

The Full Face Covering Debate: An Australian Perspective

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The wearing of full face coverings by women in public, such as burqas and niqabs, has become a controversial and hotly debated issue both in Australia and around the world. While some overseas jurisdictions have opted to ban full face coverings Australia, despite some attempts to ban full face coverings, has so far opted for a more nuanced approach. This article examines the Australian debate from the calls for a complete ban of full face coverings by political leaders such as Senators Fred Nile and Cory Bernardi through to the passage of the Identification Legislation Amendment Act 2011 (NSW). In particular the article highlights that more recent debate on the issue has focused on ways in which concerns surrounding security and identity checks can be met without imposing a blanket ban on the wearing of full face coverings.

In Australia, there have recently been a small number of incidents involving women wearing a full face covering. These incidents have sparked debate in the political arena and in popular media. In 2010, a woman in a District Court trial in Western Australia requested to give evidence while wearing her niqab.¹ This real life court drama was echoed in the 2011 Australian Broadcasting Corporation television programme, 'Crownies',² which portrayed an incident where a Muslim woman wearing a niqab³ attempts to give evidence in Court.⁴ The woman in the television drama is prohibited from giving evidence while wearing her niqab and is given a prickly reception by the judge. Ultimately, the woman refused to remove her niqab and does not give evidence. While there are differences between the fictional and real incidents, both highlight the emerging debate regarding the covering of the face in public and the need for lawmakers to address this issue.

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1 David Webber, 'Judge Orders Woman to Remove Face Veil', ABC News (Online), 19 August 2010 <HYPERLINK "<http://www.abc.net.au/news/2010-08-19/judge-orders-woman-to-remove-face-veil/950520>">

2 The programme centres on a group of lawyers working at the New South Wales Department of Public Prosecutions.

3 The garment is referred to as a burqa in the programme. A burqa (also burka) is a garment which completely covers the body including the head and face. A niqab similarly covers the body of the wearer, but has a slit in the material through which the wearer's eyes can be seen.

4 *Crownies: Episode One* (Directed by Cherrie Nowlan, Screentime Australia, 2011).

The New South Wales Government has recently confronted the issue of full face coverings in public. In July 2011, the New South Wales Premier, Barry O'Farrell, announced that Cabinet was in the process of drafting new laws which would give police the power to require people to remove full face coverings.⁵ The *Identification Legislation Amendment Act 2011* (NSW) was passed on 15 September 2011, becoming the first legislation in Australia to specifically deal with full face coverings.⁶

It is important to recognise that the legal debate in Australia has evolved from whether or not full face coverings should be banned to when and where they may be legitimately restricted. This change in emphasis is critically important. In the former debate, the two sides of the argument were diametrically opposed, advocating either a complete ban or complete freedom. The Australian debate has moved away from this polarised position. The debate by lawmakers now centres on when and where it may be necessary to restrict full face coverings and how this can be done in a way which addresses community concerns and respects the religious beliefs of women who choose to wear a full face covering.

This article will examine the Australian public debate on the wearing of full face coverings in public. It will trace the debate from early calls for a complete ban to the more nuanced approach that is currently favoured. The article will also examine the incidents which have sparked public debate and propose a way forward for the law in this area. The article does not contain detailed analysis of arguments for and against a ban on full face coverings. As mentioned above, the Australian debate has moved on from this polarised position and to dwell on these outdated arguments would be to ignore the progress that has been made in the Australian debate.

BANNING THE BURQA – THE EARLY DEBATE

The wearing of full face coverings has been debated around the world in recent years. In Europe, the debate has led to a number of countries, most notably France and Belgium, banning full face coverings in public.⁷ One year on from the introduction of the ban in France, approximately 20 women have been fined for violating the ban.⁸ Some of these women have vowed to appeal their fines

5 Barry O'Farrell, 'Cabinet Approves New Police Powers on Face Coverings' (Media Release, 4 July 2011).

6 The Bill received assent on 20 September 2011. The Act, with the exception of schedule 2.6, came into effect on 1 November 2011.

7 Anne Hewitt and Cornelia Koch, 'Can and Should Burqas be Banned? The Legality and Desirability of Bans of the Full Veil in Europe and Australia' (2011) 36 *Alternative Law Journal* 16, 16.

8 Alison Hird, 'One Year of France's Burka Ban Yields 20 Fines and No Men Prosecuted', RFI English (online), 12 April 2012 <<http://www.english.rfi.fr/france/20120411-one-year-frances-burka-ban-yields-20-fines-and-no-men-prosecuted>>.

and, if necessary, take their case to the European Court of Human Rights.⁹ In Australia, there have been calls for a similar ban to be introduced, most notably by New South Wales Senator Fred Niles, Federal Senator Cory Bernardi and South Australian MP Robert Such.

