing exercise. Despite this, as Burke would no doubt encourage,<sup>21</sup> this Part takes heed of society’s morality as expressed in current laws, and considers how they can apply to developments in the law.

b. What discrimination laws do

While a full review of the nuances in Australia’s discrimination laws is unnecessary for the purposes of this paper, before considering why discrimination is prohibited, it is useful to outline some *basic* features of what Australian discrimination laws do. Namely:

- a) All Australian discrimination laws, except the Northern Territory’s<sup>22</sup> and the *Racial Discrimination Act 1975* (Cth),<sup>23</sup> prohibit two types of discrimination - direct and indirect discrimination.
- b) In most legislation, direct discrimination occurs when, because of a person’s attribute, the discriminator treats a person less favourably than the discriminator would treat a person without that attribute (the comparator model).<sup>24</sup> Meanwhile, in Victoria and the ACT, direct discrimination occurs if a person treats or proposes to treat a person with the relevant attribute unfavourably because of that attribute (or, in the case of ACT, because the person has 1 or more protected attributes).<sup>25</sup> In this formulation, there is no ‘comparator’. As an example, on either formulation, a restaurant would be prohibited from refusing to serve a woman because of her sex.
- c) Indirect discrimination generally occurs when the discriminator applies a facially neutral condition that disadvantages people with a particular attribute and is

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<sup>19</sup> Edmund Burke, *The Speech of Edmund Burke, Esq; on moving his resolutions for conciliation with the colonies* (22 March 1775) (Eighteenth Century Collections Online) available

<https://quod.lib.umich.edu/e/ecco/004895777.0001.000/4?node=004895777.0001.000%3A3&view=text>

<sup>20</sup> PJ Marshal, Donald C Bryant and William B Todd (ed), *The Writings and Speeches of Edmund Burke* (Oxford Scholarly Editions, on-line) Vol 4, p 383.

<sup>21</sup> Jesse Norman, *Edmund Burke: Philosopher, Politician, Prophet* (William Collins, 2013) 192-193.

<sup>22</sup> *Anti-Discrimination Act* (NT) s 20.

<sup>23</sup> *Racial Discrimination Act 1975* (Cth) s 9, 11-16.

<sup>24</sup> See, for use of this comparator formulation: *Anti-Discrimination Act 1977* (NSW) ss 7, 24, 38B, 39, 49B, 49T, 49ZG, 49ZYA; *Anti-Discrimination Act 1991* (Qld) s 10(1); *Equal Opportunity Act 1984* (WA) ss 8-10A, 35AB, 35A, 35O, 36, 53, 66A, 66V, 67A; *Anti-Discrimination Act 1988* (Tas) s 14; *Sex Discrimination Act 1984* (Cth) s 5; *Disability Discrimination Act 1992* (Cth) s 5; *Age Discrimination Act 2004* (Cth) s 14.

<sup>25</sup> *Discrimination Act 1991* (ACT) s 8(2); *Equal Opportunity Act 2010* (Vic) s 8; *Equal Opportunity Act 1984* (SA) ss 29, 51, 66, 85A, 85T. The ACT law also explicitly provides that it will be direct discrimination if the unfavourable treatment was because of ‘1 or more protected attributes’.



unreasonable.<sup>26</sup> For example, unreasonably refusing to allow people with long hair inside a restaurant, and enforcing it, would be indirect sex discrimination.

- d) Discrimination is prohibited in specified contexts, typically associated with the ‘public’ realm, such as in employment and in providing goods and services.
- e) There are then exceptions to the prohibitions on discrimination, reflecting countervailing considerations, such as religious freedoms.<sup>27</sup>
- f) While some discrimination laws also contain other prohibitions, such as prohibiting offensive speech<sup>28</sup> or sexual harassment,<sup>29</sup> these are not relevant for our purposes.

It is relevant to realise Australian discrimination laws ordinarily prohibit direct and indirect discrimination in the public realm, and often include exceptions.

c. Why prohibit discrimination?

Having explained the reasons for the approach to this conceptual framework, and what discrimination laws do, this sub-part now draws on other authors’ works to outline a partially satisfactory conceptual framework for determining the appropriate grounds of discrimination.

(i) **Rationality and relevance-based accounts**

When considering what makes discrimination on a given ground improper, as John Gardner stated, an ‘obvious and simple starting point lies in rationality.’<sup>30</sup> Tarunabh Khaitan summarises persons who make relevance-based (or rationalist) arguments for discrimination laws as making:

‘the rationalist claim that the purpose of discrimination law is to prohibit discrimination on grounds which are irrelevant to the legitimate objectives of the employer, landlord, or other discriminator. For example, race discrimination is prohibited in employment because race does not usually have any bearing on a person’s ability to perform a job’<sup>31</sup>

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<sup>26</sup> See *Anti-Discrimination Act 1977* (NSW) ss 7(1)(c), 24(1)(b), 38B(1)(b) and (c), 39(1)(b), 49B(1)(b), 49T(1)(b), 49ZG(1)(b), 49ZYA(1)(b); *Anti-Discrimination Act 1991* (Qld) s 11(a); *Equal Opportunity Act 1984* (WA) ss 8-10A, 35AB, 35A, 35O, 36, 53, 66A, 66V, 67A; *Equal Opportunity Act 1984* (SA) ss 29, 51, 66, 85A, 85T. A slightly different formulation is used in *Equal Opportunity Act 2010* (Vic) s 9(1); *Discrimination Act 1991* (ACT) s 8(3)-(4); *Anti-discrimination Act 1998* (Tas) s 15; *Sex Discrimination Act 1984* (Cth) s 5(2); *Disability Discrimination Act 1992* (Cth) s 6(2); *Age Discrimination Act 2004* (Cth) s 15.

<sup>27</sup> See, for example, *Sex Discrimination Act 1984* (Cth) s 37.

<sup>28</sup> For example, *Racial Discrimination Act 1975* (Cth) s 18C.

<sup>29</sup> For example, *Equal Opportunity Act 2010* (Vic) Part 6.

<sup>30</sup> John Gardner, ‘On the Ground of Her Sex(uality)’ (1998) 18 *Oxford Journal of Legal Studies* 167, 168.

<sup>31</sup> Khaitan, above n 18, 134.

On these arguments, discriminators will be better off as a result of following discrimination laws, because they will avoid the 'irrational' behaviour of taking factors into account that are irrelevant to the objective they are pursuing.

Some statements by legislators suggest they are motivated, at least somewhat, by such relevance-based accounts. The Victorian Attorney-General, in a second reading speech to the *Equal Opportunity Bill 1995 (Vic)* stated:

A person's physical features should not be used to judge the suitability of the person for a job. Ultimately, such judgment should be based on performance criteria. If a person is the best qualified person and can perform the required duties, the fact that he or she is of a certain height or weight should be irrelevant.<sup>32</sup>

The hypothetical employers in this second reading speech should have chosen the employee based on performance criteria, thereby getting the best performing employee, rather than being irrationally distracted by physical features. A similar theme emerges from Victorian Minister's second reading speech:

It is the view of the Government that a person's truly private lawful belief or activity is irrelevant to his or her employment, education, occupational standing, accommodation or receipt of goods or services.<sup>33</sup>

On this approach, prohibiting discrimination was partly justified on the basis it prevented persons being treated less favourably based on attributes that were 'irrelevant' to the public activity they wanted to engage in (employment etc).

Further, where discrimination laws have prohibited persons from engaging in activities that would be a rational pursuit of an objective, such as taking into account *some* persons' disabilities choosing amongst applicant for a role, they have often been objected to on the basis they require a discriminator to not take into account a rationally relevant consideration.<sup>34</sup> This emphasis on 'relevance' is perhaps unsurprising, because, as Khaitan argues, a key assumption of the 'lay' understanding of discrimination is that the ground is

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<sup>32</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Mrs Wade).

<sup>33</sup> Cited in *Nestle Australia Ltd v President and Members of the Equal Opportunity Board* [1990] VR 805, 817 (emphasis added).

<sup>34</sup> See, for example, Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press, 40th Anniv, 1962) 111–115; Samuel R Baenstos, "Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights' (2003) 89(5) *Virginia Law Review* 825, 827, quoting Sherwin Rosen, 'Disability Accommodation and the Labor Market' in Carolyn L Weaver (ed) *Disability and Work: Incentives, Rights and Opportunities* (1991) 18, 21.

‘irrelevant to the purpose of the distribution at hand’.<sup>35</sup> This is not to say ‘relevance’ or ‘rationality’ is the only factor that society or legislators take into account, but suggests society and legislators consider it more acceptable to prohibit discrimination where not engaging in this conduct would be beneficial, rather than detrimental, to discriminators.

Much prohibited discrimination is, indeed, ‘irrational’, in the sense that it does not advance the discriminator’s objectives. Irrational discrimination can occur consciously. For example, a discriminator may believe in an incorrect stereotype of groups of people, and make a decision on this basis. Irrational discrimination may also occur unconsciously. For example, unconscious schemas may lead people to ‘associate’ bad characteristics to people with a prohibited attribute (for example, a sex, race or disability), and this may lead them to make a decision that is in fact against the discriminator’s best interests.<sup>36</sup> Relevance-based accounts of discrimination laws may find *some* support from these cases.

On the other hand, like many other laws (think employment, competition, consumer and criminal laws), discrimination laws also prohibit behaviour by discriminators that would otherwise involve a rational pursuit of their objectives.<sup>37</sup> Sunstein pointed to two such scenarios. *First*, where the discrimination reflects ‘The desires of third parties’.<sup>38</sup> This occurs where ‘third parties are in a position to impose financial punishment on non-discriminatory employers’.<sup>39</sup> For example, a restaurant owner who hires black waiters may find racist customers stop dining there, such that it may be economically rational to only hire non-black staff.<sup>40</sup> For the profit-seeking employer in this scenario, black and white employees are not ‘alike’, but they must be treated as such under discrimination laws. *Second*, even absent discriminatory third parties, discrimination may be rational because it reflects ‘Statistically accurate generalizations’.<sup>41</sup> When choosing amongst people for a job, a rational employer uses various proxies to predict their ultimate concern, which is the employee’s future performance. For example, they use attendance at educational institutions, marks and references from previous jobs. As Sunstein argues, due to statistical differences, ‘race or sex

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<sup>35</sup> Khaitan, above n 18, 50.

<sup>36</sup> Timothy Wilson and Nancy Brekke, ‘Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations’ (1994) 116 *Psychological Bulletin* 117; L Krieger, ‘The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity’ (1995) 47 *Stanford Law Review* 1161 at 1186–11.

<sup>37</sup> Cass Sunstein, ‘The Anticaste Principle’ (1994) 92 *Michigan Law Review* 2410, 2418.

<sup>38</sup> *Ibid* 753.

<sup>39</sup> *Ibid* 754.

<sup>40</sup> This example has been used to argue against race discrimination laws. See, Friedman, above n 29, 111–112.

<sup>41</sup> Sunstein, ‘Three Civil Rights Fallacies’, above n 16, 753.

in some contexts may be every bit as accurate a predictor as, say, test scores, education or previous employment.<sup>42</sup> Further, ‘reliance on more direct and individualistic devices may be too costly to be worthwhile’.<sup>43</sup> Take a job applicant in a small town that has suffered strong historical racism, and where one race is far worse off in terms of poverty, education, crime rates, and exposure to crime. It may be economically rational for an employer who wants to quickly and cheaply make an employment decision to racially discriminate in this process.

While this shows that discrimination laws prohibit conduct that may be a rational pursuit of an objective, there is a further weakness in relevance-based accounts of discrimination law: discrimination laws also leave untouched much irrational conduct. Take the example of sex shop and brothel owners who claim they are ‘discriminated against’ on the basis of their industry, because banks would not give them loans.<sup>44</sup> If banks are to measure loans primarily against the standard of whether it will help them be profitable, by shutting out an industry, the banks may indeed be engaging in economically irrational behaviour. But discrimination laws do not prohibit this conduct. Discrimination laws are also unlikely to apply if an employer irrationally decides not to employ people wearing blue suits, people from Drummoyne, or Macquarie University graduates. In this way, discrimination laws leave untouched much conduct that is irrational.

Certainly, as both Khaitan and Gardner argued, relevance-based accounts do not provide a complete justification for discrimination laws. But they should not be discarded entirely from consideration. They have enduring appeal, as evidenced in the attitudes of the general population and statements by parliament. Indeed, they are relevant for this point: prohibiting persons from rationally pursuing their objectives imposes a cost on them (it does not if it was irrational). These persons incur a cost because they cannot do what is best to achieve this objective. This cost needs to be justified. The greater the cost imposed on persons, the stronger the justification needs to be. Accordingly, some other consideration, or considerations, is needed, to explain why discrimination laws may be justified, especially when they require persons to not pursue their otherwise legitimate objectives.

