

**Review of Division 4,  
Part 3 of the *Law Enforcement  
(Powers and Responsibilities)  
Act 2002: face coverings  
and identification***

**August 2013**

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## Foreword

Police officers routinely need to check people's identity to enforce the law. On some occasions the person may be wearing an item of clothing, such as a helmet or a veil. A new law, introduced to ensure that officers have the power to require such a face covering to be removed if the person needs to be identified, sought to strike a balance between the requirements of policing and the sensitivities and beliefs of those members of our community.

In my office's review of how police applied the law in its first year of operation, we found that the law was used predominantly in relation to drivers who wore a niqab, which is a face covering worn by some Muslim women. Our review therefore focused on how the law had been applied in these types of situations and would be best applied in the future.

Overall, police use of the law was infrequent and largely uncontroversial. Notwithstanding this, if the law and police policy continue in their current form, future uses may not go as smoothly. The importance of officers continuing to implement the law effectively and sensitively should not be understated. The incident that led to the introduction of the new law demonstrated the potential for such interactions, particularly when they involve a male officer, to escalate and to cause disquiet.

Some improvements need to be made to the law and police policy and information documents to ensure the continued successful implementation of the new police powers. Increased community awareness of these police powers, coupled with respectful communication and adherence by officers to procedures established to ensure privacy, are critical to the law's long term success.

Underpinning police procedures should be an understanding that women who wear a niqab have few concerns about uncovering their face for another woman and generally accept a police officer's authority to require this, but also have a genuine need for privacy.

The recommendations we have made centre on making it a lawful requirement that a female officer be made available, only where requested and where practicable, to look at the face of any woman wearing a face covering for religious reasons. We also recommend that police be given further guidance to help them handle situations where they need to identify a person whose face is covered. In particular, practical information about how privacy can be afforded in the situations where the law is currently most commonly used – identifying female drivers in traffic matters – would be most useful for traffic and general duties officers who patrol in key locations in metropolitan Sydney.

Focussing on police officers is not enough, however, particularly as individual officers may only need to use the powers occasionally. It is also important that women who wear a niqab and the wider Muslim community have a greater understanding about the new law.

There was a recognition amongst some police that any occasion where they use the new law in a way that acknowledges a woman's dignity and privacy is a small step in maintaining good relations with the Muslim community. In my view, the improvements that we have recommended will be beneficial to both police and all members of our community, and make the routine process of police identifying people as straightforward as possible.



Bruce Barbour  
Ombudsman



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# Executive summary

On 1 November 2011 a new Division 4, Part 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) was introduced, which authorised police to require that a person uncover their face when being identified. The Ombudsman was given the responsibility of scrutinising how police exercised their powers under this new law for the first year of its operation.

Our review examined whether the new law allows police to perform a fundamental aspect of their work: verifying a person's identification, with appropriate regard to issues such as religious sensitivities.

For this review, we gathered information from the NSW Police Force, consulting relevant police records and individual officers; the Community Relations Commission (CRC); submissions received in response to our issues paper; other government agencies; and individuals and organisations whose members would be most affected by the new laws. We researched other laws in NSW concerning identification and non-compliance and reviewed relevant literature and media. A limitation of our review was the lack of quantitative data regarding uses of the power in the review period from which to draw any meaningful conclusions.

Under the new law police can require that a person remove an item covering their face, such as a motorcycle helmet or a niqab, which is a face covering worn by some Muslim women in NSW. Removal of such items allows police to view a person's entire face and compare it to any photo identification. The new law requires that this process must be conducted quickly and in a way that provides reasonable privacy if the person requests it, as far as is reasonably practicable.

Police recorded using the power on eight occasions during the review period. On seven of those occasions police were verifying the identification of a female driver who was wearing a niqab. We also received some information that suggested that the new law may have been used on a small number of other occasions, but was not officially recorded. Even with these occasions included, the new law was used infrequently. In our view the officers involved generally used the law appropriately.

We requested submissions from organisations or members of the public in relation to how police use of the new law might impact on individuals who wear any type of face covering. As significant concerns or issues were only raised in relation to women who wear the niqab, and police also recorded exercising the law almost exclusively in relation to this group, we closely considered issues raised by the application of the new law to this group of women.