In May 2010, a person wearing a burqa robbed a man in a Sydney car park.¹⁰ This led South Australian Liberal Senator Cory Bernardi to call for the banning of the burqa in Australia. According to Senator Bernardi, 'the burqa has no place in Australian society. I would go as far as to say it is un-Australian.' He also commented that 'the burka separates and distances the wearer from the normal interactions with broader society' and that '[e]quality of women is one of the key values in our secular society and any culture that believes only women should be covered in such a repressive manner is not consistent with the Australian culture and values'.¹¹

Senator Bernardi made reference to specific situations, including banks and petrol stations, where in his opinion the wearing of the burqa is inappropriate. He based this on the fact that, as a motor bike rider, he would be required to remove his helmet in these settings as it too obscures identity.¹² Senator Bernardi's remarks captured significant media attention and he later participated in the Australian Broadcasting Corporation's programme *Q&A*¹³ and SBS's programme *Insight*,¹⁴ where he repeated his call for a blanket ban on the wearing of the burqa and niqab.

Liberal Opposition Leader Tony Abbott, then Prime Minister Kevin Rudd and Deputy Prime Minister Julia Gillard all made statements in response to Senator Bernardi. Tony Abbott said that he believed 'a lot of Australians find the wearing of the burqa quite confronting and I wish it was not widely worn'.¹⁵ He stopped short of calling for a ban of the burqa, instead focusing on the liberal principles of free speech saying '[h]e (Bernardi) has expressed a view, I respect the view, I don't absolutely share it, but I can understand the concerns in the community'.¹⁶ Kevin Rudd and Julia Gillard also ruled out a ban with Julia Gillard making similar comments to Tony Abbott: 'I can understand Australians that do find it confronting; it's a little different on our streets'.¹⁷ This limited response to the issue did not bring the debate to an end. Simply stating that there would be no

9 'France Issues First Face-Veil Fines', ABC News (online), 23 September 2011 <<http://www.abc.net.au/news/2011-09-22/france-issues-fines-for-veiled-women/2912058>>.

10 'Burqa Bandit in Armed Cash Grab' *Sydney Morning Herald* (online), 6 May 2010 <<http://www.smh.com.au/nsw/burqa-bandit-in-armed-cash-grab-20100506-ub1r.html>>.

11 Cory Bernardi, 'Burka Bandits Justify a Burka Ban', *The Drum Opinion ABC News* (online), 6 May 2010 <<http://www.abc.net.au/unleashed/33978.html>>.

12 *Ibid.*

13 *Q&A: Backlash in Bennelong?* (Australian Broadcasting Corporation, 2010).

14 *Insight: Banning the Burqa* (SBS, 2010).

15 Michael Owen, 'Australians Find Burqa Confronting, Tony Abbott Says', *The Australian* (Canberra) 7 May 2010.

16 *Ibid.*

17 Katharine Murphy, 'Rudd and Gillard Disagree on Burqa', *The Age* (Melbourne) 8 May 2010.

ban did not address the concerns of people like Senator Bernardi. While these concerns may or may not have been legitimate, ignoring them and placing them in the ‘too hard basket’ meant that the issue inevitably would be raised again.

While Senator Bernardi called for a ban, he did not introduce any legislation to that effect. In June 2010, the New South Wales Member of Parliament and President of the Christian Democratic Party, Reverend Fred Nile, introduced the Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010 (NSW) in the New South Wales Legislative Council.¹⁸ The bill sought to amend the *Summary Offences Act 1988* (NSW) by inserting two new offences in Part 2 of the Act. The first would have made it an offence to wear a face covering while in a public place¹⁹ and the second would have made it an offence to compel another person to wear a face covering in a public place.²⁰ An exception to the general prohibition was given where the person who had covered their face had a ‘reasonable excuse’.²¹ The onus of proving the existence of a reasonable excuse was placed on the defendant.²² The Bill did not mention the niqab or burqa specifically, but did state that ‘a religious or cultural belief does not constitute a reasonable excuse for the wearing of a face covering’.²³

In his Second Reading speech, Fred Nile justified the banning of full face coverings in public on three grounds. First, face coverings are habitually used by criminals, including violent protesters, to hide their identity and avoid capture. Second, face coverings such as the burqa and niqab are used by terrorists and suicide bombers as a disguise. Third, the burqa and niqab are oppressive towards women.²⁴ He also referred to the fact that several European countries already had similar bans in place,²⁵ were currently in the process of putting bans in place²⁶ or were considering introducing a ban.²⁷ The Second Reading speech debate was adjourned until the 23 September 2010, but never recommenced. The bill lapsed with prorogation. On 4 May 2011, Fred Nile gave a notice of motion to introduce the Summary Offences Amendment (Full-face Covering Prohibition) Bill 2011 (NSW). While the text of this Bill is not currently available, it can be assumed it will be similar to the 2010 Bill.