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<sup>42</sup> Ibid 756.

<sup>43</sup> Ibid.

<sup>44</sup> Yolanda Redrup, ‘Sex sells, but not if you apply for a bank loan’ *Financial Review* (Australia) 9 October 2017, 16.

(ii) Social inclusion and distributive justice

Social inclusion is a possible other consideration, which may explain society's support for discrimination laws. Collins stated:

the aim of social inclusion is to ensure the removal of barriers to participation in the benefits of citizenship, so that all groups actually achieve those benefits.<sup>45</sup>

Collins provides a broad definition of the 'benefits of citizenship', as including both material goods such as 'food and shelter' and also 'non-material benefits such as receiving a fulfilling level of education and participating in politics, cultural activities and work.'<sup>46</sup> As such, social inclusion necessarily involves concern for substantive equality and redistributive justice, because it requires these benefits must be achieved by all groups.<sup>47</sup>

Indeed, concern for 'social inclusion' (defined in this manner) between people with different attributes is often used to justify discrimination laws. For example, the Minister's second reading speech to the Age Discrimination Bill 2003 stated it was intended to 'remove barriers to work force participation' and emphasised the social and economic impact of age discrimination.<sup>48</sup> When the Racial Discrimination Bill 1975 was debated before Parliament, the Attorney-General argued it would educate on 'the evils, the undesirable and unsociable consequences of discrimination'.<sup>49</sup> This is not the language of prohibiting irrational conduct, but shows concern for promoting social inclusion for certain groups.

Further, social inclusion is not just used by contemporary politicians justifying laws, it is also deeply embedded in western philosophy. A strong conception of redistributive justice stems from John Rawls' view that:

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<sup>45</sup> Hugh Collins, 'Social Inclusion: A Better Approach to Equality Issues?' (2005) 14 *Transnational Law and Comparative Problems* 897, 913.

<sup>46</sup> *Ibid.*

<sup>47</sup> See also Khaitan, above n 18, at 135, who argues that discrimination law 'seek to reduce (and ultimately remove) any significant advantage gap between a protected group (defined by an immutable or valuable ground) and its cognate groups'. While not the same as Collins's claim, it shares a focus on securing basic goods for persons in disadvantaged groups. So too, see Owen Fiss, "Groups and the Equal Protection Clause" (1976) 5 *Philosophy and Public Affairs* 107.

<sup>48</sup> Commonwealth, Parliamentary Debates, House of Representatives, 3 December 2003, 18786 (Sen Chris Ellison).

<sup>49</sup> References in Tim Soutphommasane, 'The Whitlam Government and the Racial Discrimination Act' (6 November 2015) <https://www.humanrights.gov.au/news/speeches/whitlam-government-and-racial-discrimination-act#fn4>

Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.<sup>50</sup>

While Rawls justified this principle by using the hypothetical scenario whereby a person is placed in an ‘original position’ behind a ‘veil of ignorance’, so they do not know what place in society they will have, this position bears some similarities to ‘contractualist’ theories of justice, including those of Jean-Jacques Rousseau,<sup>51</sup> Thomas Hobbes<sup>52</sup> and John Locke.<sup>53</sup> These theories justify some form of redistribution by way of a hypothetical social contract between citizens and the state. The precise basis for justifying redistribution, and the exact extent of redistribution required, is not important for our purposes. Nonetheless, it is important to appreciate that this concern for redistributive justice (and social inclusion) has deep roots in our society.

The greater the disadvantage suffered by a group, the stronger the concern for social inclusion and redistributive justice.<sup>54</sup> The greater the ‘social and economic inequalities’, the further we are from Rawls’ desired position. Additionally, such disadvantages have the potential to seriously demoralize a group, and thereby create further inequality, giving further reason for concern.<sup>55</sup> It is no coincidence that it is the most disadvantaged groups that are often referenced in justification for discrimination laws – we are more concerned about social disadvantage for more disadvantaged groups.<sup>56</sup>

(iii) Selecting groups for protections: Immutability and Identified Importance  
A concern for social inclusion, however, does not fully explain why only some disadvantaged groups are covered by discrimination laws. For example, persons who have committed certain types of crimes, persons without formal education, persons with low intelligence and persons with low social skills may all experience the ‘benefits of citizenship’ to a lower degree because of these attributes, but are not protected groups under discrimination laws. When, then, is society’s concern for social inclusion triggered, such that discrimination law

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<sup>50</sup> John Rawls, *A Theory of Justice* (Oxford University Press, 1971) 302.

<sup>51</sup> Jean-Jacques Rousseau, *The Social Contract* (Penguin Classics, 1968) 62-63

<sup>52</sup> Thomas Hobbes, *Leviathan* (The University of Adelaide, ebooks) Chapters XVII and XVIII.

<sup>53</sup> John Locke, ‘An essay concerning the true, original, extent, and end of civil government’ in P Laslett(ed) *Two Treatise of Government* (Cambridge University Press, 1970).

<sup>54</sup> See, for an economic consideration of why this is: David A Strauss, ‘The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards’ (1991) 79 *Georgetown Law Journal* 1619.

<sup>55</sup> David A Strauss, ‘The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards’ (1991) 79 *Georgetown Law Journal* 1619, 1630.

<sup>56</sup> For example, see South Australia, Parliamentary Debates, House of Assembly, 14 July 1966, 491; Commonwealth of Australia, Parliamentary Debates (Hansard), Senate, 21 November 1973, 1976-1977.

should be utilised? Traditionally there are two types of attribute that, when combined with sufficient concern for social inclusion, may justify a discrimination law: immutable attributes and attributes that represent a fundamental choice.<sup>57</sup>

*Immutability.* Prohibiting discrimination has often been partly justified on the basis the relevant attribute is not chosen and cannot be changed (or is difficult to change). The four Commonwealth discrimination laws address such attributes, being race, sex, disability and age.<sup>58</sup> In countries where there is an open-ended 'equality' or anti-discrimination principle, courts have the role of determining whether discrimination on particular grounds, not listed in legislation, should be prohibited.<sup>59</sup> Robert Wintemute explained that one test courts use to determine whether discrimination should be prohibited in these jurisdictions is whether the attribute is 'immutable', in the sense that it cannot be changed and it was not chosen by the person whose status it is (another test regarded whether it represents a fundamental choice).<sup>60</sup> Khaitan also recognised immutability as a factor that both courts and legislators use to determine whether an attribute should be protected from discrimination, but argued courts have understood immutability as including 'not only characteristics that cannot be changed, but *also* those whose initial acquisition itself was not based on a choice made by the possessor'.<sup>61</sup> (Confusingly, Khaitan refers to the inability to change the attribute, he goes on to explain that courts have stated that, in fact, they only require that changing the attribute would involve great difficulty.<sup>62</sup>) Khaitan did not point to any circumstances where *just* the lack of initial choice or *just* the inability or difficulty to change the attribute, without the other, was sufficient to justify discrimination law.<sup>63</sup> In truth, lack of initial choice and inability or difficulty to change an attribute have generally coincided (think of sex, disability, age and race), such that little has turned on this point. Justice Jackson in dissent against a US Supreme Court majority decision that allowed Japanese persons to be imprisoned during world war two, stated:

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<sup>57</sup> See Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford University Press, 1995); Khaitan, above n 18, Chapter 3.

<sup>58</sup> *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>59</sup> See, for discussion of how these jurisdictions approach this question Khaitan, above n 18, ch 3.

<sup>60</sup> Robert Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Constitution, and the Canadian Charter* (Oxford University Press, 1995) 177.

<sup>61</sup> Khaitan, above n 18, 7 (emphasis added). For cases he used to support this argument, see p 57, citations 33 and 34, which include quotations, and page 59, referring to *Watkins v United States Army* (1989) 875 F2d 699, 726.

<sup>62</sup> Khaitan, above n 18, 59-60.

<sup>63</sup> Khaitan, above n 18, 60.

here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, *and* belongs to a race from which there is no way to resign. (emphasis added)<sup>64</sup>

In this way, both the inability to choose the attribute and the fact it cannot be changed were used to support the prohibiting discrimination on its basis. We may feel sympathy for a person who chose an attribute which is difficult to change, but this has not traditionally been sufficient to justify a discrimination law.

Nonetheless, excessive reliance on immutability to justify discrimination laws may be flawed. As Sunstein argued, if drugs were discovered that allow blacks to become whites, this hardly seems a justification to not prohibit racial discrimination.<sup>65</sup> There are some choices that we hope people can make (such as keeping one's race or sex, even if there is an option to change them) without being subject to discrimination. This leads to the second basis on which society's concern for social inclusion may be triggered to justify preventing discrimination on a given attribute.

*Fundamental choice.* When combined with sufficient concern for social inclusion, the fact an attribute represents a fundamental choice is another factor that may justify a discrimination law.<sup>66</sup> A attribute need not be immutable to receive protection under Australian discrimination laws. Most notably, discrimination on the grounds of religion and political belief, or some similar grounds (eg religious belief or activity) are protected in 6 out of 8 Australian states and territories,<sup>67</sup> and in employment-related disputes under the *Fair Work Act 2009* (Cth).<sup>68</sup> These laws are not without controversy in Australia, as evidenced by the debate over the proposal to introduce Commonwealth religious discrimination laws,<sup>69</sup> and that discrimination on religious and political grounds is not prohibited in NSW or South Australia. In considering why certain chosen grounds are included in discrimination laws, Sophia Moreau said:

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<sup>64</sup> *Korematsu v United States* (1944) 323 US 214, 243

<sup>65</sup> Sunstein, 'The Anticaste Principle', above n 49, 2443.

<sup>66</sup> See Khaitan, above n 18, 50, for his summary of when judges have considered a ground ought to be protected by discrimination law.

<sup>67</sup> *Anti-Discrimination Act 1991* (Qld) s 7; *Anti-Discrimination Act 1992* (NT) 19; *Equal Opportunity Act 1984* (WA) Part IV; *Equal Opportunity Act 2010* (Vic) s 6; *Anti-Discrimination Act 1988* (Tas) s 16; *Discrimination Act 1991* (ACT) s 7.

<sup>68</sup> Sections 351 and 772.

<sup>69</sup> See, for example, Katherine Murphy and Sarah Martin, 'Conservatives agitate for religious freedom law but Coalition voters not on board – Essential poll' *Guardian*, 9 July 2019.



We think religion is such an important part of the life of religious persons that they should not have to compromise it in order to have the opportunities that they would have had in these areas, but for their religion.<sup>70</sup>

Moreau does not propose a clear conceptual answer to when a choice will be so important that it justifies protection of discrimination law, but suggests religious discrimination laws are likely justified by an appeal to 'how central religious activities are to our conceptions of ourselves and our ability to shape our own lives in our own way.'<sup>71</sup> Certainly, if something is 'central' to our conception of ourselves or our ability to shape our lives, this would support arguments it is 'fundamental' and persons ought not need to sacrifice potential discrimination in the public realm because of this choice.

(iv) Why *not* prohibit discrimination, or why have exceptions?  
Discrimination laws may restrict other things that are commonly considered human goods, such as freedom of speech, parental choice, religious freedom and economic productivity. As Sunstein explains:

Any legal solutions must be evaluated in light of the effects on various possible human goods that those alleged solutions will compromise. If legal remedies produce more unemployment, greater poverty, and higher prices for food and other basic necessities, they are, to that extent, a bad idea.<sup>72</sup>

Many accidents of nature lead to persons being disadvantaged economically, including their natural strength (or lack thereof) or intelligence. But to prohibit discrimination based on intelligence or strength may have such deleterious impacts on the economy, that doing so would in fact cause greater suffering than prohibiting it – including perhaps for the weak and unintelligent. It is not necessary, nor would it be possible, to create an exhaustive list of considerations weighing against discriminations laws.

Nonetheless, if a proposed discrimination law does limit human goods, we should consider whether exceptions to prohibitions may adequately account for these concerns, without abandoning the law entirely. For example, in the *Sex Discrimination Act 1984* (Cth) concern for freedom of religion led to exceptions for religious bodies;<sup>73</sup> concern for the

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<sup>70</sup> Sophia Moreau, 'What is Discrimination?' (2018) 38(2) *Philosophy and Public Affairs* 143, 156.

<sup>71</sup> *Ibid* 157.

<sup>72</sup> Sunstein, 'The Anticaste Principle, above n 49, 2437.