Although the law was not used much during the first 12 months of its operation, with a growing Muslim population in NSW it seems more likely than not that police may need to use it more frequently in the future. Further, the importance of these kinds of interactions going smoothly should not be underestimated. The public controversy that followed the case that led to the new law – involving a lone male police officer and a woman driver wearing a niqab – demonstrates how one interaction can escalate and spark a wider community response. Our scrutiny of the efficacy of the new law was therefore focused on whether the people directly affected by it, and the officers who use it, had any concerns. A large number of our research activities involved consultations with community groups and officers.

In our view, the law has enhanced the process of identification for police. However, we also found that officers would benefit from additional guidance regarding issues, such as how to afford privacy in circumstances involving a driver, and interacting with women who wear a niqab in these circumstances. As the new law has been applied only within certain Local Area Commands, and often by officers from Traffic and Highway Patrol Command, we have recommended that enhanced policy and information materials should be targeted to officers from these Commands. We have also recommended that all officers be reminded of the procedural requirements under LEPRA when applying the new law.

For the group most affected by the new law, Muslim women who wear a niqab, we found that while they recognised the need to uncover their face to be lawfully identified, they were reluctant to have a male police officer view their face. Members of this group were also concerned that other males present or passing by might view their face during this process.

After considering these views, similarities between the removal of a niqab for identification and the concept of a search, and related laws that apply to some other NSW public officials, we have recommended that LEPRA be amended so that a female officer is made available for women who wear a niqab, but only where this is reasonably practicable under the circumstances. Our recommended guidance for officers regarding simple methods for affording privacy, like having the person face away from any onlookers when they uncover their face, will also assist in addressing the issue of any male bystanders viewing a woman's face.

From the information available, it appears that women who wear a niqab have relatively little knowledge about the provisions of the new law, including those that give people the opportunity to seek further privacy when uncovering their face. In our view, the full benefits of these important elements of the law will only be properly realised in practice, if steps are taken to better educate and inform the community and police officers.

The CRC has funded the development of a resource kit and delivery of information sessions regarding new laws that relate to face coverings. We have recommended that the NSW Police Force participate, where appropriate, in this and any other similar strategies.

It was also suggested that Roads and Maritime Services disseminate information about the new law for motor registry customers at the time of enrolment and licence renewals. As most uses of the new law have involved traffic matters, the issuing of a new licence is recognised as a key moment when women who drive and wear the niqab could receive this information. We therefore recommended that Roads and Maritime Services develop public education materials, in consultation with the CRC and other relevant stakeholders.

We will monitor the implementation of our recommendations, and have therefore made two further recommendations that both Roads and Maritime Services and the NSW Police Force provide us with information on their progress within 12 months of the tabling this report.

# Recommendations

1. The Attorney General consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to include an extra safeguard that, where a woman wearing an item of clothing that covers her face for religious reasons requests that a female police officer be made available to check her identity, one will be made available if this is reasonably practicable under the circumstances. .... 28
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  - that police should confirm with a woman wearing a face covering for religious reasons whether or not the physical circumstances in which she has been required to uncover her face to be identified provide adequate privacy
  - that any request made by any such woman for additional privacy be met if reasonably practicable
  - that a woman nonetheless be required to uncover her face in circumstances of limited privacy, if no provision for additional privacy is reasonably practicable.
3. The NSW Police Force should include information in the *South West Sydney Islamic Information Guide* that, when viewing the face of a woman wearing a niqab to verify her identification: ..... 32
  - if the officers present are all male, where possible only one officer should view the woman's face
  - in a public space, possible methods for affording privacy include having the woman face towards a wall or sit in her car (if available).
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  - if an officer has required a woman to uncover her face, it is good practice to indicate when he or she has finished verifying the woman's identification and communicate that she can cover her face again
  - if an officer is conducting passive breath testing, it is good practice to explain that he or she will need to place the alcolizer device close to the woman's mouth to conduct the test.
7. The NSW Police Force includes an explanation in the *South West Sydney Islamic Information Guide* as to why women who wear a niqab find an officer viewing their face as more invasive than viewing a driver licence photo..... 38
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9. The NSW Police Force integrates information regarding the new law into their existing community engagement strategies for the Muslim communities in those key Local Area Commands with higher Muslim populations..... 42
10. The NSW Police Force participates, where invited and appropriate, in any education strategies regarding the new law developed by relevant community groups, including those strategies associated with the resource kit that has been funded by the Community Relations Commission and is currently being developed by the United Muslim Women's Association. .... 42