18 Reverend Fred Nile had previously introduced the Full Face Covering Prohibition Bill 2006 (NSW) on 23 November 2006. However, the bill lapsed on prorogation.

19 Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010 (NSW) sch 1 cl 11(1).

20 Ibid., sch 1 cl 11(7).

21 Ibid., sch 1 cls 11(1), (3).

22 Ibid., sch 1 cl 11(6).

23 Ibid., sch 1 cl 11(4).

24 New South Wales, *Parliamentary Debates*, Legislative Council, 22 June 2010 (Fred Nile).

25 Belgium, Turkey and Italy.

26 Note that at the time of Fred Nile’s speech, France was in the process of putting a ban in place. The French ban on the covering of the face in public has since been implemented.

27 Switzerland and Spain.

In July 2010, one month after Fred Nile introduced his Bill, Independent South Australian MP, Robert Such, introduced the Facial Identification Bill 2010 (SA). This bill was a more nuanced approach to the issue. It did not create a blanket ban on full face coverings in public. Instead it gave prescribed premises the power to display a sign which indicated that a person whose face was obscured could not enter the premises.²⁸ Prescribed premises were defined in the bill as premises used for an authorised deposit institution (ADI), a State or Federal government agency or ‘any other business or activity where, for reasons of security or for the purposes of compliance with any Act or law, it is necessary or desirable to establish the identity of persons in the premises so used’.²⁹

In his second reading speech, Robert Such emphasised that he did not care what people wore, and that this bill would not ban the burqa. Rather, it would allow people to be identified. He specifically referred to the need to identify students taking exams, people renewing their driver’s licence, people entering banks and witnesses and accused in courtrooms.³⁰ This Bill, if it had have been passed, would have been a more measured approach than that proposed by Fred Nile and would have begun to address the concerns of people like Senator Bernardi. However, the Bill was still heavy-handed. Where signs could be displayed at prescribed premises, a person could not re-cover their face once their identity had been verified. If the reason for this, or similar legislation, is security, then once a person’s identity has been verified there is no longer a need to see their face. Continuing to require an individual to remain uncovered only serves to continue their discomfort.

The legislation may also have had the effect of preventing those who habitually cover their face in public from accessing vital public services. For example, government agencies, such as Centrelink, would have been entitled to display a sign refusing entry or service to a person wearing a full face covering. Accepting Fred Nile or Senator Bernardi’s argument that women who wear a full face covering are oppressed, then excluding them from services offered by a government agency would have the effect of barring them from receiving assistance to better their circumstances. It is conceivable that a public hospital would have been covered by this legislation, making it likely that a woman would delay taking herself or a sick child to hospital because she was concerned that she would be required to remove her veil. While it can be argued that she should put her physical wellbeing or that of her child ahead of her religious beliefs, this argument fails to recognise that often the spiritual trumps the physical.

While neither Bill was successful, they demonstrate two different approaches to the issue of face coverings in public. Fred Nile’s bill created a blanket ban similar to that in force in France and Belgium. The bill was not flexible and placed the

28 Facial Identification Bill 2010 (SA) cl 2(1).

29 Ibid, cl 2(3).

30 South Australia, *Parliamentary Debates*, House of Assembly, 22 July 2010 (Hon. Robert Such).

burden on the person covering their face to demonstrate that they had a reasonable excuse not to remove their face covering.³¹ Further, rather than being religiously neutral, the Bill specifically provides that religious and cultural reasons are not reasonable excuses for refusing to remove a face covering.³² On the other hand, Robert Such's Bill adopted a situational approach, limiting any ban to situations where there may be a legitimate security concern.

Since July 2010, the debate in Australia has moved away from discussing whether or not full face coverings should be banned. Instead the debate has focused on situations where the viewing of a person's face may be important for reasons of security or justice.

