

Queensland Human Rights Commission

**REVIEW OF QUEENSLAND'S
ANTI-DISCRIMINATION ACT 1991**

Submission by Daniel Lowry

A submission to:

- (i) Amend the Act to include 'physical features' in section 7, as an attribute; and
- (ii) Include 'bodily characteristics' as part of a 'physical feature; and
- (iii) Include tattoos in the definition of a 'bodily characteristic'.

Introduction

One of the purposes of the *Anti-Discrimination Act 1991* ('the Act') is 'to promote equality of opportunity for everyone by protecting them from unfair discrimination'.¹ As the Commission itself has recognised in the discussion paper released as part of the review into the Act,² it is important 'to ensure the list of attributes remains relevant and protects people who are most at risk'.³ However, the Act does not currently prohibit discrimination against an individual's physical features at all.⁴

Background

The reason why this submission arises is that some time ago my partner and I were invited out to dinner by my father. The rest of the family also attended. Unfortunately, the restaurant at which the family had booked was prepared to allow everyone else in, other than myself. I have a number of tattoos on my body, including neck and head tattoos, which I consider to be art. None are in any way garish or send an offensive message, however, I was told my neck and head tattoos did not meet "the dress code" and I would only be allowed entry into the

¹*Anti-Discrimination Act 1991* (Q) s 6(1).

² Queensland Human Rights Commission, 'Review of Queensland's Anti-Discrimination Act' (Discussion Paper, 30 November 2021) ('*Discussion Paper*').

³ *Discussion Paper* (n 2) 93.

⁴ See *Anti-Discrimination Act 1991* (Q) s 7.

restaurant if I covered up my tattoos. I had no means of doing so and therefore the family party all declined to dine there and we left, dining at another restaurant. I felt embarrassed and ostracised, and as 2 other members of the family had a significant number of visible tattoos – but not on their head, I felt discriminated against but powerless to do anything about it. I have not stated the name of the establishment, as for what follows, it is irrelevant. I do hold a copy of its “dress code” – confirming the blanket ban on neck/head tattoos unless they are covered. A copy is attached with the venue name redacted.

This was not the first time I have suffered this discrimination, having been denied entry to at least a dozen other venues in the past 5 years and being given a similar reason – breach of the dress code, you have face/neck tattoos or no reason at all. The attached short survey highlights that my experience is not an isolated one.

Discussion Paper

The *Discussion Paper* explicitly asks whether ‘physical features’ should be added into the Act as a protected attribute.⁵ This submission goes to why the Act should be extended to such discrimination, and more specifically, as has been judicially determined in Victoria, that the definition of “physical features” should include non-offensive tattoos and other non-offensive “object d’arte”, such as piercings, birth marks or even a haircut. Whilst my submission will concentrate on tattoos other “physical features” arising from birth, gene hereditary factors or acquired by choice are equally as important. Such goes to the very heart of anti-discrimination legislation, including the Act, which I ask should be amended.

Firstly, this submission will highlight the prevalence of tattoos in Queensland today, demonstrating a need for persons who choose to wear them needing protection. It will further explore the outdated assumptions surrounding tattooed individuals – which due to section 10 of the Act, as legislated as being irrelevant, as well as the implications of holding such assumptions. The submission will then suggest concrete reforms to the Act that hopefully may remedy this issue.

I PHYSICAL FEATURES DISCRIMINATION AT-LARGE

⁵ *Discussion Paper* (n 2) 104.

Before turning to the specific suggestions in relation to tattoos, this submission recognises that tattoos are but one element of the larger issue of ‘discrimination’ based on physical features. In that spirit, I wish to provide a general comment concerning the need for the inclusion of ‘physical features’ as a protected attribute under the Act.

The first point to make is that discrimination based on physical features is a rampant problem. This goes well beyond teasing of young children for being “too fat” or “ugly”, which can have a devastating effect on the youth of today. Such teasing by fellow youth could never fall within the province of the Act, as children under 12, and perhaps as old as 14 – if suggested reforms of criminal law come about, cannot be held criminally accountable in Australia. Often such teasing occurs without ill-intent, and whilst better not said, is uttered lacking any relevant conviction.

Just as race, sex, or even gender identification are determined at birth – where the baby has no choice, there are other ‘physical features’ not referred to in section 7 of the Act, about which a person can have no control such as weight, size, height, disability or skin colour – none of which are referred to in the section 7 of the Queensland legislation, although are equally attributes of a person. Victoria – with its *Equal Opportunity Act* 2010, section 6 and the ACT – with its *Discrimination Act* 1991, section 7, specifically include disability and “physical features’ as ‘attributes’, in their legislation, against which one cannot discriminate. The Queensland legislation should do so as well.

Unfortunately, discrimination against persons with ‘non-conforming’ physical features to a malcontent, is not limited to name-calling or childhood exclusion, it is a real factor that permeates everyday living for some persons, which can amount to more than unfair and be discriminatory:

- (i) A Stanford University professor, Ms Deborah Rhode, in an article arguing in favour of a similar sort of protection as suggested in this submission for American anti-discrimination law, steps through in detail both the many ways in which people are routinely biased against individuals based on their looks and the significant costs of such biases.⁶ She notes for example how those who are less attractive are less likely to be seen as ‘smart, happy, interesting, likeable, successful and well-adjusted’,⁷ something plainly likely to diminish one’s ability

⁶ Deborah L. Rhode, ‘The Injustice of Appearance’ (2009) 61 *Stanford Law Review* 1033, 1035-1048.

⁷ *Ibid* 1037-8.

to find suitable employment. Another example worth highlighting is the citation of research that shows obese people are ‘seen as less likeable and as having less self-control, self-discipline, effective work habits, and ability to get along with others’,⁸ similarly fatal to many being able to find suitable employment.⁹

- (ii) Ms Elizabeth Adamitis, a government lawyer in Seattle, Washington State, USA, in her research paper, cites further research that has shown that those with unattractive bodily characteristics (such as overweight women or short men) face lower wages.¹⁰
- (iii) Professor Peter Waring of Murdoch University in Perth, Western Australia, describes how organisations are increasingly requiring ‘aesthetic labour’ of employees, which manifests as companies selecting for and cultivating certain looks,¹¹ the inevitable product of which is discrimination based on physical features.¹²

In my view, it is immensely regrettable that physical features are used to discriminate against people in any circumstance. For many people, the characteristics on which they are discriminated against are, not unlike race or gender, characteristics over which they had no control, like height. Furthermore, for considerations like discrimination because of weight, the ‘bodily characteristic’ may have come about because of other social disadvantage – for example poor health education, low socio-economic status that prevents access to nutritional food, or inability to access healthcare. And for all physical characteristics – whether those characteristics are innate like height, or the product of personal choice like tattoos – they are by and large irrelevant when it comes to considerations like competence in the workplace or whether you should be denied entry into certain commercial premises.

It must not be forgotten that, as referred to in the *Australian Journal of Human Rights*, anti-discrimination law has a ‘symbolic purpose’ to signal that ‘discrimination on certain grounds is seen to be unacceptable’.¹³ As this submission has made eminently clear, when it comes to

⁸ Ibid 1038.

⁹ See ibid 1039 for focus on employment outcomes.

¹⁰ Elizabeth M. Adamitis, ‘Appearance Matters: A Proposal to Prohibit Appearance Discrimination in Employment’ (2000) 75 *Washington Law Review* 195, 198.

¹¹ Peter Waring, ‘Keeping up Appearances: Aesthetic Labour and Discrimination Law’ (2011) 53(2) *Journal of Industrial Relations* 193, 196.

¹² See for example, ibid 200ff, where Waring discusses an anti-discrimination complaint launched against the airline Virgin Blue in Queensland – though that case was ultimately determined on the basis of age-discrimination, at 201, Waring describes how Virgin Blue selected employees to maintain a particular look.