<sup>73</sup> *Sex Discrimination Act 1984* (Cth) s 37.

impact on dramatic arts and entertainment led to exceptions in this field;<sup>74</sup> concern for persons' comfort in being fitted for clothing by person of the same sex led to exceptions in the clothing industry;<sup>75</sup> concern for educational options and perhaps parental freedom led to exceptions for educational institutions;<sup>76</sup> and concern for safety, may have led to exceptions for sport.<sup>77</sup> Determining whether an exception should be included may be determined by a 'weighing' analysis, under which the negative effects of the discrimination are weighed against the 'good' that it may restrict. Indeed, one approach that has garnered some support,<sup>78</sup> but has not been adopted in Australia, is to include a 'general limitations clause', creating an exception to the prohibition on discrimination where it satisfies some broad 'proportionality' test. For example, the *Equality Act 2010* (UK) adopts such an approach by providing (in some instances) that discrimination does not occur if it is 'a proportionate means of achieving a legitimate aim'.<sup>79</sup> Exceptions in European Union directives also often use a proportionality test, with exceptions to general discrimination only being justifiable if they are a proportionate measure for some legitimate objective.<sup>80</sup> Without going into the niceties of this test, it is relevant that, if an exception is implemented, it may nullify, or at least attenuate, an objection to the law itself.

On the other hand, some costs of introducing prohibitions on discrimination cannot be dealt with by way of exceptions. In particular, administrative costs of running cases, the costs imposed on parties who have incorrect claims made against them, and the costs of erroneous decisions against persons<sup>81</sup> (which will inevitably occur), all need to be taken into account. If a prohibition leads to 100 new claims made against people, and only 1 of these claims is based on actual unlawful conduct, this will have imposed significant burdens on people. While the legislature may limit the way the law imposes these costs, such as by including the ability to make costs orders against complainants, the costs in terms of time and, very likely,

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<sup>74</sup> Ibid s 30(2)(b).

<sup>75</sup> Ibid s 30.

<sup>76</sup> Ibid s 38.

<sup>77</sup> Ibid s 42.

<sup>78</sup> See Senate Standing Committee on Legal and Constitutional Affairs, 'Effectiveness of the *Sex Discrimination Act 1984* in eliminating discrimination and promoting gender equality', Commonwealth, 2008, recommendation 36; ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report*, LRAC No 3 (2015) 102.

<sup>79</sup> *Equality Act 2010* (UK) ss 13, 15, 19, 60, 69, 193, Sch 9, 1(1). For commentary, see *Akerman-Livingstone (Appellant) v Aster Communities Ltd* [2015] UKSC 15. See also Article 4 of both the Council of the European Union's Race Equality Directive (2000/43/EC) and Employment Equality Directive (2000/78/EC), which refer to proportionality as a test for allowing discrimination.

<sup>80</sup> See Evelyn Ellis and Philippa Watson, *EU Anti-Discrimination Law* (Oxford University Press, 2<sup>nd</sup> ed, 2013) chapter 9.

<sup>81</sup> Strauss, above n 54, 1631-2.

money, will never be fully recovered under these laws. If such costs arise, then it needs to be considered whether they outweigh the benefits that the law may introduce.

(v) Limits of the framework

As described above, the framework in this Part is based on the moral underpinnings for traditional discrimination law grounds, and does not consider whether these should be reformulated. It may be that some new justification for a discrimination law can be formulated which engages society's morality. But it is beyond the scope of this paper to consider whether discrimination laws should be used in such new ways. Rather, the paper builds on the current moral underpinnings of discrimination laws, to see if they can be extended to physical features discrimination.



Some important points come out of Part One. The more a discrimination law prevents persons rationally pursuing their objectives, the greater the cost it imposes, and the stronger the justification for the law must be. These costs may be outweighed by the benefits of social inclusion to a group defined by an immutable attribute or an attribute that represents a fundamental choice of the possessor. Finally, a wide range of other considerations may weigh against prohibiting discrimination on a particular ground, but these considerations may be dealt with, or at least attenuated, by creating exceptions to the prohibition.

## Part Two: The Phenomenon of Physical Features Discrimination

### A. The beauty bias

(i) Common views on who is beautiful

While beauty is in the eye of the beholder, there is good reason to believe beholders have similar opinions on beauty. In a meta-analysis of studies of attractiveness, Langlois et al found:

*contrary to conventional wisdom, there is strong agreement both within and across cultures about who is and who is not attractive.*<sup>82</sup>

This meta-analysis showed that persons had 'high and significant levels of agreement when judging the attractiveness of others.'<sup>83</sup> To give an idea of the strength of this finding, the 'correlation coefficient' for ratings of adults was .90 and .85 for children (0 indicates no relationship between people's ratings, and 1 indicates a perfect relationship between the

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<sup>82</sup> Langlois, above n 7, 404.

<sup>83</sup> Ibid 399.

ratings). This finding of a strong level of agreement amongst persons on what is attractive is supported by other studies.<sup>84</sup> These studies primarily use photos of faces when judging attractiveness.

Common views on beauty likely have some biological basis. First, strong cross-cultural agreement on attractiveness suggests we have some innate views on beauty.<sup>85</sup> Second, even babies will spend more time looking at an attractive over an unattractive face, when the faces are placed next to each other.<sup>86</sup> This suggests there is some natural preference towards people with certain facial features. Third, research has located a particular region of the brain that is responsible for facial recognition, and perhaps responsible for recognising certain facial features as more attractive.<sup>87</sup> Finally, there may be a logical evolutionary explanation for *some* innate views on beauty, making a biological basis for these views more likely. For example, attraction to persons with good hip-to-waist ratios and healthy waists may be advantageous from an evolutionary perspective.<sup>88</sup> All this evidence considered together suggests there is some biological basis for views on beauty.

There are, nonetheless, significant cultural factors at play. People are attracted to, and attribute positive attributes to, people who look like them, and this leads to certain facial features being preferred in different cultures.<sup>89</sup> Further, the impact of culture is not limited to facial features. For example, the ideal 'buttocks' for men varies considerably between cultures.<sup>90</sup> However, this does not change the fact that, certainly within Australia and to a degree universally, persons can be placed into largely agreed categories of attractiveness.

(ii) The halo effect

There is considerable evidence to establish that people unconsciously attribute a wide variety of positive attributes to attractive persons. In a landmark 1972 study, university students were given 3 pictures of persons, one attractive, one of average attractiveness, and one relatively

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<sup>84</sup> Alan Feingold, 'Good-looking people are not what we think' (1992) 111(2) *Psychological Bulletin* 304.

<sup>85</sup> D.M. Buss, 'Sex differences in human mate preferences: Evolutionary hypotheses tested in 37 cultures' (1989) 12 *Behavioural and Brain Sciences* 1; Langlois, above n 7.

<sup>86</sup> Alan Slater et al, 'Newborn Infants' Preference for Attractive Faces: The Role of Internal and External Facial Features' (2000) 1(2) *Infancy* 265.

<sup>87</sup> Alexander Todorov, *Face Value: The Irresistible Influence of First Impressions* (Princeton University Press, 2017) 13.

<sup>88</sup> Devendra Singh, 'Adaptive Significance of Female Physical Attractiveness: Role of Waist-to-Hip Ratio' (1993) 65(2) *Journal of Personality and Social Psychology* 293; Jason Weeden and John Sabini, 'Physical Attractiveness and Health in Western Societies: A Review.' (2005) 131(5) *Psychological Bulletin* 635.

<sup>89</sup> Alexander Todorov, *Face Value: The Irresistible Influence of First Impressions* (Princeton University Press, 2017) 135.

<sup>90</sup> Paul I Heidekrueger et al, 'The Ideal Buttock Size' (2017) 140(1) *Plastic and Reconstructive Surgery* 20.

unattractive.<sup>91</sup> They were asked to rate the person on various personality traits; asked to predict their marital, parental, social and professional, and total happiness; and predict the likelihood they would fall into a low, average or high status occupation (for example, army sergeant, army captain or army colonel).<sup>92</sup> On all but one scale attractive people were ranked above unattractive people (sometimes tying with average people at the top). The exception was for 'parental competence', where people of average attractiveness were ranked most competent, then unattractive persons, and then attractive persons.<sup>93</sup> Despite this exception, this study established a widespread instinctive bias towards attractive people on almost all scales.

This bias, at least in some circumstances, does not disappear when persons are provided with further relevant information about persons. When male university students were asked to judge a female writer's work, they gave it the highest mark when accompanied by a photo of an attractive 'author', worst when accompanied by a photo of an unattractive author, and in between these two scores when it was not accompanied by a photo.<sup>94</sup> In another study, school principals were given a student summary record and a photo of a student. The student summary record included information on the student's grades, in the content areas of reading, language, arithmetic, social studies, science, art, music and physical attitudes; outlined the students' absences for the school year; and scores the child on a 'satisfactory' - 'unsatisfactory scale'.<sup>95</sup> When asked questions about the students, the principals were still influenced by the students' attractiveness. As the authors explained:

*Teachers expected attractive children to have higher IQs, to have parents especially interested in academic achievement, and to get more future education than their less attractive counterparts.*<sup>96</sup>

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<sup>91</sup> Karen Dion, Ellen Berscheid and Elaine Walster, 'What is Beautiful is Good' (1972) 24(3) *Journal of Personality and Social Psychology* 285.

<sup>92</sup> *Ibid* 287.

<sup>93</sup> *Ibid* 288.

<sup>94</sup> David Landy and Harold Sigall, 'Beauty is Talent: Task Evaluation as a Function of the Performer's Physical Attractiveness' (1974) 29(3) *Journal of Personality and Social Psychology* 299.

<sup>95</sup> Margaret M. Clifford and Elaine Walster, 'The effect of physical attractiveness on teacher expectation' (1973) 46(2) *Sociology of Education* 248, 250.

<sup>96</sup> *Ibid* 254.

Some studies have shown instinctive biases based on looks sometimes disappear when persons are given additional information.<sup>97</sup> But it is important for our purposes that they do not always – these biases may persist despite the additional information.

(iii) Not inadvertently rational

While studies suggest that attractive people do generally display some positive attributes more so than unattractive people, this does not mean these biases lead to ‘rational’ results. In Langlois et al’s meta-analysis of such studies, it found that ‘Compared with unattractive children, attractive children were more popular, better adjusted, and displayed greater intelligence/performance competence’, and results for adults paralleled these results.<sup>98</sup> Nonetheless, this does not suggest it is rational to discriminate on the basis of attractiveness. First, some of the studies show clearly irrational behaviour. The university students who ranked attractive persons’ work better were clearly acting irrationally – they let an irrelevant external factor influence their views on the quality of work. Second, the impact of attractiveness is disproportionate to the amount of information it provides. Langlois et al.’s meta-analysis found an attractive adult is more intelligent than an unattractive adult 52% of the time, and to have better social skills 55% of the time.<sup>99</sup> These are hardly significant figures from a recruiter’s point of view. Use of other proxies for intelligence or social skills, such as tests and structured interviews, would render attractiveness virtually irrelevant. Yet studies show that people rely on attractiveness as a predictor of intelligence and occupational competence to a much heavier degree than the minor indications they provide of competence.<sup>100</sup>

(iv) Cumulative and social effects

It appears likely that over time the halo effect leads to children being treated differently, which in turn leads to greater confidence, social skills and competence on certain measures. As Elizabeth McClintock states ‘Perhaps partially because physically attractive individuals are treated preferentially, they enjoy improved school performance, ...’<sup>101</sup> Indeed, teachers’ inaccurate expectations of children's performance in younger years have been shown to be

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<sup>97</sup> See, for discussion on how biases to politicians with a certain appearance disappear with additional knowledge, Todorov, above n 113, 54.

<sup>98</sup> Langlois et al, above n 7, 402.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid 400.

<sup>101</sup> Elizabeth McClintock, ‘Beauty and Status: The Illusion of Exchange in Partner Selection?’ (2014) 79(4) *American Sociological Review* 575, 578.

predictive of children's performance in later years.<sup>102</sup> This is consistent with findings that, if teachers are told that a random selection of children are intellectually gifted, then these children's performance on IQ tests surpasses other students' when assessed later.<sup>103</sup> If teachers pay less attention to less attractive children; and teacher attention leads to better outcomes; there is a plausible pathway whereby less attractive children will end up performing worse on numerous scales.