'TASNIM'

In July 2010, during the preparations for the fraud trial of Anwar Sayed,³³ a request was made by one of the female witnesses, known as Tasnim, to give her evidence while wearing a niqab.³⁴ The defence objected expressing concern that if she gave evidence while wearing the niqab the jury would not be able to properly assess her evidence because they could not see her face.³⁵ Judge Shauna Deane of the Western Australian District Court ruled that Tasnim had to uncover her face while giving evidence, but left it for the parties to determine how this could be best achieved.³⁶

In handing down her decision, Judge Deane noted that she had not been able to find other Australian cases where a witness had requested to give evidence while wearing a full face covering.³⁷ She did however acknowledge that cases had arisen in other common law jurisdictions including the United States of America, Canada and New Zealand. Judge Deane then referred extensively to the reasoning

31 Summary Offences Amendment (Full-face Coverings Prohibition) Bill 2010 (NSW) sch cl 11(6).

32 Ibid., sch cl 11(4).

33 Anwar Sayed was accused of fraudulently obtaining State and Federal grants for the Muslim Ladies College of Australia by falsifying the number of students on the roll. Anwar Sayed was found guilty and jailed for four and a half years for his part in the fraud.

34 Nicolas Perpetch, 'Tasneem Must Remove Niqab for Perth Trial, Judge Rules', *The Australian* (Canberra) 19 August 2010. Tasnim is a Muslim woman who follows the Islamic faith. She believes that the wearing of the niqab is not an essential element of Islam. Despite this she has worn the niqab all of her adult life. Judge Deane noted that Tasnim is an Australian citizen who moved to Australia from South Africa, and had worn the niqab at her Australian citizenship ceremony. See Transcript of Proceedings, *The Queen v Anwar Shah Wafiq Sayed* (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1043 – 1044.

35 Transcript of Proceedings, *The Queen v Anwar Shah Wafiq Sayed* (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1042.

36 Ibid., at 1060.

37 Ibid at 1041. As the Judge notes, this may reflect the fact that previous cases had not garnered media attention, rather than the complete non-existence of such cases.

of Judge LH Moore in the New Zealand case *Police v Razamjoo*.³⁸

Judge Deane emphasised the need to balance the right of the accused to a fair trial and the interest of the witness to have her religious practice accommodated by the court.³⁹ In her opinion, this balancing exercise had to take account of the public interest in the effective prosecution of criminal charges and in bringing alleged offenders to justice.⁴⁰ Quoting Judge Moore in *Police v Razamjoo*, Judge Deane referred to the features of a fair trial, including that a fair trial is not just one that is fair to the accused, but one which is fair to witnesses, as well as other stakeholders.⁴¹ Ultimately, Judge Deane states that the real focus of her decision was the jury:

The focus is on the issue of whether the members of the jury as the sole judges of the facts in this case will be impeded in their ability to fully assess the reliability and credibility of the evidence of a particular witness if they are not afforded the opportunity of being able to see that witness's face when they give evidence at trial.⁴²

Judge Deane acknowledged that the demeanour of a witness and the viewing of their face is not the only way in which credibility is assessed. She also acknowledged that in some cases the demeanour of a witness may be misleading. Ultimately, she considered that in this case the jury should have the assistance of seeing the witness' face to assess her credibility.⁴³

In handing down her decision, Judge Deane emphasised that she did not want her decision to be treated as precedent for future trials and that she was not ruling on the wearing of particular clothing.⁴⁴ Judge Deane reasoned that her decision lacked precedential value as evidence given by different witnesses in different trials would be of a different nature. In some cases, evidence may be uncontentious so that the finder of fact will have less need to assess the veracity of a witness' testimony.⁴⁵ In other cases, the finder of fact may be a judge sitting without a jury.⁴⁶ The witness may be the victim of the crime for which the accused is being

38 [2005] DCR 408. For a discussion of this case see Paul Morris, 'Covering Islam – Burqa and Hijab: Limits to the Human Right to Religion' (2004) 4(7) *Human Rights Research Journal*; David Griffiths, 'Pluralism and the Law: New Zealand Accommodates the Burqa' (2006) 11 *Otago Law Review* 281.

39 Transcript of Proceedings, *The Queen v Anwar Shah Wafiq Sayed* (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1051.

40 *Ibid.*, at 1051 – 1052

41 *Ibid.*, at 1051-1052.

42 *Ibid.* at 1058.

43 *Ibid.* at 1059-1061.

44 *Ibid.* at 1041.

45 *Ibid.* at 1048-1049.

46 *Ibid.* at 1052.

tried or they may be giving evidence in a trial to which they are a party.⁴⁷ In the present case, Judge Deane was of the opinion that the proposed evidence was potentially contentious.⁴⁸ Despite the Judge's assertions, it is hard to see how her decision will not be considered by future courts when this issue is raised again. At the very least, lawyers are likely to advise witnesses who wish to have their faces covered that this is an unlikely possibility.