¹³ Alice Taylor and Joshua Taylor, ‘The place of tattoos, beards and hairstyles in discrimination law’ (2020) 26(3) *Australian Journal of Human Rights* 468, 469-70.

discrimination based on physical features – whether it is against tattoos as focused on here or other physical features – even in our more accepting Queensland, it continues to occur. The reason the Act’s existing list of protected attributes is praise-worthy because it recognises that discrimination against the attributes protected by section 7, cannot and should not be permitted. As equally praise-worthy is the Commission’s current review of the Act, and request for submissions as to its possible amendment and therefore improvement. Just as the currently listed ‘attributes’ in section 7 of the Act should not be a proper bases upon which to judge people in important areas of life such as employment, the provision of accommodation and in the provision of goods and services, there is similarly no reason why a person’s body should generally be a barrier to that person advancing themselves economically¹⁴ and socially, throughout their life.

To continue to ensure that the Act fulfils its overall purpose to ensure ‘equality of opportunity for everyone by protecting them from unfair discrimination’¹⁵ ‘physical features’ should be added as a protected attributed under section 7 of the Act. For certainty, non-offensive tattoos and other ‘bodily features’ should be enshrined in the definition of ‘physical features’ when that term is included in the attributes, listed in section 7 of the Act.

II GROWING ACCEPTANCE OF TATTOOS

Tattoos are becoming increasingly popular in Queensland

In general, tattoos are becoming increasingly popular in Australian society. A recent estimate from McCrindle Research suggests that nearly 25% of Australians have at least one tattoo.¹⁶ Notably, this is part of a growing trend; greater levels of Australians are choosing to get tattooed,¹⁷ and there does not seem to be anything to suggest the growth in the tattooed population of Australia will slow down soon. Applying this to Queensland’s estimated population of 5 221 000 (as of 30 June 2021),¹⁸ approximately 1.3 million Queenslanders

¹⁴ See for example Peter Waring, ‘Keeping up Appearances: Aesthetic Labour and Discrimination Law’ (2011) 53(2) *Journal of Industrial Relations* 193, 198 for a discussion of the consequences of the growth of ‘aesthetic labour’ and the consequent discrimination described earlier.

¹⁵ *Anti-Discrimination Act 1991* (Q) s 6(1).

¹⁶ McCrindle Research, ‘Tattoos on the Rise Among Aussies’ (Media Release, 2020) <<https://mccrindle.com.au/insights/blog/tattoos-on-the-rise-among-aussies/>>.

¹⁷ McCrindle Research, ‘Tattoos on the Rise Among Aussies’ (Media Release, 2020) <<https://mccrindle.com.au/insights/blog/tattoos-on-the-rise-among-aussies/>>.

¹⁸ ‘National, state and territory population’, *Australian Bureau of Statistics* (Web Page, 16 December 2021) <<https://www.abs.gov.au/statistics/people/population/national-state-and-territory-population/latest-release#states-and-territories>>.

today are sporting a tattoo. Furthermore, these tattoos are not ‘one-off’ tattoos – an estimated 61% of tattooed Australians (so 796 000 Queenslanders) have at least two tattoos.

While Queensland (and Australia more broadly) certainly has its own unique cultural context, the rise in the popularity of tattoos closely mirrors trends, anecdotal and statistical, observed in nations like the United Kingdom,¹⁹ the United States of America,²⁰ and New Zealand.²¹ The spread of tattoos is also not confined to a single gender – men *and* women are both participating in the act of getting tattoos. McCrindle’s latest estimate illustrated that 31% of women and 19% of men in Australia have tattoos. Considering the historical association of tattoos with ‘men’,²² the fact that women now outnumber men in terms of the proportions (and likely overall numbers) of those with tattoos is further demonstrative of how tattoos have achieved broad mainstream acceptance; it is acceptable for anyone to get tattoos should they please.

Why are tattoos becoming more popular?

The growth in tattooing is largely attributable to a generational shift in attitudes. Tattoos have empirically become more acceptable to have over time. Previous research has suggested that it is ‘Generation Y’ – those born after 1980 – that are the most tattooed generation.²³ However, anecdotally, one need only browse social media briefly to see that most people getting tattoos are young people, including many young Queenslanders. Given the greater cultural acceptability of tattoos as compared to older generations,²⁴ this is an unsurprising fact. However, the consequence of this is that it is those younger Queenslanders who, without the protection of the Act, are more at risk of suffering the indignity of being unable to

¹⁹ See Priya Elan, “‘There’s been a paradigm shift’: tattoos go mainstream after lockdown”, *The Guardian* (online, 28 May 2021) <<https://www.theguardian.com/fashion/2021/may/28/theres-been-a-paradigm-shift-tattoos-go-mainstream>>.

²⁰ Chris Jackson, ‘More Americans Have Tattoos Today than Seven Years Ago’, *Ipsos* (News Article, 29 August 2019) <<https://www.ipsos.com/en-us/news-polls/more-americans-have-tattoos-today>>.

²¹ See for example: ‘Air New Zealand drops ban on staff tattoos’, *BBC News* (News Article, 10 June 2019) <<https://www.bbc.com/news/business-48577668>> and Tess Nichol, ‘How getting a tattoo became so mainstream’, *NZ Herald* (online, 21 January 2017) <<https://www.nzherald.co.nz/lifestyle/how-getting-a-tattoo-became-so-mainstream/DMQTMTDAAHBM2TTW7FTF6F3QZY/>>.

²² Note ‘The Relationship Between Tattoos and Employee Workplace Deviance,’ *Journal of Hospitality & Tourism Research*, Vol. 43, No. 7, September 2019, 1025–1043

²³ James Cook University, ‘Tattoo Growth Still Strong’ (Media Release, 1 January 2015) <<https://www.jcu.edu.au/news/releases/2015/april/news-and-media19>>.

²⁴ Carol Rääbus, ‘Why do you still have to hide tattoos and piercings at work?’, *ABC Everyday* (News Article, 3 October 2019) <<https://www.abc.net.au/everyday/why-do-you-still-have-to-hide-tattoos-and-piercings-at-work/11504614>> and McCrindle Research, ‘Tattoos on the Rise Among Aussies’ (Media Release, 2020) <<https://mccrindle.com.au/insights/blog/tattoos-on-the-rise-among-aussies/>>. For the purposes of this submission, ‘older generations’ is referring to those born before the 1980s.

participate fully in Queensland society. For example, young, tattooed individuals may be barred from venues, because of a feature of their physical appearance.

This section has established, prima facie, that the case for including specific protections against discrimination on the basis of physical features carries substantial merits. Considering especially the significant number of Queenslanders, and others more broadly who come to Queensland, say for tourism, work or education, who are likely to be tattooed, there is a seemingly large contingent of individuals who are significant risk of being discriminated against. The next section will explore more specifically the problematic assumptions that underlie discrimination against people with tattoos more broadly.

III WHAT DOES DISCRIMINATION LOOK LIKE IN THIS CONTEXT?

The next section of this submission is, broadly, to outline the ways in which tattooed individuals continue to be discriminated against in Queensland today. This is to explain the extent of discrimination faced.

Even with a more tattoo-accepting society, tattooed individuals continue to be routinely discriminated against, both in social contexts, such as entry into bars prohibiting tattoos, but also in the workforce.

When it comes to the labour force, research has found that photos of tattooed applicants were rated significantly lower on hire ability scales in jobs involving customer interaction compared with photos of applicants without tattoos.²⁵ Many people, without apparent justification,²⁶ view tattooed individuals as less professional,²⁷ or less competent.²⁸ Additionally, in *The Journal of Social Psychology*, Zestcott et al, found that tattooed individuals experienced more negative implicit attitudes from those around them, and that these attitudes were associated with less perceived warmth and competence.²⁹ Tews and Stafford, in a journal titled *International Journal of Contemporary Hospitality Management*,

²⁵ Andrew Timming, Karoline Mortensen and Michael French, 'Are tattoos associated with employment and wage discrimination? Analyzing the relationships between body art and labor market outcomes' (2018) 72 *Human Relations*.