The view that attractive persons achieve advantages *directly* through receiving biased assessments as a consequence of the halo effect, and *indirectly* through the increased confidence and social skills they obtain over time, has support in recent studies. In one study, university students were separated into 'employers' and 'employees'. The employees submitted basic labour characteristics (age, sex, university, matriculation, year, previous job experience, extracurricular activities, and hobbies<sup>104</sup>). The employees performed a practice task on a computer, and were asked to predict how they would perform doing a slightly harder task. Attractive employees predicted they would do better, but actual performance did not correlate with attractiveness.<sup>105</sup> Employers were asked to predict employees' performance in various 'conditions', whereby they may or may not see the employee, see their resume, have a phone interview, or conduct a face-to-face free-form interview.<sup>106</sup> By doing so, the study showed how much the employees confidence, physical appearance, oral interaction, and physical interaction led to employers deciding to employ attractive over unattractive people. The experimenters summarised:

*We find that about 15 to 20 percent of the beauty premium is transmitted through the confidence channel and about 40 percent, each, through the visual and oral interaction channels.*<sup>107</sup>

Interestingly for us, this shows that beauty influences employers into making incorrect decisions through (1) seeing them, (2) hearing them and (3) the employees' greater confidence levels. As such, it is not *merely* the fact that people are more attractive that leads employers

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<sup>102</sup> Nicole S Sorhagen, 'Early Teacher Expectations Disproportionately Affect Poor Children's High School Performance.' (2013) 105(2) *Journal of Educational Psychology* 465.

<sup>103</sup> S.W. Raudenbush, 'Magnitude of teacher expectancy effects on pupil IQ as a function of the credibility of expectancy induction: A synthesis of findings from 18 experiments' (1984) 76(1) *Journal of Educational Psychology* 85.

<sup>104</sup> Mobius and Rosenblat, above n 9, 224-5.

<sup>105</sup> Ibid 229.

<sup>106</sup> Ibid 225.

<sup>107</sup> Ibid 234.

to hire them, it is also the cumulative effect that being attractive has on confidence levels and interactive skills.

There is some reason to consider this halo effect leads to less attractive people having lower socioeconomic status. In a seminal study by Daniel Hamermesh and Jeff Biddle, they found that workers of above average beauty earn about 10 to 15 per cent more than workers of below average beauty.<sup>108</sup> Further, various studies have supported the view that people with high socioeconomic status are more attractive than people with low economic status.<sup>109</sup> This correlation, combined with the studies showing biases towards attractive people and the cumulative effects this has over times, suggests it is likely that being unattractive plays some role in causing unattractive people to be in lower socioeconomic classes.

(v) Presentation and expression

While being naturally attractive leads on average to being advantaged, persons can often significantly increase their attractiveness through presentation and expression. For example, ratings of attractiveness for men increased by 'dressing in a manner that signals status, and displaying light facial stubble.'<sup>110</sup> So too, application of makeup can increase perceptions of women's attractiveness, likeability, competence and trustworthiness.<sup>111</sup> Making minor adjustments to persons' faces can adjust other aspects of their outward appearance.<sup>112</sup> This shows 'cosmetic' effects on whether people are perceived as attractive, competent, or trustworthy. Meanwhile, in a study which used computer-generated facial features and participants rated the faces on certain traits, Alexander Todorov and Nickolaas Oosterhof showed that displaying a positive emotional state can make a face appear more attractive.<sup>113</sup> As such, cosmetics and expression mould 'attractiveness', such that attractiveness should not be seen as completely unchangeable or static.

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<sup>108</sup> Daniel S. Hamermesh and Jess E Biddle, 'Beauty and the Labor Market' (1994) 84(5) *American Economic Review* 1174; referred to in Mobius and Rosenblat, above n 9 222.

<sup>109</sup> G. H. Elder Jr, 'Appearance and education in marriage mobility' (1969) 34 *American Sociological Review* 519, 519; Daniel S. Hamermesh and Jess E Biddle, 'Beauty and the Labor Market' (1994) 84(5) *American Economic Review* 1174.

<sup>110</sup> Elizabeth M. Hill et al., 'Physical Attractiveness: Manipulation on Female Perceptions of Attractiveness, Masculinity, and Dominance in Male Faces' (1987) 8 *Ethology and Sociobiology* 143; Nick Neave and Kerry Shields, 'The Effects of Facial Hair Manipulation on Female Perceptions of Attractiveness, Masculinity, and Dominance in Male Faces' (2008) 45 *Personality and Individual Differences* 373.

<sup>111</sup> Catherine S. Louis, 'Up the Career Ladder, Lipstick in Hand' *New York Times*, 12 October 2011, E3.

<sup>112</sup> Todorov, above n 89, ch 6.

<sup>113</sup> Alexander Todorov and Nikolaas N Oosterhof, 'Modeling Social Perception of Faces' (2011) March 2011, *IEEE Signal Processing Magazine* 117, 119.



(vi) Related appearances - Competence, Trustworthiness and Dominance

While most commentary advocating for appearance-based discrimination laws has focused on a 'beauty bias', there is also now a substantial body of research on discrimination on the basis of other faces, such as 'competent', 'trustworthy' and 'dominant' looking faces. People on average tend to view some faces as more trustworthy,<sup>114</sup> competent,<sup>115</sup> and dominant,<sup>116</sup> amongst other things. These are related to, but not the same as, attractiveness. For example, Todorov explains how an 'impression' of competence can be built 'from facial cues of attractiveness, masculinity and confidence.'<sup>117</sup> Whether a person is advantaged as a result of their face depends somewhat on context. As Todorov explains, dominant looks may hurt a person if we need to decide whether they are a violent criminal, but help them if we need to decide whether they will be a good military officer.<sup>118</sup> Nonetheless, it would be reasonable to expect that trustworthiness and competence lead to advantages in a wide range of contexts, likely leading to systemic advantage to people with these looks. As with attractiveness, however, cosmetics and facial expressions exert a limited influence whether people are assessed as having trustworthy, dominant, and other types of faces.<sup>119</sup>

B. Weight bias

One non-facial feature which society appears to have considerable prejudice (both conscious and unconscious) towards is overweight persons, in some ways reflecting the beauty bias. Implicit association tests suggest that persons instinctively associate overweight persons with negative characteristics.<sup>120</sup> Much weight bias also occurs consciously and explicitly, with one survey of American physicians returning findings that 'Physicians associated obesity ... with poor hygiene, noncompliance, hostility, and dishonesty'. In a 1989 study:

*nurses agreed that obesity can be prevented by self-control (63%) and that obese persons are unsuccessful (24%), overindulgent (43%), lazy (22%), and experience unresolved anger (33%)*<sup>121</sup>

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<sup>114</sup> Todorov, above n 73, 43; E Cogsdill et al, 'Inferring Character from Faces: A Developmental Study' (2014) 25 *Psychological Science* 1132.

<sup>115</sup> Todorov, above n 89, 126.

<sup>116</sup> Todorov, above n 89, 60.

<sup>117</sup> Todorov, above n 89, 127.

<sup>118</sup> Todorov, above n 89, 69.

<sup>119</sup> Catherine S. Louis, 'Up the Career Ladder, Lipstick in Hand' *New York Times*, 12 October 2011, E3.

<sup>120</sup> BA Teachman and KD Brownell KD, 'Implicit anti-fat bias among health professionals: is anyone immune?' (2001) 25 *International Journal of Obesity and Related Metabolic Disorders* 1525.

<sup>121</sup> Rebecca Puhl and Kelly D Brownell, 'Bias, Discrimination, and Obesity' (2001) 9(12) *Obesity Research* 788, 792. This was summarising the results of a 1989 study.

Attributing negative attributes to persons based on their weight is not only found in the medical field, but appears elsewhere in society.<sup>122</sup>

It is possible these biases may contribute to the overrepresentation of overweight and obese persons in lower socio-economic classes. There is considerable evidence that, in developed countries, people in lower socio-economic classes are more likely to be obese.<sup>123</sup> Further, we know from the above studies that biases against persons based on their appearance sometimes lead to lower confidence and social skills, which in turn sometimes lead to lower pay. It is extremely difficult, and perhaps impossible, to accurately test whether, and if so the extent to which, these biases cause this wider socio-economic disadvantage. But the strength of the biases provides at least a reasonable hypothesis that they cause persons to be in lower paid jobs, and therefore being in lower socio-economic classes. There are undoubtedly an array of reasons for overweight persons being in lower socio-economic classes,<sup>124</sup> and there is insufficient evidence that these biases are amongst the most significant. But there is a reasonable hypothesis these contribute to this phenomenon.

### C. Height bias?

On the current research, it is unable to be determined if there are similar biases in favour of tall persons leading to economic advantage. Studies have consistently found the taller people earn more money.<sup>125</sup> Rhode claimed this is attributable to a bias towards tall people, and used this to argue in favour of physical features discrimination laws.<sup>126</sup> However, a 2008 study by Anne Case and Christina Paxson found that cognitive ability is associated with height, and when cognitive ability is accounted for, the 'height premium' effectively disappears.<sup>127</sup> The correlation between height and cognitive ability is likely due to the fact that people who are well-nourished as children are consequently more likely to reach both their cognitive and height potentials.<sup>128</sup> These findings do not rule out the existence of any height bias in certain

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<sup>122</sup> C Hoyt et al, 'The Obesity Stigma Asymmetry Model: The Indirect and Divergent Effects of Blame and Changeability Beliefs on Antifat Prejudice' (2017) 2(1) *Stigma and Health* 53.

<sup>123</sup> Youfa Wang, 'Cross-National Comparison of Childhood Obesity: The Epidemic and the Relationship between Obesity and Socioeconomic Status' (2001) 30 *International Journal of Epidemiology* 1129; Lindsay McLaren, 'Socioeconomic Status and Obesity' (2007) 29 *Epidemiological Reviews* 29.

<sup>124</sup> *Ibid.*

<sup>125</sup> Nicola Persico, Andrew Postlewaite and Dan Silverman, 'The Effect of Adolescent Experience on Labor Market Outcomes: The Case of Height' (2004) 112(5) *Journal of Political Economy* 1019, 1027–1030.

<sup>126</sup> Rhode, above n 2, 28.

<sup>127</sup> Anne Case and Christina Paxson, 'Stature and Status: Height, Ability and Labor Market Outcomes' (2008) 116(3) *Journal of Political Economy* 1.

<sup>128</sup> *Ibid.*

contexts. But given these findings, caution is required when assessing articles that argue for physical features discrimination laws on the basis of a 'height bias'.

#### D. Particular strength of impact on women

There is also good reason to consider that, at least in some contexts, beauty and weight biases disproportionately affect women. For example, one study found that men need to be obese before there is a negative relationship between their weight and their income, whereas women only need to be overweight;<sup>129</sup> one found weight bias particularly affected female interviewees in simulated job interviews,<sup>130</sup> and another found bias against obese females in simulation criminal trials, but not against obese men.<sup>131</sup> Further, women sometimes have harder physical features expectations to meet - needing to look young, when men can look old and distinguished. This may be of concern because it compounds other disadvantages experienced by women<sup>132</sup> – leading to significant disadvantage for unattractive women.

#### E. Bias due to 'chosen' physical features

In this paper, chosen physical features are physical features that are not immutable. That is, they are either the result of a choice to adopt the attribute or is not difficult to remove. In this sense:

- being overweight is an immutable attribute. Being overweight should not be considered to be 'chosen', because it would be unusual to someone to consciously 'choose' to be overweight, there is a strong genetic component to being overweight, and it also is influenced from early childhood practices that the person has no control over.<sup>133</sup> Further, studies suggest only a small amount of people are able to change it, suggesting, not only is it unchosen, but that it can also only be changed with great difficulty.<sup>134</sup>

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<sup>129</sup> Timothy A Judge and Daniel M Cable, 'When It Comes to Pay, Do the Thin Win? The Effect of Weight on Pay for Men and Women' (2011) 96(1) *Journal of Applied Psychology* 95.

<sup>130</sup> Regina Pingitore, Bernard L Dugoni, R. Scott Tindale, and Bonnie Spring, 'Bias Against Overweight Job Applicant in Simulated Employment Interview' (1994) 79(6) *Journal of Applied Psychology* 909.

<sup>131</sup> N A Schvey, R M Puhl, K A Levandoski, K D Brownell, 'The influence of a defendant's body weight on perceptions of guilt' (2012) 37(9) *International Journal of Obesity* 1275.

<sup>132</sup> Workplace Gender Equality Agency, 'Australia's Gender Pay Gap Statistics' (August 2019) available here <[https://www.wgea.gov.au/sites/default/files/documents/Gender\\_pay\\_gap\\_fact\\_sheet\\_august\\_2019.pdf](https://www.wgea.gov.au/sites/default/files/documents/Gender_pay_gap_fact_sheet_august_2019.pdf)>.

<sup>133</sup> Fernando Riveros-McKay, Vanisha Mistry, Rebecca Bounds, Audrey Hendricks, Julia M. Keogh, Hannah Thomas, Elana Henning, Laura J. Corbin, Stephen O'Rahilly, Eleftheria Zeggini, Eleanor Wheeler, Inês Barroso, I. Sadaf Farooqi, 'Genetic architecture of human thinness compared to severe obesity' (2019) 15(1) *PLOS Genetics* 1.