As Tasnim's request to wear the niqab was refused, she gave evidence in the trial from a separate room via video link. Only 19 men, all of whom were required to attend for the purposes of conducting the trial, were present in the courtroom while her evidence was given. Men who did not need to be in the courtroom, including journalists, were excluded.⁴⁹ Judge Deane's balancing of the witness' religious beliefs and the need for a fair trial demonstrates that Australia's legal system is flexible enough to operate in these situations without the need for a complete ban of full face coverings. Tasnim was not required to give evidence with her face uncovered before anyone unnecessary to the trial process, while at the same time the jury were able to properly assess the veracity of her evidence.

CARNITA MATHEWS⁵⁰

The debate surrounding the wearing of face coverings in public was reignited when Carnita Matthews was stopped by New South Wales police for a random breath test on 7 June 2010. The following day, a woman made a statutory declaration in front of a justice of the peace accusing the police officer involved in the random breath test of forcibly trying to remove Ms Matthews' face covering. The statement was signed Carnita Matthews, but the woman did not remove her face veil while making the declaration.⁵¹ The accusations were found to be inconsistent with footage taken by a video camera in the police car. Ms Matthews was charged with making a false statement and was initially found guilty in the Magistrates Court and sentenced to six months in jail. Ms Matthews appealed the decision and on 20 July 2011, her appeal was upheld in the New South Wales

47 See cases discussed in Natasha Bakht, 'What's in a Face? Demeanour Evidence in the Sexual Assault Context' in Elizabeth Sheehy (ed) *Sexual Assault Law, Practice and Activism in a Post Jane-Doe Era* (University of Ottawa Press, 2010).

48 Transcript of Proceedings, *The Queen v Anwar Shah Wafiq Sayed* (District Court of Western Australia, 164 of 2010, Deane DCJ, 19 August 2010) 1049-1050. As the witness' evidence related to the number of children enrolled at the Muslim Ladies College, a fact directly in issue between the parties, Judge Deane concluded that the witness' testimony was contentious.

49 Kate Campbell, 'Burqa Woman Testifies in Fraud Trial', *The West Australian* (Perth), 18 October 2010.

50 At the time of writing, the New South Wales District Court had been unable to provide a transcript of the court proceedings of Ms Matthews' case.

51 Janet Fife-Yeomans, 'No Covering Up Similar Signatures in Carnita Matthews Burqa Case' *The Daily Telegraph* (online) 1 July 2011 <<http://www.dailytelegraph.com.au/news/sydney-nsw/new-twist-in-carnita-matthews-burqa-case/story-e6freuzi-1226085143698>>.

District Court by Judge Jeffreys.⁵²

In giving his decision, Judge Jeffreys stated that he could not be certain that the woman who made the complaint was Ms Matthews, as the woman was wearing a full face veil at the time the complaint was made.⁵³ There was an attempt to identify the woman who made the statement as Ms Matthews by comparing the signature on Ms Matthews' driver's licence with that on the statutory declaration.

However, Judge Jefferys said that '[w]hen I compare the signature on the statutory declaration and the signature (on the licence) I am unable to conclude they appear to be the same'.⁵⁴

The New South Wales Police Minister, Mike Gallagher, initially responded to Ms Matthews' acquittal by suggesting that finger prints be used to identify people making statements.⁵⁵ While this suggestion has not been followed, it marks a change in the way public figures have responded to incidents involving people wearing full face coverings. In the past the response has been to call for a wholesale ban of full face coverings or to place the issue in the 'too hard basket'. Minister Mike Gallagher's response strikes a balance between respecting freedom of expression and attempting to address the problems highlighted by the Carnita Matthews incident. This is a move in the right direction.

IDENTIFICATION LEGISLATION AMENDEMENT ACT 2011 (NSW)

While Minister Mike Gallagher's suggestion has not been adopted, the New South Wales Government has responded to the issue. On 4 July 2011, the Premier of New South Wales, Barry O'Farrell, released a media statement in which he stated that '[p]olice will be given new powers to require motorists and others suspected of committing crimes to remove any head covering so they can be identified'.⁵⁶ On 15 September 2011, the New South Wales Parliament passed the *Identification Legislation Amendment Act 2011* (NSW) ('the Act') giving police and other officials this power.⁵⁷

52 Janet Fife-Yeomans and Paul Kent, 'Muslim Woman Carnita Matthews Escapes Jail by Remaining Behind Her Burqa' *The Daily Telegraph* (Sydney), 21 June 2011.