²⁶ See section IV (the one about comparing people).

²⁷ See Dwane H Dean, 'Consumer perceptions of visible tattoos on service personnel' (2010) 20(3) *Managerial Service Quality* 294, 304.

²⁸ Dwane H Dean, 'Young Adult Perception of Visible Tattoos on a White-Collar Service Provider' (2011) 12(3) *Young Consumers* 254.

²⁹ Colin Zestcott et al, 'What Do You Think About Ink?: An Examination of Implicit and Explicit Attitudes Toward Tattooed Individuals' (2017) 158 *The Journal of Social Psychology*.

observed that a myriad of studies had pointed towards showing that were negative attitudes observed against those with tattoos in workplace contexts.³⁰

It seems, little has changed in the last 100 years where discrimination is still exercised against tattoo wearing persons, however, leaving aside Victoria and the ACT, there has not been legislation clearly detailing that such discrimination is not lawful, as opposed to the other attributes listed in section 7 of the Act. Considering the strength of these attitudes still likely held amongst many people, and as noted earlier, the number of Queenslanders who have tattoos today, it can be easily inferred that many are being discriminated against on the basis of tattoos. Alternatively, where more people are getting tattoos, and likely visible ones at that, the potential for discrimination by employers is strong enough that action ought to be taken to prevent it.

In the social space, the discrimination against people with tattoos is far more direct and known. Dress code policies by venues throughout Queensland routinely prohibit people from showing their tattoos.³¹ These policies require people who have visible tattoos to make the unenviable decision of either having to cover up and hide aspects of their body for the purposes of social enjoyment, or face prohibition from certain venues and miss out.³²

To assist in confirming this point, 10 days ago a short survey was disseminated to various tattooists and generally, which to date has had 70 responders. The results received so far, which are annexed to these submissions as Annexure A, confirm the level of discrimination, in Queensland, is significant

The Victorian experience about discrimination based on tattoos is informative. There, as the Commission would be aware, discrimination on the basis of physical features is prohibited.³³ Figures from the Victorian Equal Opportunity and Human Rights Commission have shown that in the past 5 years, tattoos and piercings have caused approximately 22% of all alleged discrimination claims are on the grounds of appearance.³⁴ This demonstrates that, where a

³⁰ Michael J Tews and Kathryn Stafford, 'Tattoos and Unfavourable Treatment Among Employees in the Hospitality Industry' (2020) 32(5) *International Journal of Contemporary Hospitality Management* 1925, 1926. There are some studies pointing the opposite way also cited by the authors.

³¹ This can be provided on request

³² See for example: 'Brisbane woman Stephanie Stiletto claims she was turned away from Blackbird Bar & Restaurant over neck tattoo', *PerthNow* (online, 22 September 2019) <<https://www.perthnow.com.au/lifestyle/fashion/brisbane-woman-stephanie-stiletto-claims-she-was-turned-away-from-blackbird-bar-restaurant-over-neck-tattoo-ng-b881331056z>>.

³³ *Equal Opportunity Act 2010* (Vic) s 6. The prohibition existed in the previous iteration of this statute also, see *Jamieson v Benalla Golf Club* [2000] VCAT 1849.

³⁴ Yolanda Redrup, 'Victorian lawyers lobby states to prevent workers from being discriminated against based on appearance', *SmartCompany* (News Article, 11 September 2013)

provision prohibiting ‘physical features discrimination’ is introduced, the provision will not sit dormant but likely be used by many Queenslanders who are the victims of such discrimination.

What is equally as important to note, that arises from this reported study, is that where the definition of ‘physical features’ fails to identify with any specificity, what is included in the definition of that phrase, such discrimination continues. As will be referred to subsequently in these submissions, the inclusion of tattoos, as a component of ‘physical features’, came through judicial interpretation of ‘bodily characteristics’ which were included as a sub-set of ‘physical features’ in the Victorian legislation. Had they been included, along with other relevant characteristics, such as birthmarks or piercings, it is likely less discrimination would have followed and therefore less resources having to be utilised by the Equal Opportunity Commission to respond to complaints made.

It is estimated that 61% of tattooed Australians (or an estimated 796,000 Queenslanders) have more than one tattoo, and having more tattoos usually increases an individual’s willingness to show them,³⁵ it follows that the need for law reform to protect these people who are likely to be vulnerable to stigma and discrimination, is pressing.

IV CHALLENGING ASSUMPTIONS ABOUT TATTOOED INDIVIDUALS

As the Act itself acknowledges, with the carving out of exemptions to the general prohibitions against discrimination by affected entities throughout the Act,³⁶ there are circumstances in which certain discrimination may be justified where there are proper grounds to do so.

The currently permitted *general* discrimination against those with tattoos does not seem to have any coherent basis that would justify its current exclusion as a protected attribute under section 7 (as part of a broader ‘physical features’ protection). In any event, where there is direct discrimination, as occurred in my instance – section 10 of the Act clearly states:

(2) It is not necessary that the person who discriminates considers the treatment is less favourable.

<<https://www.smartcompany.com.au/people-human-resources/managing/victorian-lawyers-lobby-states-to-prevent-workers-from-being-discriminated-against-based-on-appearance/>>.

³⁵ Lynda Dickson et al, ‘Stigma of ink: Tattoo attitudes among college students’ (2014) 51(2) *The Social Science Journal*.

³⁶ See *Anti-Discrimination Act 1991* (Q) ss 25-36, 41-44, 48-51, 59-65, 73-75, 79-80, 87-92, 97-100, Part 5.

(3) *The person's motive for discriminating is irrelevant.*

This submission wishes to highlight the unjustified nature of discrimination against those with tattoos by bringing to the Commission's attention research that has been undertaken regarding people with tattoos ultimately to show that those Queenslanders with tattoos are just like other Queenslanders, no more no less, and thus worthy of specific protection within the Act.

Why do Queenslanders get tattoos?

In a journal titled: *Advances in Mental Health*, Kalanj-Mizzi, Snell and Simmonds engaged in a detailed interview with heavily tattooed members of the Gold Coast, Queensland community to understand this subset of the population more deeply.³⁷ The authors note that previous studies have shown some links between 'having tattoos' and social deviancy.³⁸ However, such studies were done *prior to* the increasing mainstream acceptance of tattooing, which render these links irrelevant.³⁹ The members of this study did not get tattoos to pledge allegiance to any club or group, nor to conform to someone's expectations.⁴⁰ In fact, often tattoos were sought as a method of self-expression, or as a method of expressing their interests and artistic appreciation.⁴¹ The use of tattoos as art has been attributed to an estimated 12% of tattooed individuals feel that their tattoos are an extension or expression of who they are.⁴² Other research has, who suggested that primary motivation tattooed individuals have when getting tattooed has to do with the tattoo's personal meaning.⁴³ Tattoos can help mark a significant experience or struggle in a person's life. This can be supported by the fact that 72% of tattooed Australians had their most recent tattoo as a picture or symbol.⁴⁴

Tattooed individuals who have experienced adversity, sexual abuse, or trauma have also reported the healing or cathartic effects of tattoo acquisition.⁴⁵ Moreover, research has shown that those survivors of trauma have readily discussed the conscious use of tattoos as a catalyst

³⁷ Stephanie Kalanj-Mizzi, Tristan Snell, and Janette Simmonds, 'Motivations for multiple tattoo acquisition: an interpretative phenomenological analysis' (2018) 17 *Advances in Mental Health* 196.

³⁸ Ibid 198.

³⁹ Ibid 198.

⁴⁰ Ibid 202.

⁴¹ Ibid 202-207.

⁴² Vinita Mehta, 'Why People Get Tattoos', *Psychology Today* (News Article, 3 September 2019) <<https://www.psychologytoday.com/au/blog/head-games/201909/why-people-get-tattoos>>.