<sup>134</sup> James Anderson, Elizabeth C Kronz, Robert C Frederich and Constance L Wood, 'Long-term weight-loss maintenance: a meta-analysis of US studies' (2001) 74(5) *The American Journal of Clinical Nutrition* 579.

- the attributes of attractiveness, a trustworthy appearance and competent appearance are the consequence of a combination of immutable physical features (eg nose structure) and the chosen factors around presentation (eg makeup and haircuts).

Discrimination often occurs on the basis of chosen physical features. For example, studies suggest that jurors have a bias against persons with facial tattoos.<sup>135</sup> And we do not need to limit ourselves to empirical studies that have found statistically significant societal effects. To show that physical features discrimination occurs in other circumstances, one only needs to think of how people are treated on the basis of haircuts (imagine a mohawk in a law firm), tattoos (or neck tattoos in a law firm), or facial hair (see Part 3, on the Australian experience on the law!<sup>136</sup>) This discrimination may occur consciously (for example, consciously thinking ‘that haircut doesn’t belong in a law firm’) or unconsciously (for example, not consciously thinking about the haircut, but having the haircut unconsciously lead one to the view ‘he’s not suitable for the job’). There is no exhaustive study or studies on the extent of such discrimination. It is sufficient to note, for the purposes of this paper, that it exists, and such physical features may have a substantial impact on people’s lives.

#### F. The importance of chosen physical features

It is also important to recognise that chosen physical features can represent important aspects of a person's identity, including by associating them with groups or attributes that are protected by discrimination law. Again, we do not need to limit ourselves to empirical studies to arrive at this conclusion. As Rhode said 'how individuals present themselves to the world may implicate core political values, cultural identity, and religious beliefs.'<sup>137</sup> One needs only think of some Rastafarians' and black persons' dreadlocks,<sup>138</sup> Sikhs' religious connection with their hair, or Maori tattoos to recognise the importance chosen physical features can have to a persons' identify.

#### G. Shaping physical features

People, especially women, sometimes shape their physical features, or become obsessed with them, to a dangerous degree. One North American study showed two-thirds of high school girls at any time are trying to lose weight.<sup>139</sup> This preoccupation with image may have led to

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<sup>135</sup> Friederike Funk and Alexander Todorov, ‘Criminal Stereotypes in the Courtroom: Facial Tattoos Affect Guilt and Punishment Differently’ (2013) 19(4) *Psychology, Public Policy, and Law* 466.

<sup>136</sup> Pages 34 to 38.

<sup>137</sup> Rhode, above n 2, 12.

<sup>138</sup> Danielle Douglas-Gabriel, 'The cultural ramification of dreadlocks', *The Washington Post*, 12 June 2015.

<sup>139</sup> J.C Rosen and J Gross, ‘The prevalence of weight reducing and weight gaining in adolescent girls and boys’ (1987) 6 *Health Psychology* 131.

increased anorexia rates, which increased dramatically in the late twentieth century.<sup>140</sup> In 2012, 4 per cent of Australians had an eating disorder, with 3 per cent of these having anorexia nervosa, 12 per cent having bulimia nervosa, 47 per cent having binge eating disorder, and 38 per cent having other eating disorders.<sup>141</sup> In Australia, around 3 times as many women experience anorexia nervosa as men.<sup>142</sup> Overall rates of cosmetic surgery have increased substantially in the United States since 2000, with strong increases in some procedures including lower body lifts, thigh lifts, upper arm lifts, breast augmentation and tummy tucks (reliable data is not available for Australia), with the overwhelming majority of surgeries on women.<sup>143</sup> While not all persons who have undergone cosmetic surgery necessarily have a harmful obsession with their image, combined with the trends on mental health disorders, this may be a further indication that a significant amount of the population have unhealthy obsessions with appearance.

#### H. The enjoyment of bodily aesthetics

On the other hand, being able to appreciate, and have appreciated, one's physical beauty, is something that, in certain circumstances, is seen as worthwhile in our society. Indeed, as Sherri Irvin states, the process of admiring the aesthetics of the body 'can be a source of delight for both the subject and the object of the gaze.'<sup>144</sup> Appreciation of physical features, however, can involve a wide variety of experiences, which society attaches different levels of value to.

On the one hand, appreciation of physical features can lead to moments of insight, empathy and bliss. For example, spending time in art galleries often involves considerable time appreciating the human form and physical features. Taking well-known examples, appreciating the beauty in Michelangelo's *David* may be a highlight of some persons' lives. So too, many would be sadder if appreciating the beauty of the physical features of *Mona Lisa* was condemned. While some have criticised artistic aesthetics for striving for 'objective standards of beauty',<sup>145</sup> some art promotes heterogenous views of beauty. Art may promote

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<sup>140</sup> R.M. Bell, *Holy anorexia* (University of Chicago Press, 1985).

<sup>141</sup> Butterfly Foundation, *Paying the Price: The economic and social impact of eating disorders in Australia* (2012) < <https://thebutterflyfoundation.org.au/assets/Uploads/Butterfly-report-Paying-the-Price-Executive-Summary.pdf>> (accessed 6 July 2018).

<sup>142</sup> National Eating Disorders Collaboration, 'Who is affected?' < <https://www.nedc.com.au/eating-disorders/eating-disorders-explained/something/who-is-affected/>> (accessed 4 August 2019).

<sup>143</sup> American Society of Plastic Surgeons, '2016 Plastic Surgery Report' (2016).

<sup>144</sup> Sherri Irvin, 'Why Body Aesthetics?' in Sherri Irvin (ed), *Body Aesthetics* (Oxford Press Scholarship Online, 1st ed, 2016) 1, 1.

<sup>145</sup> Ibid 2.

seeing beauty in deformed persons, the stout woman in a fishing village, and the gaunt man. So too may cinema, theatre and novels. Books may also may deepen readers' appreciation of physical beauty, provide vicarious enjoyment for readers in enjoying the physical features of others, and readers may experience vicarious enjoyment of both admiring others' physical features and having one's own physical features admired. Certainly, society shows a deep appreciation for both these experiences.

On the other hand, not all appreciation of physical beauty is the same, or equal. Take the Victoria's Secret Christmas Show, displaying women with similar body shapes. Perhaps a person can find similar experiences walking in a good art gallery and watching this show, but it seems unlikely. When asked why Victoria's Secret does not use plus size or transgender models, the Chief Marketing Officer of Victoria's Secret's parent company said 'Because the show is a fantasy. It's a 42 minute entertainment special.'<sup>146</sup> This suggests Victoria's Secret shows are not designed to promote insight or empathy - they are there for fantasy. Certainly, based on these comments, it is not designed to provide the same moments of insight, empathy and bliss, as may be offered by a good art gallery.

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It is useful here to summarise the key points arising from this Part, as they will feed into Part Four. First, there are widespread biases against less attractive and overweight individuals (and perhaps people with other facial features), which leads to lower confidence and lower social skills, which in turn leads to even further disadvantage, with these biases being particularly felt by women. Second, perceptions of attractiveness involve a combination of natural looks, presentation (eg makeup) and facial expression. Third, people also discriminate on a wide variety of other physical features, some chosen (for example, haircuts) and some not (for example, other facial features), in various contexts. Fourth, chosen physical features can represent important aspects of a person's identity, including by associating them with groups or attributes that are protected by discrimination law. Fifth, people, and particularly women, shape their looks in response to these social judgments, sometimes to harmful degrees. Sixth, the appreciation of physical beauty can lead to a wide variety of internal experiences, some of which are considered highly socially valuable, and some less so.

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<sup>146</sup> Kyle Munzenrieder, 'Victoria's Secret Exec Explains Why They Don't Use Trans or Plus-Size Models', *W Magazine*, 9 November 2018.

## Part Three: The Experience Under Australian Law

This part examines three aspects of the experiences in the ACT and Victoria on physical features discrimination. First, it outlines the main features of the statutory schemes. Second, it outlines some of the relevant issues of interpretation of these laws. Third, it briefly considers the impact these laws have had on social practices in these jurisdictions.

### A. The statutory scheme

#### (i) Discrimination

Under both the Victorian and ACT legislation, 'physical features' is a prohibited attribute, such that persons are prohibited from discriminating, directly or indirectly, based on them.<sup>147</sup> 'Physical features' is defined in the Victorian legislation as 'a person's height, weight, size or other bodily characteristics',<sup>148</sup> and the same definition applies in the ACT legislation, except that the word 'characteristics' is replaced with 'features'.<sup>149</sup> The tests for discrimination are discussed in Part One.<sup>150</sup>

#### (ii) Areas of operation

It was mentioned in Part One<sup>151</sup> that discrimination laws tend to only operate in the 'public' realm, and the ACT and Victorian laws that prohibit physical features discrimination are no different. The ACT and Victorian legislation prohibits discrimination in the areas of:

1. Employment
2. Education
3. Access to public premises
4. Provisions of goods, services or facilities
5. Providing accommodation
6. Membership to clubs.<sup>152</sup>

The Victorian legislation also contains specific prohibitions in relation to discrimination in sport and local government.<sup>153</sup> The emphasis on the public realm was recognised by President McKenzie of the Victorian Anti-Discrimination Tribunal, when she stated that it appeared the Victorian legislation was 'is not intending to interfere with relationships of a particularly

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<sup>147</sup> See description of basic features of Australian discrimination laws at page 8 - 9.

<sup>148</sup> *Equal Opportunity Act 2010* (Vic) s 4.

<sup>149</sup> *Discrimination Act 1991* (ACT), Dictionary.

<sup>150</sup> See page 8.

<sup>151</sup> See page 9.

<sup>152</sup> *Discrimination Act 1991* (ACT) Part 3; *Equal Opportunity Act 2010* (Vic) Part 4.

<sup>153</sup> *Equal Opportunity Act 2010* (Vic) Pt 4, Divs 7 and 8.

private and personal kind.<sup>154</sup> So too, the ACT Law Reform Advisory Council described how the ACT legislation 'carves out 'private' areas from the more general 'public' areas that are covered by the Act'.<sup>155</sup> Of course, the public and private divide is an elastic and controversial one,<sup>156</sup> and it is beyond the scope of this article to consider where this divide properly falls. It is sufficient that legislators currently view the areas above as sufficiently 'public', and leave other areas that are typically identified as in the 'private realm' unregulated by discrimination laws.

(iii) Exceptions

The ACT and Victorian legislation include both general exceptions to when discrimination is prohibited, and exceptions specific to physical features discrimination. In the ACT, the general exceptions can be divided into those:

- a) Further protecting the 'private' sphere from prohibitions on discrimination, including relating to engaging someone to conduct domestic duties, engaging someone to provide residential care for children, providing domestic accommodation, and adoption.
- b) Giving people in relevant classes equal opportunity (ie substantive equality measure).
- c) Enabling discrimination by voluntary and religious bodies.<sup>157</sup>

Victoria has exceptions performing similar functions, with minor differences that do not matter for the purposes of this paper.<sup>158</sup> Meanwhile, both Victoria and the ACT have two exceptions that do not apply to all other attributes, but do not apply to physical features:

- a) In relation to employment discrimination, where the employment relates to dramatic or artistic performance, photographic or modelling work or similar employment<sup>159</sup>
- b) Where the discrimination is 'reasonably necessary' to protect the health and safety or property of any person.<sup>160</sup>

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<sup>154</sup> *People Matching Pty Ltd* [1997] VADT 55.

<sup>155</sup> ACT Law Reform Advisory Council, *Review of the Discrimination Act 1991 (ACT) Final Report*, LRAC No 3 (2015) 50. It went on to recommend a general prohibition on discriminatory conduct, except for private conduct (recommendation 6.1).

<sup>156</sup> See Margaret Thornton, *The Liberal Promise: Anti-discrimination Law in Australia* (Oxford University Press, 1990) 102-107, for discussion on why this is the case and the elasticity of the private-public divide.

<sup>157</sup> *Discrimination Act 1991 (ACT)*, Part 4, Div 4.1.

<sup>158</sup> *Equal Opportunity Act 2010 (Vic)* Part 5.

<sup>159</sup> *Equal Opportunity Act 2010 (Vic)* s 26(4); *Discrimination Act 1991 (ACT)* s 57Q.

<sup>160</sup> *Equal Opportunity Act 2010 (Vic)* s 86(1); *Discrimination Act 1991 (ACT)* s 57R.



These exceptions reveal some of the ‘countervailing’ considerations that apply in relation to prohibiting physical features discrimination, including the enjoyment of appreciation of beauty, which will be discussed in Part Four of this paper.