- 11. Roads and Maritime Services develops public education materials, in consultation with relevant stakeholders including the Community Relations Commission and representative organisations, to be distributed to women who wear a niqab when they are issued with a new driver licence. .... 42
- 12. Within 12 months of the tabling of this reports, the NSW Police Force report to the NSW Ombudsman on the progress it has made to implement recommendations 2 to 10. .... 43
- 13. Within 12 months of the tabling of this reports, Roads and Maritime Services report to the NSW Ombudsman on the progress it has made to implement recommendation 11. .... 43

# Acknowledgements

We would like to thank the NSW Police Force, Community Relations Commission, Department of Attorney General and Justice, Corrective Services NSW, Juvenile Justice NSW, Roads and Maritime Services, Australian Customs and Border Protection Service, Australian Federal Police and the Chief Police Officer for the ACT for providing information and assistance for this review. Particular thanks to all the NSW police officers and employees who participated in interviews and provided us with their frank and honest comments during Local Area Command visits.

We would also like to thank all of the organisations and individuals who provided information during interviews, responded to our issues paper and participated in our surveys. We appreciate your comments and your willingness to share your personal experiences with us. Without the valuable information that you provided we would not be in a position to comprehensively assess the effects of the new law.

This report was researched and written by Sally Haydon, Ya Njameh (Jemi) Jeng and Selena Choo with the assistance of Michael Gleeson, Les Szaraz and Yenda Clifton.

# Glossary

burqa	a type of outer garment worn by some Muslim women that extends from a woman's head to her feet and covers her face (see also 5.5.1)
CALD	culturally and linguistically diverse
CAN	court attendance notice
chador	a type of outer garment worn by some Muslim women that extends from a woman's head to her feet and covers her face (see also 5.5.1)
CRC	Community Relations Commission
COPS	Computerised Operational Policing System
hijab	style of clothing worn by some Muslim women that can involve loose clothing and the covering of the woman's hair and ears, but does not usually involve the covering of her face (see also 5.5.1)
ICV	in-car video (a camera that is attached to many police traffic patrol cars)
JP	Justice of the Peace
LAC	Local Area Command
LEPRA	<i>Law Enforcement (Powers and Responsibilities) Act 2002</i>
MWA	United Muslim Women's Association
niqab	An item of clothing that covers the face and that is worn by some Muslim women (see 5.5.4)
NSWPD	New South Wales Parliamentary Debates (Hansard)
RBT	random breath test
SOPs	Standard Operating Procedures
RMS	Roads and Maritime Services

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# Chapter 1. Introduction

Police officers, when exercising powers under particular laws, can check a person's identity. Many members of the public have encountered the exercise of such a power when they have been asked to produce their driver licence during a random breath test. There are many other circumstances where police can lawfully require a person to identify themselves, ranging from where a person can assist police to investigate an indictable offence to being a person upon whom police are serving a fine default warrant. A comprehensive although not exhaustive list of laws under which NSW police can request or require a person to produce identification particulars is available on the NSW Ombudsman website.<sup>1</sup>

An officer who needs to check a person's identity will commonly ask for photo identification and look at a person's face, to compare the person's face against the photo. Other methods police use include asking the person for personal information like their date of birth, or checking the person's signature. This process becomes more complicated where a person's face is covered. In this chapter we outline changes to the law that were made recently to clarify the responsibilities of police and members of the public when this situation arises, and our role in scrutinising the implementation of the changes.

## 1.1 The introduction of a new law

On 1 November 2011, changes to the law in NSW gave police officers a statutory power to require a person who is wearing something that covers his or her face (such as a veil, helmet or mask) to briefly remove it to enable police to see the person's face for the purpose of checking his or her identity.

The Act that made the changes, called the *Identification Legislation Amendment Act 2011* (the Amendment Act), inserted a new Division (Division 4) into Part 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and a number of related provisions to give effect to this new power. In this report, we refer to the provisions giving police the new power as 'the new law'. The relevant provisions are included in Appendix A.

A person who fails to comply with the new law commits an offence. In the most serious type of this offence, where a police officer suspects that a vehicle has been used in connection with an indictable offence and demands that the driver of the vehicle and/or its passengers identify themselves under s. 14 of LEPRA, the new law provides a fine of up to \$5,500 and/or imprisonment for up to 12 months where there is a refusal to remove a face covering for the purpose of that demand. Otherwise, an offence under the new law carries a fine of up to \$220.