⁴³ Vinita Mehta, 'Why People Get Tattoos', *Psychology Today* (News Article, 3 September 2019) <<https://www.psychologytoday.com/au/blog/head-games/201909/why-people-get-tattoos>>

⁴⁴ McCrindle Research, 'Tattoos in Australia' (Media Release, 2016) <<https://mccrindle.com.au/insights/blog/tattoos-in-australia/>>.

⁴⁵ Armstrong de Almeida, 'Inked women: narratives at the intersection of tattoos, childhood sexual abuse, gender and the tattoo renaissance' (Masters Thesis, University of Victoria, 2009).

for personal change, growth, and healing.⁴⁶ This demonstrates that most modern Queenslanders are using their tattoos as important outlets for personal and cultural expression, a purpose which should be supported and not stifled by disincentivising getting tattoos - which discrimination will tend to do. As 36% of tattooed individuals received their first tattoo when aged 26 and older,⁴⁷ those who receive tattoos are likely more mature and have made an educated decision to get one. As evidenced in the short survey, attached as Annexure A to these submissions most persons who responded so far, view their tattoo(s) as art.

To summarise, the modern tattoo-acquiring individual is someone who is often doing so to advance themselves and their own sense of identity. In a more pluralistic Queensland, it should be the case these objectives are encouraged, not discouraged by the continued tolerance of discriminating on the basis of tattoos.

Tattoos of cultural significance

For many Queenslanders, the tattoos they adorn are not simply ways of expressing their personal identity but are often very significantly culturally based. Most famously, many Polynesian cultures have a rich history of using tattoos for cultural significance. In an article in the journal titled *The Diplomat*, James DeHart provides an accessible summary of the history of Polynesian tattooing.⁴⁸ Tattoos have long been an ancient social practice for the various societies within Polynesia – as DeHart describes, they were often used as rites of passage, and carry deep spiritual and social meanings for the communities that used them.⁴⁹ For modern Polynesians especially, DeHart explains how tattoos today are a ‘personal act of commitment to Polynesian culture’,⁵⁰ in the context of a broader revival of Polynesian culture that had been previously suppressed by colonialists. He includes an observation from Tahitian film-maker Charles Perez, who makes the point that many in Tahiti are heavily tattooed, likely due to the cultural significance of these tattoos.⁵¹ Many traditional tattoos are required to be on parts of the body that are visible.⁵² Considering that Queensland has,

⁴⁶ December Maxwell, ‘Phoenix Ink: Psychodynamic Motivations for Tattoo Attainment by Survivors of Trauma’ (Thesis, University of Hawaii, 2017).

⁴⁷ Jamie Tomlinson, ‘New Australian Tattoo Stats 2020’, *Goodbye Tattoos* (News Article, 21 November 2020) <https://goodbyetattoos.com/new-australian-tattoo-stats-2020/>.

⁴⁸ James DeHart, ‘Sacred Ink: Tattoos of Polynesia’, *The Diplomat* (Article, 25 November 2016) <<https://thedi diplomat.com/2016/11/sacred-ink-tattoos-of-polynesia/>>.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² ‘Polynesian Tattoo: History, Meanings and Traditional Designs’, *Zealand Tattoo* (Web Page, 28 September 2017) <<https://www.zealandtattoo.co.nz/tattoo-styles/polynesian-tattoo-history-meanings-traditional-designs/>>.

according to data from the 2016 census, around 34% of the approximately 200,000 Pacific Islanders in Australia⁵³ - there is likely 61,000 Polynesians in Queensland.⁵⁴ This would suggest many of those tattooed in Queensland are adorning culturally significant tattoos. This is before even considering other groups who likely have similarly important tattoos.

Discrimination against those with culturally specific tattoos would likely already be protected under the 'race' or 'religious belief or religious activity'⁵⁵ grounds under the Act. This is because the definition of discrimination on the basis of a protected attribute includes 'a characteristic that a person with any of the attributes generally has'.⁵⁶ Many Polynesian tattoos are on their arms and their face, thus creating the difficulty that when asking for such a tattoo to be covered up it would not only be embarrassing or degrading but insulting of that person's heritage and likely in contravention of section 7(g) of the Act occurs. The person next in line, perhaps without such cultural significance attaching to his or her facial tattoo, as the Act is presently framed, could rightly be excluded. That anomaly needs to be avoided.

In my instance, my head tattoo failed the 'dress code' – in other words it was a blanket no to head tattoos, even though I was subsequently allowed to dine at a different establishment. I was not barred because any tattoo was considered offensive or may offend – had that been suggested different considerations would have followed. Another 2 people in the party had many tattoos and they were to be permitted to enter, thus confirming it was a pre-ordained discrimination.

Many prohibitions on tattoos are 'blanket' bans, and negative attitudes towards tattoos exist even where non-objectionable, it is likely that people with these tattoos are either still suffering the impacts of tattoo-related discrimination in the ways outlined earlier. Public acceptance of tattoos in New Zealand, where the Māori nation routinely adorn their face and have other visible tattoos, has been accepting of facial tattoos, as evidenced by the fact that in December 2021 the first Māori woman, adorning a 'moko kauae'- which was a dominant tattoo over her chin, presented the primetime news bulletin on TV.⁵⁷

⁵³ James Batley, 'What does the 2016 census reveal about Pacific Islands communities in Australia?', *DevPolicyBlog* (Blog Post) < <https://devpolicy.org/2016-census-reveal-about-pacific-islands-communities-in-australia-20170928/>>.

⁵⁴ Ibid – there is approximately 181000 Polynesians nationwide, with this estimate assuming an even spread of Pacific Islander sub-groups.

⁵⁵ *Anti-Discrimination Act 1991* (Q) ss 7(g), (i).

⁵⁶ *Anti-Discrimination Act 1991* (Q) s 8(a).

⁵⁷ Daniel Keane, 'Māori news anchor becomes first woman in New Zealand to present with traditional chin tattoo', *Evening Standard* (online, 30 December 2021) <<https://www.standard.co.uk/news/world/maori-woman-new-zealand-first-news-anchor-chin-tattoo-b974318.html>>.

Moko kauae - are received by women on their lips and chin. A moko kauae represents a woman's whānau and leadership within her community, recognising her whakapapa, status, and abilities. It is a traditional taonga passed down over many generations from the ancestress Niwareka. Tā moko are also applied to other parts of the body, including the forehead, neck, back, stomach and calves.

Whilst a step towards normalising the acceptance of facial tattoos it seems that ever since the Human Rights Act (New Zealand) was introduced in 1993 the Human Rights Commission has had the following appear on its web-site:

"person of Māori descent may not be denied employment... because they wear moko visible".

While that passage refers to facial tattoos, it is equally applicable to any form of traditional cultural tattoo.

It would follow that, considering the continued discrimination that occurs against tattooed Queenslanders, it is unlikely that those with culturally significant tattoos feel any more comfortable displaying their tattoos, an immensely regrettable outcome that hopefully would be remedied by a legislative change that would allow more broadly for an acceptance of tattoos.

Are tattooed Queenslanders different from non-tattooed Queenslanders?

Notwithstanding the assumptions that many Queenslanders may have about the ways the people with tattoos act and think, the most recent academic literature on this subject shows that, the links between tattoos and social deviancy are no longer there. Swami, in his 2012 study on the psychological attitudes of tattooed and non-tattooed individuals, suggested that there were no significant differences on attitudes to authority exist between tattooed and non-tattooed individuals.⁵⁸ Furthermore, there were only small to negligible differences on multiple measures of mood and personality between tattooed and non-tattooed individuals.⁵⁹ As early as 2008, Tate and Shelton warned that the statistically significant differences that might be observed between tattooed and non-tattooed individuals in various psychological measures 'most likely reflect inconsequential real world differences between those with and

⁵⁸ Viren Swami, 'Written on the body? Individual differences between British adults who do and do not obtain a first tattoo' (2012) 53 *Scandinavian Journal of Psychology* 407, 411.