### B. Relevant issues of interpretation

Given the issues raised in Parts One and Two, it is relevant to consider, in relation to the ACT and Victorian laws:

- a) Are both chosen and immutable physical features discrimination prohibited?
- b) Is 'attractiveness' based discrimination prohibited?
- c) Is unconscious discrimination prohibited?

- (i) Chosen and immutable ‘physical features

In her second reading speech, the Victorian Attorney-General stated:

The attribute of physical features is not intended to include such things as tattoos and body piercing which a person may choose to acquire.<sup>161</sup>

It is not clear how this the Attorney-General thought the legislation could be interpreted in this manner.

The Victorian Civil and Administrative Tribunal has not agreed with this approach. In *Fratas v Drake International Ltd t/a Drake Jobseek*,<sup>162</sup> DP McKenzie found that hair (including facial hair) and baldness were physical features. This approach was supported by Member Grainer in *Kuyken v Chief Commissioner of Police*, who stated:

In my view, the expression “other bodily characteristics” is a broad expression that encompasses a person’s hair or facial hair, both of which are characteristics that are clearly “pertaining to the body”.<sup>163</sup>

This finding was not challenged on appeal to the Victorian Supreme Court.<sup>164</sup> This suggests a physical feature is any characteristic ‘pertaining to the body’. Similarly, DP McKenzie expressed the view that tattoos are physical features, and stated:

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<sup>161</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Mrs Wade).

<sup>162</sup> (2000) EOC 93-038.

<sup>163</sup> *Kuyken v Lay (Human Rights)* [2013] VCAT 1972, [70].

<sup>164</sup> *Kuyken v Lay* [2015] VSC 204, [57].

In its ordinary meaning physical features would embrace any distinctive bodily mark or attribute. I consider that the words "other bodily characteristic" [in the definition of physical features] has a broad meaning when looked at in this way.<sup>165</sup>

As Neil Rees, Simon Rice and Dominique Allen state, this decision leaves the term physical features 'open to its 'ordinary meaning', thereby including features acquired by choice and probably encompassing physical features that are the result of, for example, cosmetic surgery'.<sup>166</sup>

(ii) Attractiveness and physical features

*Some* cases of 'attractiveness based' discrimination would be physical features discrimination. No cases I reviewed directly addressed this issue. However, DP McKenzie considered physical features to be 'visible, distinctive and ... attributes of the body'.<sup>167</sup> Meanwhile, facial expressions have been found not to be physical features.<sup>168</sup> As such, if attractiveness is a combination of natural features, presentation and expression (see Part Two<sup>169</sup>), then a claim that someone is more attractive than another person will not always indicate differentiation on physical features. It may just be that the other person had different makeup, clothes and looked happier. On the other hand, clearly, sometimes the distinction may be based on physical features. If it is a person's nose, or a combination of their nose, jaw line and body shape, that makes them unattractive, and they are discriminated against on the basis of their unattractiveness, a case of physical features discrimination would be made out. Clearly, matters of proof in any such cases would be exceedingly difficult, especially as these distinctions are often made at an unconscious level.

The variability of what makes a person attractive creates further problems of proof, but does not pose an in-principle reason why attractiveness-based discrimination cannot be physical features discrimination. Both Hugh Grant and Colin Firth are attractive, but have different facial and bodily features. Say Grant, Firth and a more qualified unattractive man applied for a job, and the unattractive man missed out because he was less attractive. How would this unattractive man make a claim? Discrimination on the basis of a thin, angular face? Grant has one, but Firth does not. Discrimination on the basis of a thin, as opposed to stocky, body? Grant and Firth differ there also. A person may still be able to make out a claim on the basis they have some physical feature, or combination of

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<sup>165</sup> *Jameison v Benalla Gold Club Inc* [2000] VCAT 1849.

<sup>166</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018) [10.18.3].

<sup>167</sup> *Ibid.*

<sup>168</sup> *Fratras v Drake International Ltd t/a Drake Jobseek* (2000) EOC 93-038.

<sup>169</sup> See above p 27.

physical features, that rendered them less attractive than Grant and Firth, and which led to them being disadvantaged. As such, the fact ‘attractiveness’ comes in different shapes and sizes will not always prevent an attractiveness-based claim bring successful – but it may make it more difficult.

(iii) Unconscious discrimination

Unconscious discrimination, both direct and indirect, is prohibited under Australian discrimination law. It is uncontroversial that indirect discrimination does not turn on making a finding of whether the impugned condition or requirement was consciously or unconsciously affected by the protected attribute.<sup>170</sup> Clearly, whether or not a condition or requirement has, or is likely to have the effect of, disadvantaging persons with an attribute is not an inquiry that requires consideration of the state of mind of the person who imposed the condition or requirement. Despite some recent uncertainty,<sup>171</sup> an increasing number of cases have found that unconscious direct discrimination is prohibited.<sup>172</sup> Therefore, even if a person does not consciously consider a person’s attribute, but unconscious mental processes lead them to treat the person worse because of it, this may constitute direct discrimination.

C. The societal impact of these laws

In my searches of the case law,<sup>173</sup> after over 23 years of physical features discrimination laws in Victoria and over 2 years in the ACT,<sup>174</sup> there has only been one successful claim of physical features discrimination and at least 45 unsuccessful claims of physical features discrimination.<sup>175</sup> Of the decisions reviewed, only 6 involved an application brought purely on the basis of physical features, and at least one of these could have been brought as a disability discrimination claim, with the alleged physical feature being 'chronic lower back pain'.<sup>176</sup>

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<sup>170</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349, 363.

<sup>171</sup> See, for discussion, Liam Meagher, ‘Australian Courts’ Approaches to Unconscious Direct Discrimination and Adverse Action’ (2017) 30 *Australian Journal of Labour Law* 1, 12.

<sup>172</sup> See *Wang v Australian Capital Territory* [2016] ACAT 71; *Bindaree Beef v Riley* (2013) 85 NSWLR 350, [94]; *Wotton v Queensland (No 5)* [2016] FCA 1457, [956]. See also the earlier decisions of *IW v Perth* (1997) 191 CLR 1, 59; *Purvis v New South Wales* (2003) 217 CLR 92, [155]-[157], [236].

<sup>173</sup> The following searches were performed: Noteup on Austlii on s 6 of the *Equal Opportunity Act 2010* (Vic) with the terms “physical features”; Noteup of s 7 of the *Discrimination Act 1991* (ACT) with the term “physical features”; searches within all ACT and Victorian Case law with the search terms "'physical features' and 'discrimination'"; All cases referred to in Rhode, above n 2, were reviewed; Searches of LawNow on s 7 of the *Discrimination Act 1991* (ACT) and s 6 of the *Equal Opportunity Act 2010* (Vic) with the term “physical features”.

<sup>174</sup> Amended by the *Discrimination Amendment Act 2016* (ACT), s 20.

<sup>175</sup> See above n 14 .

<sup>176</sup> *Kuyken v Lay (Human Rights)* [2013] VCAT 1972; *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849; *Roulston v State of Vic & Anor* [2000] VCAT 820; *Kenyon v Australian Cooperative Foods* [2001] VCAT 1981; *Zarb v Northern Melbourne Institute of TAFE* [2000] VCAT 660. *Judd v Department of Transport and Regional Services & Anor* [2000] VCAT 2495 could have been brought as a disability discrimination claim.

While there was only one successful case, there were two cases where physical features discrimination was made out. The successful claim was in *Hill v Canterbury Road Lodge Pty Ltd*.<sup>177</sup> While most elements of the claim were not made out on a factual basis, the Tribunal accepted that an employer made some 'remarks' about an employee's weight and this subjected the applicant 'to humiliation and denigration', which constituted direct discrimination.<sup>178</sup> The Tribunal awarded the applicant \$2,500 in compensation for this contravention.<sup>179</sup> There was another case in which discrimination was made out, but the claim was nonetheless unsuccessful. In *Kuyken v Lay*, VCAT found that an email from Victoria Police to employees which threatened disciplinary action for not complying with a grooming standard, constituted discrimination on the ground of physical features for some of those who needed to adjust their facial and other hair.<sup>180</sup> However, because the grooming standard was authorised by another law (the *Police Regulation Act 1958*), it fell within an exception in the *Equal Opportunity Act 2010* (Vic) (**Victorian Act**) and was not unlawful discrimination.<sup>181</sup> This decision was upheld by the Victorian Supreme Court.<sup>182</sup> This claim (and its failure) was effectively replicated by 15 other police officers in largely identical cases.<sup>183</sup>

One case displays the difficulties prohibiting physical features discrimination may have in straddling the public-private divide. Under the Victorian Act, the Victorian Civil and Administrative Tribunal (and formerly the Victorian Anti-Discrimination Tribunal) may grant an exemption from any of the provisions of the Act in relation to people or activities.<sup>184</sup> In *People Matching Pty Ltd*,<sup>185</sup> the Tribunal allowed a dating service to collect information on persons' physical features, including height and weight, along with information other protected attributes, and give advice to persons that they would have difficulty matching them on the basis of their physical features (and other protected attributes). But the Tribunal refused to grant an exemption to refuse to provide services to persons on the basis of their physical features (or other prohibited attributes). In partly granting this exemption, the Tribunal stated the '[the Act] ... does not touch what factors a person may take into account

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<sup>177</sup> [2004] VCAT 1365.

<sup>178</sup> *Ibid* [69].

<sup>179</sup> *Ibid* [77].

<sup>180</sup> *Kuyken v Lay (Human Rights)* [2013] VCAT 1972, [1]-[15], [142].

<sup>181</sup> *Ibid* [160]-[161].

<sup>182</sup> *Kuyken v Chief Commissioner of Police* [2015] VSC 204, [99].

<sup>183</sup> *Kuyken v Lay (Human Rights)* [2013] VCAT 1972, [11].

<sup>184</sup> *Equal Opportunity Act 2010* (Vic) s 89.

<sup>185</sup> [1997] VADT 55.

in himself or herself choosing a partner' and 'it would also appear that the Act is not intending to interfere with relationships of a particularly private and personal kind'. But the Tribunal then stated, 'Although the service is closely linked to private relationships, it is a service offered in a public way and in our view to grant the exemption would mean to dis-apply the Act in an extremely broad way'. Given the ability to advise persons it would be difficult to match them, the Tribunal was not satisfied there was a 'compelling public interest' in granting the exemption, and declined to do so.

Meanwhile, most of the cases alleging physical features discrimination were clearly unmeritorious. For example, in one case an employee claimed he was dismissed because of his tattoos even though it was agreed no one at the employer ever said anything about his tattoos, and there was 'nothing' in material before the tribunal from which it could 'infer that what [the applicant] alleges happened to him happened because of his tattoos';<sup>186</sup> another complaint was dismissed for 'being frivolous, vexatious, misconceived and lacking in substance',<sup>187</sup> where the patient claimed a doctor's letter to another doctor that stated the patient was 'unkept' and 'grossly overweight' constituted discrimination;<sup>188</sup> and in another, which was struck out, various grounds of discrimination were listed, with no explanation at all as to how some are made out.<sup>189</sup> Cases were often paired with claims of race,<sup>190</sup> sex,<sup>191</sup> or disability discrimination,<sup>192</sup> which often just reflected the fact the claim was not well-thought out. In reviewing the Australian case law prior to 2010, Rhode concluded that most cases bordered on frivolous,<sup>193</sup> and my review suggested that the claims that went to hearing were seriously lacking in merit.

Of course, decided cases may only represent a small proportion of cases in which complaints are made, or which are resolved between the parties without any formal complaint

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<sup>186</sup> *Kenyon v Australian Cooperative Foods* [2001] VCAT 1981, [11].

<sup>187</sup> *Hanson v Perera* [2000] VCAT 1285, [47].

<sup>188</sup> *Ibid* [30].

<sup>189</sup> *Liu v The University of Melbourne* [2002] VCAT 896 at [18].

<sup>190</sup> See, for example, *Csizmadia-Estok v Bendigo Bank (Anti Discrimination)* [2006] VCAT 1566; *Dirckze v Holmesglen Institute (Human Rights List)* [2015] VCAT 1116; *Liu v The University of Melbourne* [2002] VCAT 896; *Mondio Mario v Toyota Motor Corp Aust Ltd* [1999] VCAT 653.

<sup>191</sup> See, for example, *Grah v RMIT University and Ors (Anti-Discrimination)* [2011] VCAT 1229; *Morros v Chubb Security Personnel Australia (Anti-Discrimination)* [2009] VCAT 1845; *Menzies v Waycott & Anor* [2001] VCAT 415; *Dirckze v Holmesglen Institute (Human Rights List)* [2015] VCAT 1116.