53 Miles Godfrey, 'Veiled Women Might Be Fingerprinted in NSW' *Sydney Morning Herald* (Sydney), 21 June 2011.

54 Janet Fife-Yeomans and Paul Kent, 'Muslim Woman Carnita Matthews Escapes Jail by Remaining Behind Her Burqa' *The Daily Telegraph* (Sydney), 21 June 2011.

55 Miles Godfrey, 'Veiled Women Might Be Fingerprinted in NSW' *Sydney Morning Herald* (Sydney), 21 June 2011.

56 Barry O'Farrell, 'Cabinet Approves New Police Powers on Face Coverings' (Media Release, 4 July 2011).

57 The Act came into force on 1 November 2011, with the exception of schedule 2.6. See *Identification Legislation Amendment Act 2011* (NSW) s. 2.

The Act is very narrow in its application and mild in comparison to the legislation passed in Europe and that proposed by Fred Nile and Robert Such. The Act does not ban the wearing of full face coverings in public. Instead, designated public officers are given the power to request the removal of full face coverings in certain circumstances and to impose penalties if this request is not complied with.

The Act is divided into two schedules. The first schedule deals specifically with police officers, while the second schedule deals with juvenile justice officers, court security officers, officers authorised by Corrective Services and people witnessing affidavits and statutory declarations. The first schedule empowers police officers to require a person to remove any face covering where that person has been requested to show photographic identification or prove their identity.⁵⁸ Failure to comply with such a request results in a \$220 fine, or where the request is made of a motor vehicle driver, a \$5,500 fine or 12 months imprisonment.⁵⁹

The power to request a person to identify themselves in certain situations is not new. However, the power of a police officer to request a person to uncover their face for the purposes of an identity check is new.⁶⁰ Arguably the existing power to require a person to identify themselves implies a power to be able to verify that the identity given is correct. As such, the new police powers are simply a clarification of an existing power. This is very different from previous attempts to legislate in relation to full face coverings. All previous attempts proposed to create new offences rather than simply extending or clarifying existing ones. Further, the proposed laws were more severe in their effects by attempting to impose either a blanket ban or a situational ban. The *Identification Legislation Amendment Act 2011* (NSW), on the other hand, gives police power to request that a face covering be removed. A police officer has the discretion not to exercise this power and is required by the legislation to exercise the power in a sensitive and respectful manner.

In the second schedule, juvenile justice officers, court security officers and officers authorised by Corrective Services are also given the power to request that a person remove a face covering. If a person fails to comply, they can be removed from the relevant premises.⁶¹ In a situation where a security officer arrests an individual and requests them to uncover their face and the individual refuses, the

58 *Identification Legislation Amendment Act 2011* (NSW) sch 1 s 5, inserting s 19A into the *Amendment of Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

59 *Identification Legislation Amendment Act 2011* (NSW) sch 1 s 5, inserting s 19B into the *Amendment of Law Enforcement (Powers and Responsibilities) Act 2002* (NSW); New South Wales, *Parliamentary Debates, Legislative Assembly*, 25 August 2011, 4716 (Greg Smith, Attorney General and Minister for Justice).

60 New South Wales, *Parliamentary Debates, Legislative Assembly*, 12 September 2011, 55 (Paul Lynch, Shadow Attorney General and Shadow Minister for Justice).

61 *Identification Legislation Amendment Act 2011* (NSW) sch 2 ss 2.2, 2.3.3, 2.5.1.

maximum penalty is \$550.⁶²

The Act contains some safeguards to ensure that, where practical, the person who is required to uncover their face is afforded privacy and respect. For example, a police officer must, as far as reasonably practical, provide reasonable privacy and view the person's face as quickly as possible.⁶³ Similar requirements are in place for juvenile justice officers, court security officers and officers authorised by Corrective Services. These requirements imply that once the person's identity has been confirmed, they will be able to recover their face if they wish. In his speech to the New South Wales Legislative Assembly, Attorney General Greg Smith acknowledged that this may not always be possible.

A witness, who is required to remove a face covering, may request that they be taken back to a police station to afford some privacy. This may or may not be reasonably practicable, depending on the circumstances. The scene may not be contained and police may be required to remain at the scene.

... there may be times when officers at male correctional centres are unable to locate a female to assist with a visitor's request for a female to conduct the inspection, as there are few female staff working in those facilities. The inability of an officer to meet such a request does not invalidate the requirement to remove the face covering.⁶⁴

The second schedule also amends the *Oaths Act 1990* (NSW).⁶⁵ Under the amendment, witnesses of statutory declarations or affidavits will be required to see the face of the person making the declaration or affidavit. Failure to do so will result in a maximum fine of \$220 for the person who witnesses the statutory declaration or affidavit.⁶⁶ The inclusion of this amendment is a direct reference to the Carnita Matthews incident.