⁵⁹ Viren Swami et al, 'More Similar than Different: Tattooed Adults are Only Slightly More Impulsive and Willing to Take Risks than Non-Tattooed Adults' (2016) 88 *Personality and Individual Differences* 40.

without [tattoos]'.⁶⁰ As Swami et al observed in 2016, 'the emerging picture is one of similarity rather than difference in personality characteristics between tattooed and non-tattooed individuals, which can be ascribed to the mainstreaming and greater societal acceptance of body art'.⁶¹ What this serves to demonstrate is that any rational basis for discriminating against *everyone* with tattoos is, prima-facie, non-existent. No coherent justification can be found, and the most recent academic literature, which is more relevantly informed by our modern, more tattoo-friendly society, has corroborated the view that any previous justifications that may have existed no longer does so.

V TATTOOS ARE AN ACCEPTED PART OF LIFE

Sections II and IV of this submission have served to demonstrate the reality that the Commission must take notice of is that tattoos are now an accepted and ordinary facet of many Queenslanders' physical appearance. The sheer number of Queenslanders who already have tattoos in the status quo is indicative of their already broad acceptance within society. Moreover, the number of Queenslanders who have tattoos is only expected to grow. It has also been clearly demonstrated that the rationale for not protecting those with tattoos from being discriminated against is not evident, especially when the discrimination itself is occurring for increasingly irrational reasons. It would seem strange to the many Queenslanders with tattoos, in an era of increased body positivity and a greater social acceptance as to diversity, that it would be acceptable in modern-day Queensland to allow discrimination on the basis of this one harmless element of their appearance. For the Act to accord with modern social opinion, section 7 of the Act should be amended to add 'physical features' – that includes tattoos, as a protected attribute.⁶²

VI SUGGESTIONS FOR REFORM

The *Discussion Paper* asks whether 'physical features' should be added as a protected attribute under section 7 of the Act. This submission has argued that the answer is 'yes'. However, it is equally as important to examine the specific form of such an amendment to the Act.

⁶⁰ James Tate and Britton Shelton, 'Personality correlates of tattooing and body piercing in a college sample: The kids are alright' (2008) 45(4) *Personality and Individual Differences* 281. The authors studied both tattoos and body piercings, but they generalised their conclusions as applicable to both forms of body modification.

⁶¹ Viren Swami et al, 'More Similar than Different: Tattooed Adults are Only Slightly More Impulsive and Willing to Take Risks than Non-Tattooed Adults' (2016) 88 *Personality and Individual Differences* 40, 41.

⁶² While not strictly the focus of this submission, such arguments would also be highly applicable to the broader range of body modifications that people now undertake – the rationale for discriminating against such people is rapidly diminishing, like with tattoos, as such practices become more commonplace.

Only two jurisdictions in Australia currently protect against ‘physical features’ discrimination - Victoria⁶³ and the Australian Capital Territory (ACT).⁶⁴ Both Victoria and the ACT define the term ‘physical features’ in substantially the same terms.⁶⁵ On first glance, the definitions adopted by these two jurisdictions seem to be sufficiently broad-ranging for the purposes of protecting against discrimination based on physical features. However, as the Commission’s *Discussion Paper* highlights, the Victorian prohibition of discrimination on the ground of ‘physical features’⁶⁶ is somewhat uncertain in the grounds that it covers. The uncertainty rests on the specific words ‘bodily characteristic’ and whether or not it should cover changeable characteristics, like tattoos.⁶⁷

First, as a matter of principle, I wish to highlight that the Act already prevents discrimination on attributes both that an individual cannot change⁶⁸ and those where an individual has significant if not total agency to select how that attribute manifests.⁶⁹ Given the submission’s overall focus on tattoos, it should be evident that I take the view that the final definition of ‘physical features’ should be drafted to allow tattoos, a bodily characteristic put there by choice, to be considered part of the protected attribute under the Act, and it should specifically include in its definition, to avoid uncertainty. Protecting other bodily characteristics that come about by choice, eg piercings or dying hair, is also something this submission supports for substantially the same reasons as articulated in sections IV and V of this submission.

Secondly, I believe that any amendment to the Act to include ‘physical features’ as a protected attribute will need to be relatively explicit that changeable characteristics still fall under the protection of the Act. The reason for this suggestion emerges in light of the (limited) consideration of ‘bodily characteristics’ by the Victorian Civil and Administrative Tribunal.

In *Jamieson v Benalla Golf Club* [2000] VCAT 1849, McKenzie DP opined that, as a matter of statutory interpretation ‘tattoos’ were bodily characteristics within the meaning of

⁶³ *Equal Opportunity Act 2010* (Vic) s 6(j).

⁶⁴ *Discrimination Act 1991* (ACT) s 7(1)(m).

⁶⁵ Victoria: ‘physical features means a person’s height, weight, size or other bodily characteristics’: *Equal Opportunity Act 2010* (Vic) s 4 (definition of ‘physical features’). ACT: ‘physical features means a person’s height, weight, size or other bodily features’: *Discrimination Act 1991* (ACT) Dictionary (definition of ‘physical features’).

⁶⁶ *Equal Opportunity Act 2010* (Vic) s 6.

⁶⁷ As discussed in *Jamieson v Benalla Golf Club Inc* [2000] VCAT 1849.

⁶⁸ For example, *Anti-Discrimination Act 1991* (Q) s 7(a), (f), (g) – protecting ‘sex’, ‘age’ and ‘race’ as attributes.

⁶⁹ For example, *Anti-Discrimination Act 1991* (Q) s 7(b), (i), (k) – protecting ‘relationship status’, ‘religious belief or activity’ and ‘political belief or activity’.

‘physical features’ in the *Equal Opportunities Act 1995* (Vic).⁷⁰ However, it should be noted the comments of McKenzie DP were not relevant to the decision: she first assumed tattoos were physical features and then dismissed the claim anyway. The subsequent discussion was not crucial to her decision. However, McKenzie DP did say that ‘[i]n its ordinary meaning physical features would embrace any distinctive bodily mark or attribute.’⁷¹ The Deputy President further added ‘that there is no express exclusion of characteristics acquired after birth or of characteristics acquired as a matter of choice, as long as they can be described as characteristics of the body.’⁷² However, it should be noted that this finding ran expressly contrary to the Second Reading Speech, where the Attorney-General said ‘[t]he attribute of physical features is not intended to include such things as tattoos or body piercing which a person may choose to acquire.’⁷³ While the Deputy President is certainly right that the Second Reading Speech alone cannot lead to a finding that the phrase ‘bodily characteristic’ should be read to exclude tattoos, considering that statute is meant to be interpreted in a purposively and in light of the whole context of the provision,⁷⁴ there is a risk that a poorly drafted definition may actually exclude tattooed people from the discrimination protection provided by the Act. Given there has been scarce judicial confirmation of the very liberal approach taken by the VCAT in interpreting ‘physical features’,⁷⁵ the position in Victoria about what is and is not captured is certainly not settled.

Insofar as tattoos specifically are concerned, on top of the words ‘bodily characteristic’, which it may still be necessary to retain as a ‘catch-all’ in the way Victoria and the ACT do it, the definition of ‘physical features’ could add words to the effect of ‘marks on the body’. This has the intended impact of ensuring tattoos are protected but also has the additional benefit of explicitly clarifying that other permanent marks such as birth marks, scars or burns are also features which should not form the basis of discrimination.⁷⁶

⁷⁰ This was the predecessor to the current statute, but the protection of ‘physical features’ was in the same terms.

⁷¹ *Jamieson v Benalla Golf Club* [2000] VCAT 1849.

⁷² *Jamieson v Benalla Golf Club* [2000] VCAT 1849.

⁷³ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1251 (Jan Wade, Attorney-General).