<sup>192</sup> See, for example, *Perrett-Abrahams v Qantas Airways Limited* [2000] VCAT 1634; *Prolisko v Arthur Knight Management Pty Ltd (Anti-Discrimination)* [2005] VCAT 1868; *Menzies v Waycott & Anor* [2001] VCAT 415; *Dirckze v Holmesglen Institute (Human Rights List)* [2015] VCAT 1116; *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365; *Hanson v Perera* [2000] VCAT 1285.

<sup>193</sup> Rhode, above n 2, 136.

being made. In Victoria, complainants can apply to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) which can conciliate a matter, but not arbitrate on it, or apply directly to the Victorian Civil and Administrative Tribunal (VCAT), who may arbitrate a matter.<sup>194</sup> The VEOHRC's 2017-2018 Annual Report reported the following number of physical features complaints by area.<sup>195</sup>

	2015-2016	2016-2017	2017-2018	Total
<b>Accommodation</b>	0	0	1	1
<b>Clubs</b>	0	0	0	0
<b>Education</b>	11	2	1	14
<b>Employment</b>	62	31	40	133
<b>Goods/services</b>	39	15	19	73
<b>Local Government</b>	0	0	0	0
<b>Sport</b>	0	0	0	0
			<b>Total</b>	<b>221</b>

We do not know the outcome of these complaints, and how many were meritorious. VCAT does not report on the number of complaints of physical features discrimination lodged, meaning this does not reflect the total number of physical features complaints in Victoria.

Further, VEOHRC records that there were 586 enquiries related to physical features discrimination, out of a total number of 33,708 enquiries, from 1 July 2015 to 30 June 2018.<sup>196</sup> This suggests that persons have become aware of the prohibition on physical features discrimination, and may be considering how it applies to them. They may even be seeking to address possible issues of physical features discrimination without lodging complaints.

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Several important observations come out of Part Three. *First*, the Victorian and ACT prohibitions on physical features discrimination have some limits and exceptions designed to protect freedom in the private sphere; enable the appreciation of physical beauty in dramatic, artistic, photographic, modelling and similar works; protection of health and safety; the provisions of special measures; and freedom of voluntary and religious bodies. *Second*,

<sup>194</sup> *Equal Opportunity Act 2010* (Vic) Pt 8.

<sup>195</sup> Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2017-2018*, 80-81.

<sup>196</sup> *Ibid*, 82-83.

‘physical features’ encompasses both chosen and immutable physical features. *Third*, discrimination on the basis of attractiveness will sometimes, but not always, be physical features discrimination. *Fourth*, unconscious direct discrimination is prohibited by these laws. *Fifth*, there has been remarkably little case law on physical features discrimination, with only one successful case, but statistics on complaints and inquiries about physical features discrimination law give reason to believe they may be having some impact.

## Part Four: Should physical features discrimination be prohibited?

Applying the four stage framework developed in Part One, and drawing on the analysis in Parts Two and Three, this Part considers whether physical features discrimination should be prohibited. First, it argues for prohibiting immutable physical features discrimination. Second, it argues against a blanket ban on chosen physical features discrimination. Third, it argues for a prohibition on discrimination on the ground of physical features that represent protected attributes.

### A. Immutable Physical Features

#### (i) Relevance

Immutable physical features discrimination is commonly irrational. The analysis in Part Two shows that less attractive people, overweight people, and people with other immutable physical features (eg facial features), miss out on considerable employment and other opportunities, even though they would be best for the job or opportunity.<sup>197</sup> This is not to say that all immutable physical features discrimination is irrational. First, preferring naturally attractive people, or people with other immutable physical features, may be rational on occasion, because it reflects the desires of third parties.<sup>198</sup> For example, recruiting persons who are thin, attractive or have a ‘trustworthy’ appearance may be rational conduct for a recruiter, because customers prefer to deal with such persons. Second, while it is possible that ‘statistically accurate generalizations’ may be made about persons with immutable physical features, Part Two of this paper suggests such cases are rare.<sup>199</sup> Commonly, these generalizations do not hold true.<sup>200</sup> People commonly, as a consequence of unconscious processes, favour attractive people, thin people, people with other facial features, to an irrational degree.<sup>201</sup> As such, while prohibiting immutable physical features discrimination

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<sup>197</sup> In relation to attractive persons see pages 28 to 34; in relation to overweight persons, see 35 to 36; in relation to chosen features, see pages 37 to 38.

<sup>198</sup> Sunstein, 'Three Civil Right Fallacies', above n 16, 753.

<sup>199</sup> See above pp 21 to 22.

<sup>200</sup> See above pp 21 to 22.

<sup>201</sup> See Collins, 'Social Inclusion' above n 45, 913; discussed above at p 31.

may occasionally prevent persons taking rationally relevant factors into account, there is good reason to believe immutable physical features discrimination is commonly irrational.

(ii) Social inclusion

Prohibiting immutable physical features discrimination would promote social inclusion. As described in Part Two, there is widespread discrimination, often as a result of unconscious processes, against unattractive people, overweight people and persons with certain facial features, especially for women, who already face significant disadvantages.<sup>202</sup> Given the widespread nature of the discrimination against these people, they are not experiencing, to the same degree as others, the benefits of citizenship identified by Collins, such as ‘receiving a fulfilling level of education and participating in politics, cultural activities and work.’<sup>203</sup> An overweight or unattractive person may find themselves turned away from job interviews, less likely to get promotions, or be trusted in work on a systemic basis, and there is reason to believe this contributes to them being in lower socio-economic classes. Further, Part Three gave reason to believe that physical features discrimination laws are somewhat effective in preventing discrimination on this basis.<sup>204</sup> Preventing immutable physical features discrimination would, therefore increase social inclusion.

Of course, the fact that these are ‘immutable’ physical features triggers the especial concern identified in Part One<sup>205</sup> for discrimination on the basis of features that are immutable.

(iii) Costs and exceptions

Given that immutable physical features discrimination is frequently irrational, and prohibiting it would improve social inclusion for persons disadvantaged by immutable physical features, applying the first 3 stages of the framework in Part One, there is a prima facie case for prohibiting it. With this prima facie case established, consideration must turn to potential reasons for not implementing such a law. This sub-part first considers counter-considerations that may be dealt with by way of exception, and then those that cannot.

*Appreciation of beauty*

Exceptions to immutable physical features discrimination could allow for society’s desire to appreciate the aesthetics of the human body. As explained in Part Two, appreciation of

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<sup>202</sup> In relation to attractive persons see pp 28 to 34; in relation to overweight persons, see pp 35 to 36; in relation to certain facial features, see pp 34 to 35.

<sup>203</sup> See above pp 17 to 19; Collins, 'Social inclusion', above n 45, 91.

<sup>204</sup> See above pp 34 to 38.

<sup>205</sup> See above p 14.



physical features and the ability to have them appreciated is widely regarded as a worthwhile exercise, that can lead to moments of insight, empathy and bliss.<sup>206</sup> Prohibiting actors, models and similar professions from being selected based on looks, may prevent the creation of works that enable us to appreciate the aesthetics of the human body. As set out in Part Three, this is recognised in current physical features discrimination laws, which contain exceptions for employment related to dramatic or artistic performance, photographic or modelling work or similar employment.<sup>207</sup> Determining precisely the preferred scope of the exception is beyond the scope of this paper – an almost infinite amount of contexts could be considered, and there would be a 'weighing' of interests between the goal of social inclusion on the one hand, and the ability to appreciate physical beauty on the other. However, it is important to recognise that making an exception would be the appropriate way to account for this concern – and the proposed prohibition on immutable physical features discrimination would not need to be abandoned altogether.

#### *Protection of the private realm*

Another counter-consideration that may be dealt with by way of exception is protection of the private realm. Even though physical features discrimination laws target the public realm, they may intrude on typically 'private' activities. The most pressing example is dating services.<sup>208</sup> Indeed, it is not clear how some websites, such as beautifulpeople.com, which is built exclusively for beautiful people, operate under the current laws. Again, it is beyond the scope of this paper to argue for precisely how this exception should be framed. For the purposes of this paper, however, it is important to recognise that this concern for the private realm can be dealt with by way of exceptions for dating services and other exceptions, as other discrimination laws currently do.<sup>209</sup>

#### *Other exceptions that can be dealt with by way of exception*

There are some other obvious counter considerations that may be dealt with by way of exceptions. For example, enabling people to choose employees with physical features required to perform a job safely, and granting some religious exemptions to these laws, can deal with counter-considerations for health and safety and freedom of religion.

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<sup>206</sup> See above pp 28 to 30.

<sup>207</sup> See above pp 31 to 32.

<sup>208</sup> See discussion of *People Matching Pty Ltd* [1997] VADT 55 above at page 31.

<sup>209</sup> See above pp 31 to 32.

*Costs that cannot be dealt with by way of exception*

The costs of running cases, costs imposed on parties who have incorrect claims made against them, and costs of erroneous decisions against persons (**administrative costs**), are not able to be eliminated through inserting an exception into legislation. It was outlined in Part Three that the vast majority of physical features discrimination cases that were run to hearing were unsuccessful.<sup>210</sup> This may suggest that the costs of introducing this legislation are large. However, the 221 physical features discrimination claims brought by VEOHRC in the last 3 years, and 586 enquiries,<sup>211</sup> suggests there has been a far greater social impact than the reported cases suggest. Further, as also discussed in Part Three, most claims of physical features discrimination were also brought with various other discrimination claims,<sup>212</sup> suggesting the prohibition on physical features discrimination by itself only had a small impact on the amount of unmeritorious litigation being brought. It is not uncommon for there to only be a small number of claims that are successful at hearing under discrimination laws. In her review of the effectiveness of the *Racial Discrimination Act 1975* (Cth) from 2000 to 2004, Beth Gaze identified only 6 cases that were successful at hearing.<sup>213</sup> And only 4 of those cases ‘concerned substantive outcomes of the cases’ (with the other 2 involving procedural issues).<sup>214</sup> Discrimination laws can also provide success through cases settled prior to hearing, by their symbolic value in changing social attitudes, and by providing a voice (through government bodies) on issues in community education and policy development.<sup>215</sup> In all, the administrative costs of implementing a prohibition on immutable physical features discrimination would not outweigh the benefits of social inclusion outlined.

Accordingly, given immutable physical features discrimination is commonly irrational; a prohibition on this discrimination would address substantial concerns around social inclusion; and the counter-considerations can either be dealt with by creating exceptions or are not so great as to outweigh the benefits of social inclusion, there is a good case for prohibiting immutable physical features discrimination.

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<sup>210</sup> See above p 34.

<sup>211</sup> Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2017-2018*, 80-83.

<sup>212</sup> See above p 190.

<sup>213</sup> Beth Gaze, ‘Has the Racial Discrimination Act contributed to eliminating racial discrimination? Analysis the litigation track record 2000-4’ (2005) 11(1) *Australian Journal of Human Rights* 171, 187.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* 176.

B. Chosen physical features

(i) Relevance

A blanket prohibition on chosen physical features discrimination would likely impose a substantial burden on discriminators, because this would prohibit much rational discrimination. Much chosen physical features discrimination may be rational, because of the tastes of third parties (for example, café patrons may like waiters with cool haircuts and tattoos) and the ability to make statistically accurate generalizations about persons with physical features (for example, persons with hip beards may be more interested in fashion). Statistically accurate generalizations are particularly relevant for chosen physical features, because a chosen physical feature is a reliable indication the person chose to adopt it (or not get rid of it), and this may reflect upon that person. For example, a stylist company may consider that an applicant for a job with a particular type of haircut is likely to be pre-occupied with fashion and looks, and consider this is a good characteristic for the job. Chosen physical features discrimination laws would prohibit this kind of rational conduct. The recruiter would need to treat two persons who are not relevantly alike for the purposes of developing a successful business (as signified by their haircuts), alike. In this way, prohibiting chosen physical features discrimination would likely impose a substantial burden on discriminators.

(ii) Social inclusion

A prohibition on chosen physical features discrimination would, to some extent, promote social inclusion. Collins defined social inclusion as aiming to remove ‘barriers to participation in the benefits of citizenship, so that *all* groups actually achieve those benefits’ (emphasis added).<sup>216</sup> Certainly, some people are discriminated against on the basis of their chosen physical features, such as haircuts and tattoos. Preventing discrimination against persons on the basis of their haircuts and tattoos would enable groups with some ‘bad’ haircuts and tattoos to better enjoy the benefits of citizenship, such as enjoying a fulfilling employment. In this way, it would promote social inclusion for persons with certain chosen physical features.