The legislation makes no explicit reference to the niqab, burqa, Islam or religion. New South Wales Attorney General, Greg Smith, only referred to Islam towards the very end of his speech saying:

62 *Identification Legislation Amendment Act 2011* (NSW) sch 2 s 2.3.3; New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 4716 (Greg Smith, Attorney General and Minister for Justice).

63 *Identification Legislation Amendment Act 2011* (NSW) sch 1 s 5 (inserting s 19A(3) into the *Amendment of Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)).

64 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 4716 (Greg Smith, Attorney General and Minister for Justice).

65 The section of the *Identification Legislation Amendment Act 2011* (NSW) amending the *Oaths Act 1990* (NSW) has not yet come into force.

66 *Identification Legislation Amendment Act 2011* (NSW) sch 2 s 2.6; New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 4716 (Greg Smith, Attorney General and Minister for Justice).

The bill is not specific in its application to any particular group in the community and the provisions apply to any person wearing a face covering of any type that falls within the definition. However, the Government recognises that there are members of our community who wear face coverings for religious, cultural or personal reasons, and the Government is committed to working with these groups and the broader community to ensure that people understand not only their obligations but also the extent to which safeguards can reasonably be expected to apply.

In this regard, the Government has consulted with members of the Islamic community on the content of this bill and is committed to ongoing work through the Community Relations Commission on the development of guidelines that will apply to government agencies.⁶⁷

The New South Wales Shadow Attorney General, Paul Lynch, specifically linked the Act to Islam and the wearing of the niqab and burqa. He also explicitly linked the need for the Act to the case of Carnita Matthews.⁶⁸ On the other hand, New South Wales Liberal MP, Kevin Conolly, suggested that the Act covers more than just the burqa and niqab and could apply in a number of common scenarios.

The occasion to provide identification may arise not only when the person is wearing religious headgear such as a niqab but also if the person is wearing a motorbike helmet, a balaclava, a ski mask, a wraparound pair of sunglasses or even a costume or character mask such as a Mickey Mouse mask. A bandana worn around the face in some situations may attract this requirement also.⁶⁹

The Act defines a face covering as ‘an item of clothing, helmet, mask or any other thing that is worn by a person and prevents the person’s face from being seen (whether wholly or partially).’⁷⁰ By using such a wide definition and including partial face coverings, the application of the Act goes beyond restricting the wearing of the niqab or burqa only. While Ms Matthews’ case and the more general public debate surrounding the burqa and niqab were the catalyst for this legislation, the Act actually addresses a far broader issue in terms of how people are identified.

The comments by New South Wales Liberal MP Bryan Doyle, a former policeman, demonstrate a use to which this legislation could apply which does not relate to the niqab or burqa.

In my former role as a public order policeman I attended many major football games. Sometimes people turn up to those games wearing gorilla masks. I

67 New South Wales, *Parliamentary Debates*, Legislative Assembly, 25 August 2011, 4716 (Greg Smith, Attorney General and Minister for Justice).

68 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 55 (Paul Lynch, Shadow Attorney General and Shadow Minister for Justice).

69 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011 (Kevin Conolly).

70 *Identification Legislation Amendment Act 2011* (NSW) sch 1 s 1.

often found that people who turned up at sporting events with their faces concealed felt much freer and more open to engage in antisocial behaviour but once the masks were removed and the person's identity was revealed it was much easier to apply the process of the law. Madam Acting-Speaker would also be familiar with those hoodlum elements that sometimes slink around shopping centres with their faces concealed.⁷¹

The *Identification Legislation Amendment Act 2011* (NSW) is extremely narrow in its application. Nevertheless, the Act does begin to address the concerns of people like Senator Bernardi and Fred Nile without unduly infringing upon the rights of Muslim women and others who may wish to cover their face in public. It is yet to be seen how effective the Act will be at achieving its aims. To this end the Act includes a requirement for the Ombudsman to monitor the operation of the Act for 12 months from its commencement and to prepare a report for the Minister on its operation.⁷² One problem has already been identified. Because of the nature of the power granted to police, it is not possible to definitively list all possible circumstances where a police officer will have the power to request a person to remove a full face covering. In his speech to the Legislative Assembly, Shadow Attorney General Paul Lynch identified at least 40 situations where the new police powers might be exercised and emphasised that this was far from a definitive list.⁷³

THE WAY FORWARD

Because of the narrowness of the *Identification Legislation Amendment Act 2011* (NSW), the legislation does not address every situation where a person may need to prove their identity. It does not address the need to verify that a person buying cigarettes, alcohol or R-rated movies is over 18 years. Nor does it deal with the need to make sure a person collecting a child from a child care centre or school is a person authorised by its parents to do so. Further, the Act does not address the need to identify a student taking exams. It was not designed to do so nor should it.