⁷⁴ *CIC Insurance v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

⁷⁵ See *Kuyken v Lay* [2013] VCAT 1972, [74] (Member Grainger) where facial hair was considered a bodily characteristic. This point was not challenged in the Supreme Court appeal (*Kuyken v Chief Commissioner of Police* [2015] VSC 204). In *Ruddell v Department of Human Services* [2001] VCAT 1510, [54]-[55], McKenzie DP does not totally reject the proposition that voice is a physical feature, though voice volume was not considered so.

⁷⁶ There may be further merit in listing the examples of tattoos and scars/burns/birth marks within the definition itself.

Alternatively, to avoid the earlier mentioned uncertainty and given the strong case for the inclusion of tattoos and by extension, other such modifications under the protection of the Act, the definition of physical features could include something to the effect of ‘...and bodily characteristics including body modifications, such as tattoos and piercings.’ This form of amendment may achieve a more broadly positive effect as it provides a more explicit signal as to the undesirability of discriminating not just based on tattoos, but other forms of optional self-expression like piercings or colouring of hair. Considering the breadth of discrimination that people likely face when it comes to their ‘physical features’ likely encompasses many features that are there by choice, this more explicit definition would likely avoid the Anti-Discrimination Tribunal, or a court, needing to go on an interpretive exercise to justify the protections of those with tattoos. Again, an inclusive list of examples would likely provide useful guidance to those that would otherwise discriminate. As referred to earlier, the more explicit the amendment the less resources will need to be expended by the Commission dealing with or litigating discrimination complaints.

To conclude, the discussion on the specifics of the reform, I wish to highlight, at least where tattoos are concerned, why this is a reasonable and proportionate extension of the Act. While this submission recognises the possibility that a low percentage of the tattooed population may have truly objectionable/offensive tattoos, the Act still contains general exemptions which would cover these few edge-cases. For example, the exemption in the Act to do what ‘is reasonably necessary to protect the health and safety of people at a place of work’,⁷⁷ would allow establishments to prevent individuals supposedly objectionable tattoos. Offensive tattoos or tattoos that may offend should not be protected, however, broader exemptions on the basis of tattoos being objectionable generally should be avoided. This is because it would likely introduce uncertainty in the law and could defeat the prohibition on tattoo discrimination (where someone argues, for example, that tattoos are objectionable in an ‘upper-class’ establishment). For the highly rare times organisations need to protect themselves from those with highly offensive tattoos, acting to protect safety is a sound enough justification.

The other point to make is that the extension of the Act to protect ‘physical features’ does not prevent the Queensland Government (or private organisations relying on government advice) from differentially treating the vaccinated versus un-vaccinated persons in relation to the COVID-19 pandemic. In the Victorian/ACT iterations of the ‘physical features’

⁷⁷ *Anti-Discrimination Act 1991* (Q) s 108.

discrimination protection, 'vaccination status' itself is not seen to be a bodily characteristic in the same way height, weight or even a body modification is, and it would be a stretch for a court to say so, particularly as a vaccination is more akin to the taking of a medicine, discrimination against which the Act does not prohibit. This is especially evidenced by the fact that in Victoria and the ACT, no successful claims of discrimination has occurred on the basis of vaccination status, in reliance on this or other attributes. Further, there are still two catch-all exemptions that likely defeat any effect 'physical features' being protected could have in limiting the justified differentiated treatment on vaccination status: sections 106 and 107 of the Act exist to exempt discrimination that is reasonably necessary to protect public health or the health and safety of people at a place of work. Thus, if the government or a business wanted to do this outside of the current COVID-19 laws, they have access to this. Moreover, in the world (like now) where there are laws concerning the relevance of vaccination status, on first blush it would seem that complying with those laws would be strong evidence of 'reasonably necessary' discrimination (notwithstanding *Public Health Act 2005* (Qld) s 5). Therefore, it is evident that minimising discrimination on the basis of 'physical features' does not jeopardise the ability of the Government or private organisations to ensure Queenslanders are kept safe from COVID-19.

VII CONCLUSION

It is evident that tattoos are an ordinary part of the cultural life of Queensland, with more people than ever enjoying this mode of expression. More broadly, Queensland society today is one which should seek to encourage acceptance of all body types. However, where tattoos are concerned, despite their increased acceptance in Queensland society, this submission has shown that discrimination based on the sole criterion of tattoos still occurs. The reasons for such discrimination being acceptable for reasons not immediately evident, for example when one peruses publicly available dress codes.⁷⁸ As I have sought to demonstrate, the justifications that are purported to exist likely do not. Therefore, to prevent discrimination on the grounds of 'tattoos', I have argued that is likely that only a legislative prohibition against such discrimination will help to change attitudes and protect tattooed Queenslanders from unjust treatment. Ultimately, the *Anti-Discrimination Act 1991* should be amended to include 'physical features' in section 7 of the Act, as an attribute, with specific terms suggested in

⁷⁸ Considering that people are often let into a premises anyway simply by having their tattoos covered up, it is unclear what problem is even being solved by preventing people from being able to publicly display their tattoos.

section VI, above so that it can continue to provide the most socially relevant protections against discrimination for all Queenslanders.



.....
Daniel Lowry

Dated: 23 February 2022

Email: [REDACTED]

APPENDICIES

1. Tattoo Discrimination Survey

2. Current Brisbane Dress Code Example

CONTACT DETAILS

Mobile:



Email:





Tattoo Discrimination

Tattoo Discrimination

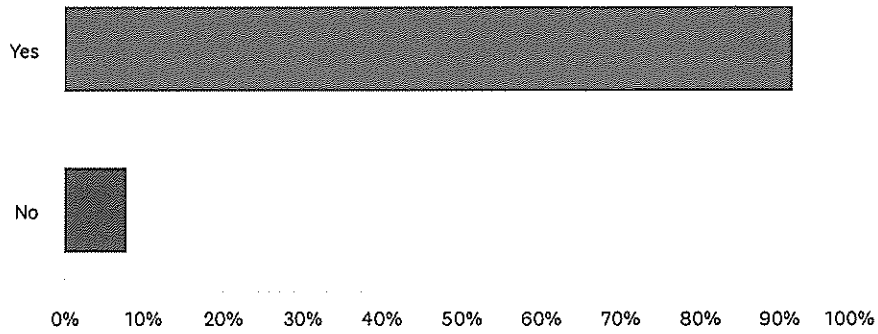
Many people experience discrimination by being denied entry to licensed premises because of their Body Art (Tattoos). The Queensland Anti Discrimination Act is being reviewed right now. If you have experienced this form of discrimination, please assist us by completing this anonymous survey which will be included in our submission to change the Act. If we are successful, this discrimination will be illegal. Please forward this survey to anyone you know who has also experienced this form of discrimination.

Tattoo Discrimination Survey

Tattoo Discrimination

Q1 Have you been denied entry to a licensed premises on the basis of your tattoos?

Answered: 74 Skipped: 0



ANSWER CHOICES

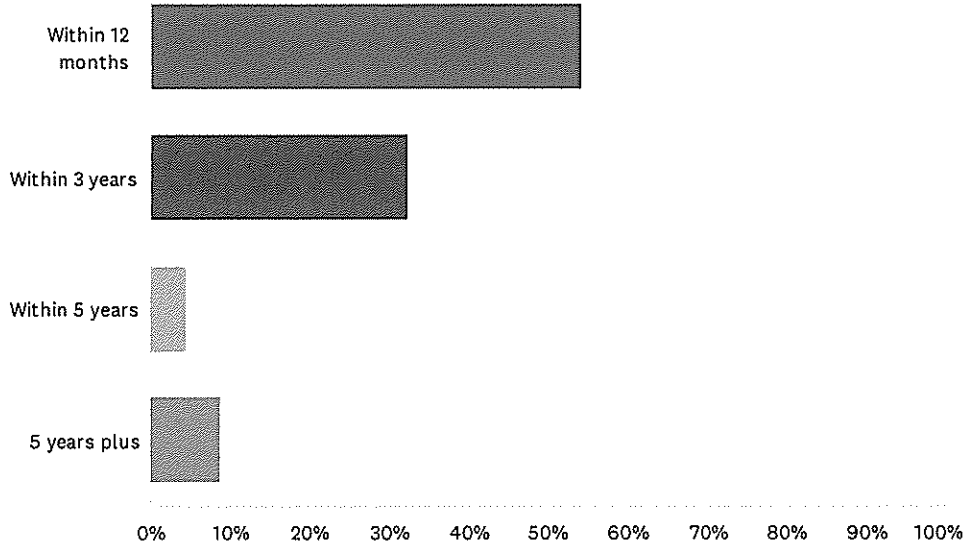
RESPONSES

Yes	91.89%	68
No	8.11%	6
TOTAL		74

Tattoo Discrimination

Q2 If yes, approximately how long ago?