Nonetheless, there are reasons to consider that chosen physical features discrimination does not give rise to the same level of concern regarding social inclusion as traditional discrimination law. When people choose physical features, such as haircuts and tattoos, it is generally because they wish to display an image, which is looked on favourably in some

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<sup>216</sup> Hugh Collins, ‘Social Inclusion: A Better Approach to Equality Issues?’, above n 45, 913.

circles. Hence, while a neck tattoo may be detrimental to a person's hope of getting a job at a law firm, it may help them fit in at a rugby league club. In this way, so long as the person is acting somewhat rationally when choosing physical features, chosen physical features are unlikely to lead to systemic disadvantage across multiple areas relevant to that person. A second relevant consideration is that some chosen physical features, such as haircuts, are also easily reversible, meaning they are unlikely to lead to systemic disadvantage for that person. Of course, some chosen physical features may be the result of a decision made when young or in exceptional circumstances, the discriminator may want to change it, it may be difficult to reverse and lead to systemic disadvantage (say some face tattoos). But these rare exceptions do not raise the same concerns for systemic disadvantage that were raised by, say, Aboriginal disadvantage, when considering race discrimination; female disadvantage, when considering sex discrimination; elderly disadvantage, when considering age discrimination; disadvantage for the disabled, when considering disability discrimination; or, given the analysis in Part 3, disadvantage of the overweight or naturally unattractive, in immutable physical features discrimination.<sup>217</sup>

(iii) Fundamental choice

Further, chosen physical features are, clearly, not immutable, and do not always represent fundamental choices. When a person chooses their hair style and tattoos, these will sometimes reflect a 'conception of' the person and may be central to a person's attempt to shape their life their 'own way'.<sup>218</sup> For example, Rastafarian's dreadlocks or a Maori tattoo may be central to their conceptions of themselves. Choosing to adopt these physical features may, therefore, be considered fundamental choices. On the other hand, many chosen physical features do not represent fundamental choices, and may even be a decision on a whim, such as a decision when at a hairdresser. It is argued below that laws can target chosen physical features that represent fundamental choices, in a logical manner, by only prohibiting discrimination on the ground of chosen physical features that represent already protected attributes.

Accordingly, given that applying a blanket prohibition on chosen physical features discrimination would likely impose a substantial burden on discriminators; that this form of discrimination does not give rise to the same level of concerns regarding social inclusion as traditional grounds of discrimination; and there is an ability to logically only target those

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<sup>217</sup> See above pp19 to 26.

<sup>218</sup> Moreau, above n 70, 156.

physical features that represent fundamental choices, the case for such a blanket prohibition on chosen physical features discrimination is weak.

C. Chosen physical features that represent protected attributes

(i) Relevance

Unlike chosen physical features discrimination *generally*, discrimination on the ground of chosen physical features that represent protected attributes cannot be said to be commonly rational. It is difficult to imagine many cases of rational discrimination on the ground of typical examples such as traditional tattoos and religious haircut. It is especially hard to imagine these examples because discrimination on the ground of the protected attribute is already unlawful and socially condemned. Take Maori tattoos. If the real reason for treating a person with Maori tattoos less favourably than persons without these tattoos is that he or she is Maori, then this would already be prohibited direct discrimination.<sup>219</sup> And it is difficult to imagine many other reasons to discriminate against a person based on their Maori tattoos other than prejudice to Maori persons by the discriminator herself (which is unlawful) or those of third parties (which is widely socially condemned). And similar analysis applies for religious or sex-related haircuts - it is difficult to imagine much rational discrimination on the basis of these attributes. Accordingly, there would not be much 'cost' imposed on discriminators through preventing them engaging in chosen physical features discrimination where the physical features represent protected attributes.

(ii) Social inclusion

Concern for social inclusion on the basis of chosen physical features that represent protected attributes is also stronger than concern on the basis of chosen physical features generally. There are clearly concerns for social inclusion for some groups defined by the protected attributes (eg some races, females, the disabled, and the elderly). If person chose to represent such a protected attribute in their physical features, concerns for possible exclusion are heightened, because the person is highlighting this attribute. For example, we would have heightened concern for discrimination against a Sikh person with a haircut that represents their religion, over Sikh persons without that haircut, because (1) persons are more likely to know this person is Sikh and (2) they have shown pride in it. In this way, there is good reason to be concerned for the social inclusion of many persons who adopt physical features that represent protected attributes (as opposed to chosen physical features generally).

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<sup>219</sup> See discussion of the law above at pp 8 - 9.

(iii) Fundamental choice

Recall that according to Khaitan, traditional grounds of discrimination represent immutable attributes or attributes that represent a fundamental choice of an individual.<sup>220</sup>

For those protected attributes that represent fundamental choices, the ability to represent that attribute through a physical feature should also be recognised as a fundamental choice. It would be rather meaningless to provide freedom of religion without the ability to practice tenets of religion that require a physical feature to be adopted. And even if the physical features are not 'required' to be adopted by one's religion, the choice to represent it through a physical feature is likely to be a choice that is central to one's conception of themselves and their ability to shape their lives as they seek it,<sup>221</sup> and therefore should be seen as a fundamental choice.

Adopting physical features that represent immutable protected attributes should also be accepted as a 'fundamental choice'. Moreau recognized that immutable attributes, such as race, sex, disability and age, are often central to persons' identify.<sup>222</sup> That is why we would be reluctant to allow discrimination on the basis of race, even if race could be changed through a drug.<sup>223</sup> The choice to represent an immutable protected attribute in one's physical features, therefore, may also be seen as a fundamental choice due to its centrality to a persons' identify.

Further, the obvious 'dividing line' for determining if adopting a physical feature is a fundamental choice is whether the attribute is already protected by discrimination law. It would be incoherent to protect a persons' right to have a 'punk rocker' haircut without also protecting their right to be a punk rocker.<sup>224</sup> Perhaps one day there will be discrimination laws based on music tastes or intelligence. If this occurs, then protecting persons' choice to have a punk rocker haircut, or some physical feature representing their intelligence (whatever that may be), may fit coherently with the existing law. But until then, it would be most coherent, building on the current discrimination law framework (which this paper aims to do), to not protect discrimination on the ground of chosen physical features where it is not protected already by discrimination laws.

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<sup>220</sup> See above pp 14 to 17.

<sup>221</sup> Moreau, above n 70, 157.

<sup>222</sup> Moreau, above n 70, 156; Sunstein, 'The Anticaste Principle' above n 49, 2443.

<sup>223</sup> Sunstein, 'The Anticaste Principle' above n 49, 2443.

<sup>224</sup> See Ann Hewitt, 'It's not because you wear a hijab, it's because you're Muslim: Inconsistencies in South Australia's discrimination laws' (2007) 7(1) *Queensland University of Technology Law and Justice Journal* 57, critiquing a South Australian law that prohibits discrimination on the ground of religious appearance of dress, but not religion itself.

(iv) Counter-considerations and exceptions

There are no particular costs that arise from prohibiting discrimination on ground of physical features that represent a protected attribute, beyond those identified in the discussion on immutable physical features, which require additional attention. There, as here, the potential costs in relation to enabling persons to appreciate beauty, protection of the private realm, health and safety concern, and freedom of religion, can be dealt with by way of exceptions; and the administrative costs do not justify abandoning this extension of the law altogether.

(v) The existing protections

This paper does not fully explore how far Australian discrimination laws go in prohibiting discrimination on the ground of physical features that represent protected attributes.

However, some brief points are made to show that, while some protections exist, a clear prohibition on physical features that represent protected attributes would not be superfluous.

Indirect discrimination provisions do not render a prohibition on discrimination on the ground of physical features that represent protected attributes superfluous. Under indirect discrimination laws, it would likely be unlawful, for example, to impose a requirement to not have Maori tattoos when applying for job and enforcing it against Maori persons, because it would likely be unreasonable and a substantially higher proportion of people who are not Maori could comply with it.<sup>225</sup> There are limits, however, on the protections provided by indirect discrimination to persons with physical features representing protected attributes. *First*, a condition (or requirement, term or practice) needs to be established. A single harmful comment against a person's Maori tattoos would be difficult to capture as indirect discrimination. But prohibiting direct discrimination on the ground of physical features that represent protected attributes could capture this.<sup>226</sup> *Second*, under indirect discrimination laws, it needs to be established that the condition is 'reasonable', which different judges and tribunal members may weigh differently. Accordingly, indirect discrimination provisions would not render a prohibition on discrimination on the ground of physical features that represent protected attributes superfluous.

Neither do 'characteristic extensions'. All Australian discrimination laws except the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the

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<sup>225</sup> See discussion of the law above at page 8.

<sup>226</sup> See, for example, *Hill v Canterbury Road Lodge Pty Ltd* [2004] VCAT 1365.

*Anti-Discrimination Act 1998* (Tas),<sup>227</sup> prohibit discrimination on the ground of a characteristic that appertains generally to persons with a protected attribute, a characteristic people with the protected attribute generally have, or a characteristic that meets either of these descriptions (a 'characteristic extension').<sup>228</sup> Allsop J held that a characteristic will 'appertain generally' to a protected attribute if it applies 'extensively' to people with that attribute or applies to them 'in the general sense'.<sup>229</sup> A person may therefore argue that a physical feature she has that represents a protected attribute is also a physical feature that people with protected attribute generally have, that applies extensively to people with that attribute, or that people with that attribute have in the general sense, and is therefore protected by discrimination law.

However, there are relevant limits when applying this characteristics extension. *First*, and most importantly, the Court of Appeal of the Supreme Court of Victoria in *Monash University v Kapoor (Kapoor)* found the characteristic extension only applies if the impugned conduct was 'based on the ground (or on the perception) that this characteristic' was related to the protected attribute.<sup>230</sup> Applying *Kapoor*, a person may discriminate on the basis of a Rastafarian's dreadlocks, so long as the reason for the impugned action did not include that the person was Rastafarian. As Rees, Rice and Allen argue, this interpretation means the characteristic extension 'serves no useful purpose':<sup>231</sup> to establish a contravention, it needs to be established that the race or religion of the person was the reason for the discriminator's conduct, but discriminating for the reason of race or religion is already prohibited. *Second*, even if the approach in *Kapoor* was rejected, the characteristics extension would not prevent discrimination on the ground of all physical features that represent protected attributes. For example, it may be that only a small amount of Maori persons have some traditional tattoos. Therefore, while these tattoos may represent a person's race, persons with this race do not 'generally have' them, and it may be found that the tattoos do not apply 'extensively' to

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<sup>227</sup> This does protect discrimination on the ground of characteristics 'imputed to' a protected attribute, but this is not relevant for our purposes: s 14(2).

<sup>228</sup> *Discrimination Act 1991* (ACT) s 7(2)(a); *Equal Opportunity Act 2010* (Vic) s 7(2)(b); *Anti-Discrimination Act 1992* (NT) s 20(2); *Anti-Discrimination Act 1991* (Qld) s 8; *Anti-Discrimination Act 1977* (NSW) ss 7(2), 24(1A), 38B(2), 39(1A), 49B(2), 49T(2), 49ZG(2), 49ZYA(2); *Equal Opportunity Act 1984* (SA) s 29(2)(c), 29(2a)(c), 29(3)(c), 29(4)(c), 51(c), 66(c), 85A(c), 85T(2)(c), 85T(4)(c), 85T(6)(c); *Equal Opportunity Act 1984* (WA) s 8(1)(b); *Disability Discrimination Act 2004* (Cth) s 16(1); *Sex Discrimination Act 1984* (Cth) ss 5(1) and 5A(1).

<sup>229</sup> *Thomson v Orica Australia Pty Ltd* [2002] FCA 939, [168].

<sup>230</sup> *Monash University v Kapoor* (2001) 4 VR 483, [35] (Chernov JA, Brookings and Ormiston JJA agreeing).

<sup>231</sup> Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (The Federation Press, 3rd ed, 2018), [2.3.1.13].



persons in this race or 'in the general sense'.<sup>232</sup> Accordingly, even if the approach in *Kapoor* was not applied, the characteristic extension would not cover all physical features representing protected attributes.

## **Conclusion**

This paper has sought to identify the moral underpinnings of traditional discrimination laws, and consider whether they can justify prohibiting physical features discrimination. The outcome, which justifies a prohibition on immutable physical features discrimination and discrimination on the ground of physical features that represent protected attributes, is a position that can be justified by 'tried and tested' means. Both forms of discrimination are commonly (though not always) irrational, and raise serious concerns for social inclusion for groups defined by immutable attributes or attributes they represent fundamental choices. There is reason to believe the laws would actually work in promoting social inclusion. Finally, counter-considerations can be largely dealt with by way of exceptions. On the other hand, a broader prohibition on discrimination on the basis of chosen physical features could not be justified, due to the cost it would impose on discriminators, the lower concern for social inclusion for persons with these physical features, and that these attributes are not immutable and do not ordinarily represent a fundamental choice.

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<sup>232</sup> *Thomson v Orica Australia Pty Ltd* [2002] FCA 939. [168].

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