There are many situations where it may be desirable to identify a person and in many of these cases the need to identify is not for national security reasons. These kinds of situations do not require legislation. Instead they require education. Those who wear a full face covering need to be made aware that there will be situations where others may need to identify them. Those who need to identify people need to be assured that it is acceptable to request a person to verify their identity and require education in the most appropriate and sensitive methods of doing so.

It is inevitable that situations will continue to arise where a person wearing a full face covering is requested to verify their identity. Some situations have already

71 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2011 (Bryan Doyle).

72 *Identification Legislation Amendment Act 2011* (NSW) schedule 1 s 7.

73 New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 55 (Paul Lynch, Shadow Attorney General and Shadow Minister for Justice).

occurred and have begun to be addressed by law makers and other situations have been identified as potential problems. Furthermore, some situations are yet to be identified and will undoubtedly come as a surprise when they do finally occur. Two examples of situations which have been identified as potential problems but have not been fully explored in Australia are highlighted below.

In 2006, a female lawyer appearing before the United Kingdom's Asylum and Immigration Tribunal (AIT) was required to remove her niqab after the judge commented that he was having trouble hearing her. The lawyer refused and the case was taken over by a male lawyer from her firm.⁷⁴ In response to this incident the President of the AIT provided the following advice:

Immigration judges must exercise discretion on a case-by-case basis where a representative wishes to wear a veil. The representative in the recent case has appeared veiled previously at the AIT hearings without difficulties. It is important to be sensitive in such cases. The presumption is that if a representative before an AIT tribunal wishes to wear a veil, has the agreement of his or her client and can be heard reasonably clearly by all parties to the proceedings, then the representative should be allowed to do so.⁷⁵

While this situation is yet to cause controversy in Australia, it is hoped that judicial officers will be guided by the President of the AIT's approach. Natasha Bakht has highlighted that the wearing of a full face veil may become an issue in the context of other courtroom roles, including judges, courtroom staff, witnesses, defendants and jurors.⁷⁶ Plaintiffs and people supporting parties or witnesses can be added to this list.⁷⁷ Bakht's comments highlight the need to assess the purpose behind seeing a particular courtroom participant's face, rather than a blanket approach to be applied to all who enter a courtroom.⁷⁸

Another situation which has been identified as a potential problem relates to parliamentarians. In his appearance on the SBS program, *Insight*, Senator Bernardi

74 Natasha Bakht, 'Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms' in Ralph Grillo et al (eds), *Legal Practice and Cultural Diversity* (Ashgate, 2009) 115.

75 Judicial Communications Office, 'Guidance on the Wearing of Veils by Representatives in Courts and Tribunals' (Press Release, 29/06, 9 November 2006); See also Bakht, above n 81, 118.

76 Natasha Bakht, 'Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms' in Ralph Grillo et al (eds), *Legal Practice and Cultural Diversity* (Ashgate, 2009) 115.

77 Natasha Bakht, 'What's in a Face? Demeanour Evidence in the Sexual Assault Context' in Elizabeth Sheehy (ed) *Sexual Assault Law, Practice and Activism in a Post Jane-Doe Era* (University of Ottawa Press, 2010), citing *Muhammad v Enterprise Rent a Car* No. 06-41896-GC (Mich. 31st Dist Ct Oct. 11, 2006). In this case the plaintiff's claim was dismissed because she refused to, as she termed it, 'take off her clothes'.

78 Natasha Bakht, 'Objection, Your Honour! Accommodating Niqab-Wearing Women in Courtrooms' in Ralph Grillo et al (eds), *Legal Practice and Cultural Diversity* (Ashgate, 2009) 115, 123-128.

mooted the possibility that a Muslim woman who was a member of parliament would need to remove her face veil in order to take part in the business of the house.⁷⁹ While this issue is yet to arise, it is not unimaginable in Australia's increasingly multi-faith and multi-cultural society.

The New South Wales legislation is not perfect and, as has been highlighted above, there are many areas of everyday life where issues surrounding full face veils are yet to be resolved. However, the way the debate has evolved in Australia indicates that the question is no longer 'should the burqa be banned?' Instead, lawmakers are now addressing the question of 'how can the legitimate interests of all parties be accommodated and where will compromises need to be made?'

79 *Insight: Banning the Burqa* (SBS, 2010). The veiled women who participated in the programme indicated that they would be prepared to unveil to vote in Parliament if it was required.