Answered: 68 Skipped: 6



ANSWER CHOICES

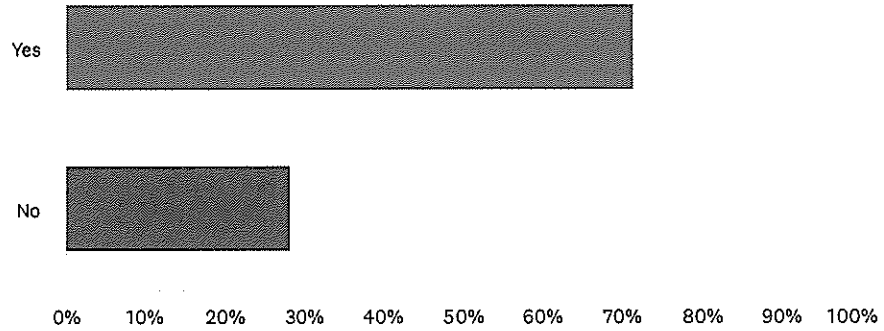
RESPONSES

Within 12 months	54.41%	37
Within 3 years	32.35%	22
Within 5 years	4.41%	3
5 years plus	8.82%	6
TOTAL		68

Tattoo Discrimination

Q3 Do you have tattoos on your face, neck or hands?

Answered: 74 Skipped: 0



ANSWER CHOICES

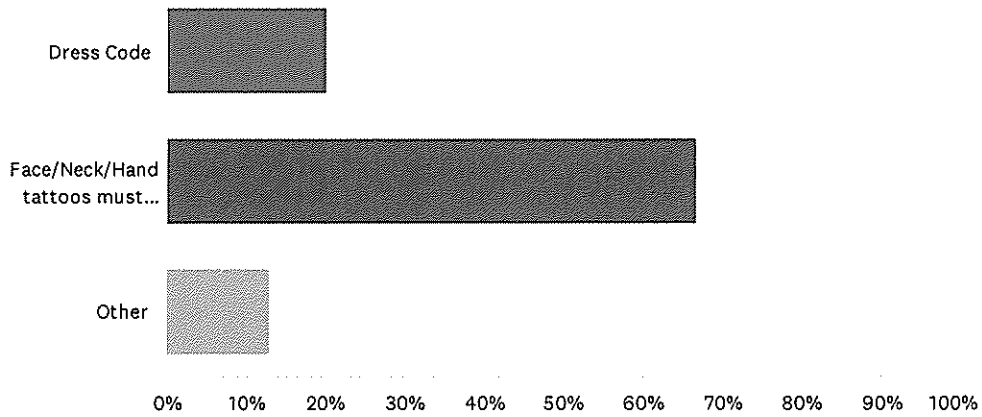
RESPONSES

Yes	71.62%	53
No	28.38%	21
TOTAL		74

Tattoo Discrimination

Q4 What reason were you given for entry refusal?

Answered: 69 Skipped: 5



ANSWER CHOICES

Dress Code

Face/Neck/Hand tattoos must be covered

Other

TOTAL

RESPONSES

20.29%

66.67%

13.04%

14

46

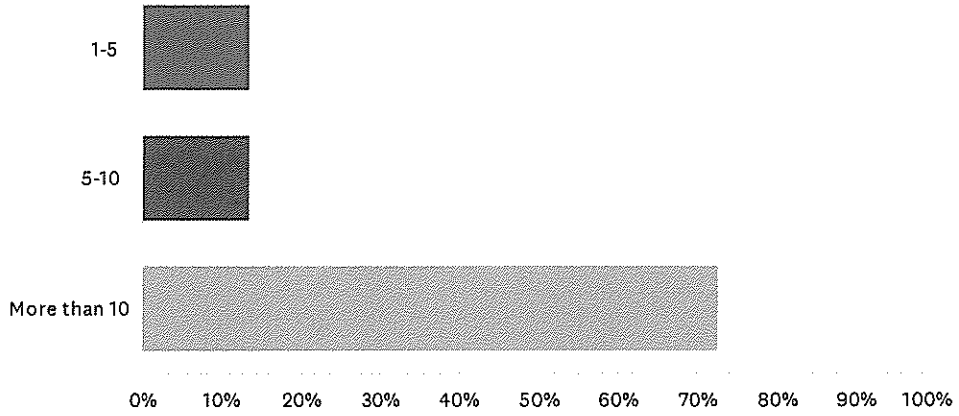
9

69

Tattoo Discrimination

Q5 How many tattoos do you have? (approximately)

Answered: 73 Skipped: 1



ANSWER CHOICES

1-5

5-10

More than 10

TOTAL

RESPONSES

13.70%

13.70%

72.60%

10

10

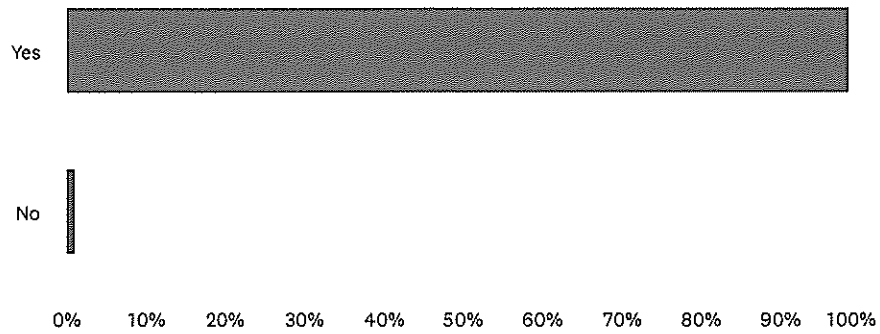
53

73

Tattoo Discrimination

Q6 Would you describe your tattoos as Art?

Answered: 73 Skipped: 1



ANSWER CHOICES

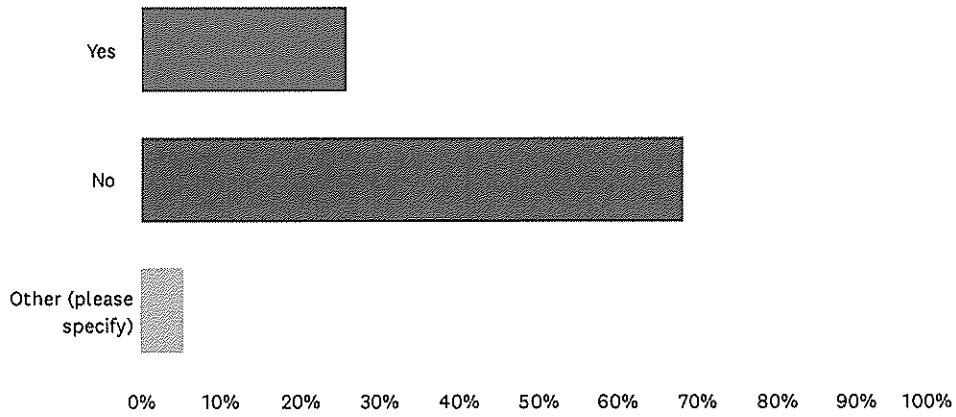
RESPONSES

Yes	98.63%	72
No	1.37%	1
TOTAL		73

Tattoo Discrimination

Q7 Are any of your tattoos of a cultural significance?

Answered: 73 Skipped: 1



ANSWER CHOICES

Yes

No

Other (please specify)

Total Respondents: 73

RESPONSES

26.03%

68.49%

5.48%

19

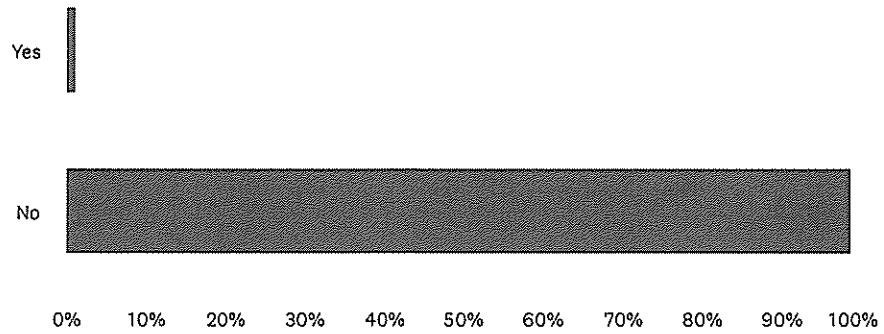
50

4

Tattoo Discrimination

Q8 In your opinion are any of your tattoos provocative?

Answered: 73 Skipped: 1



ANSWER CHOICES

Yes

No

Total Respondents: 73

RESPONSES

1.37%

98.63%

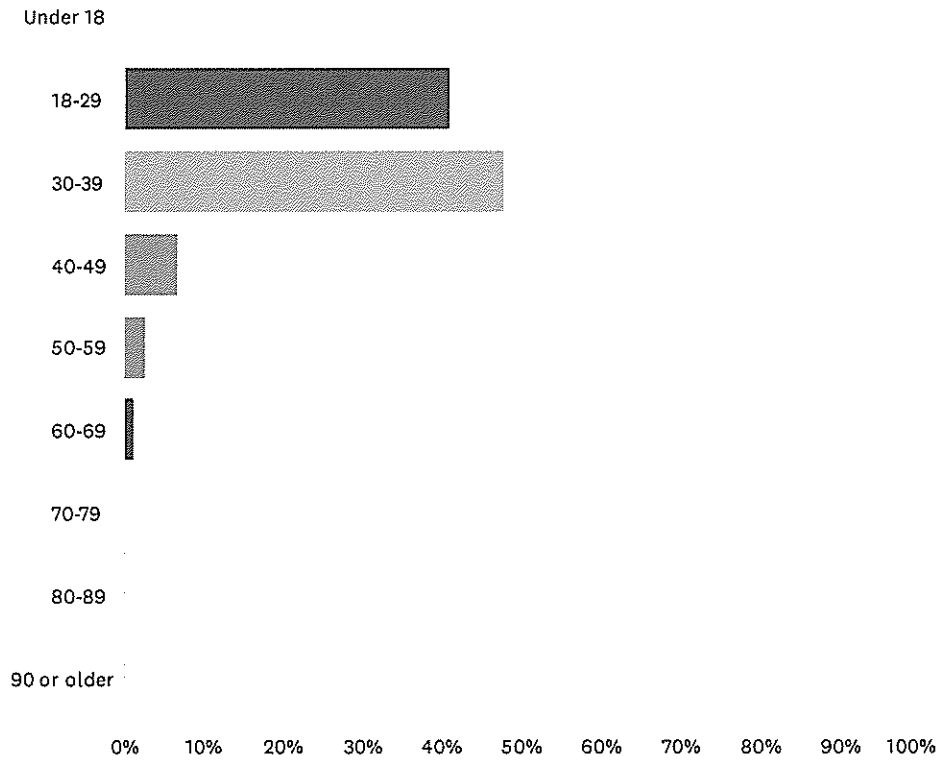
1

72

Tattoo Discrimination

Q9 What is your current age?

Answered: 73 Skipped: 1

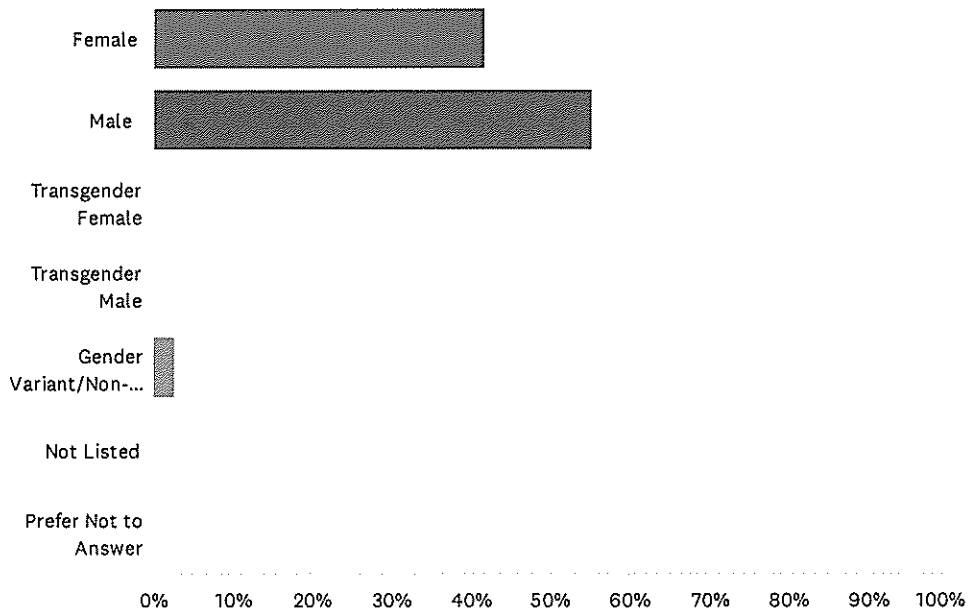


ANSWER CHOICES	RESPONSES	
Under 18	0.00%	0
18-29	41.10%	30
30-39	47.95%	35
40-49	6.85%	5
50-59	2.74%	2
60-69	1.37%	1
70-79	0.00%	0
80-89	0.00%	0
90 or older	0.00%	0
TOTAL		73

Tattoo Discrimination

Q10 To which gender identity do you most identify?

Answered: 74 Skipped: 0



ANSWER CHOICES	RESPONSES	
Female	41.89%	31
Male	55.41%	41
Transgender Female	0.00%	0
Transgender Male	0.00%	0
Gender Variant/Non-Conforming	2.70%	2
Not Listed	0.00%	0
Prefer Not to Answer	0.00%	0
TOTAL		74

Tattoo Discrimination

Q11 Name of venue/s (optional)

Answered: 30 Skipped: 44

Tattoo Discrimination


Q12 Please provide your first name only

Answered: 67 Skipped: 7



DRESS CODE POLICY

**SMART ATTIRE FRIDAYS & SATURDAYS
CASUAL WEDNESDAYS, THURSDAYS & SUNDAYS**

 reserves the right to enforce dress standards and refuse entry as per the liquor control act. Failure to adhere to this policy will result in access being declined on this occasion.

- Neck or knuckle tattoos to be discreetly covered in the venue. Face, head, or offensive tattoos are not permitted inside the venue.
- Singlets, thongs, beach wear or sportswear are not permitted inside the venue.
- Attire with offensive designs/words and insignias are not permitted in the venue.
- Dirty or unkempt appearance including torn or ripped clothing are not permitted inside the venue.
 - Dirty or unkempt footwear are not permitted inside the venue.
- No Sports jerseys or costumes (exceptions can be made on special events)

FOR THE GENTLEMEN

- Pants to be full length, no shorts allowed.
- Collared shirts preferred. Fashion Tee's okay.
- Shoes must be in great condition, dress shoes preferred.
 - Fashion canvas shoes or boots are okay.