## 1.2 Role of the Ombudsman

Section 242B of LEPRA gave our office the responsibility of keeping under scrutiny how police use the new law for the first year of its operation. That section is included in Appendix B. In this report, we use the term 'the review period' to refer to the 12-month period between 1 November 2011 and 31 October 2012.

As articulated by the Attorney General during parliamentary debates on the Bill, the government intended that the new law achieve a 'balance between the need for certain officers to have the power and the appropriate exercise of them with respect to the diverse needs and wishes of everyone in our society'.<sup>2</sup> The purpose of our review was to 'independently scrutinise'<sup>3</sup> how police applied the new law with regard to these, and other, issues.

A range of other laws were also amended by the Amendment Act to give other public officials working in courts and gaols, and people who are authorised to witness statutory declarations and affidavits, comparable powers to use when they need to identify a person. The amendment to those other laws did not include provisions for this office to review the use of the new laws by these other public officials; consequently our review was restricted to use of the new law by police officers.

This report summarises the activities and findings from our review.

## 1.3 Methodology

For this review, we gathered information from the following sources:

- the NSW Police Force, including individual police officers who had applied the new law or who were likely to apply it in the future
- the Community Relations Commission (CRC), which facilitated initial consultation about the draft legislation and has funded the design of an education program about the new law
- individuals who were required to uncover their face using the new law or who routinely wear an item of clothing to cover their face and might therefore be required to uncover their face in the future

- organisations that represent individuals who routinely wear an item of clothing to cover their face, including certain groups of Muslim women
- submissions made by members of the public and organisations
- academic literature, media reports and similar legislation in other states
- government agencies in NSW and around Australia that require or request that individuals uncover their face as part of their operations.

### 1.3.1 Information from the NSW Police Force

We reviewed 68 records that the NSW Police Force provided from its Computerised Operational Policing System (COPS) database. In particular, the NSW Police Force provided details about the eight formally documented uses of the new law during the review period. In five of those incidents, police 'in-car video' (ICV) footage was taken (from a traffic patrol car)<sup>4</sup> and this was also provided to us.

We have consulted with the NSW Police Force a number of times during this review. As part of that process, we have been provided with copies of policies and Standard Operating Procedures (SOPs), and a formal written response to both our issues paper and particular policy issues we raised in written correspondence that needed clarification.

On 6 May 2013 we provided a draft copy of this report to the Commissioner of Police. This was to give police an opportunity to provide feedback on the material in the report, to confirm that the descriptions of police processes and practices were accurate, and to provide comments on the draft recommendations.

On 5 June 2013 we received a response from police. The police response has been considered and taken into account in the findings, comments and recommendations that are made in this report.

### 1.3.2 Interviews with police officers and civilian staff

During the review we conducted a series of interviews:

- we interviewed five officers who had recorded a use of the new law
- we interviewed officers and civilian staff at four Local Area Commands (LACs) and one specialised command where it appeared likely the new law might be used in the future
- we met with officers and civilian staff from other policing units (for example, Education and Training Command and Operational Programs Command).

In all we interviewed 51 NSW Police Force employees, including an Assistant Commissioner and other officers from a range of ranks (from Constable to Superintendent). The seven civilian staff interviewed included Multicultural Community Liaison Officers at some of the LACs.

### 1.3.3 Consultations with individuals who were subject to the law

As noted above, there were eight formally documented uses of the new law. We formed the view that the people who were identified in seven of those incidents may have information relevant to our review. One of these seven people made contact with us and we interviewed them. We wrote to the other six to invite them to contact us if they wanted to participate, but none indicated that they wished to participate.

### 1.3.4 Consultations with other members of the public and organisations

We identified and invited 24 key stakeholders, including certain sporting groups, ski clubs, motorcycle organisations and religious organisations to participate in our review based on the types of face coverings worn by some of their members and the likelihood of them being directly affected by the new law. We met with six of these organisations early in our review. We also developed a fact sheet<sup>5</sup> that explained the new law and invited the broader community to participate in our review. The fact sheet was available in English, Arabic, Bengali, Dari, Dinka, Indonesian, Somali and Urdu and was sent to the key stakeholders, as well as over 800 organisations using the CRC's email link service to community and media organisations.

The Ombudsman was interviewed on Muslim radio about the review and provided information about how individuals could participate. We also attended a community forum on the topic of the new law where we distributed surveys to women present who routinely wear an item of clothing to cover their face and heard the views of some of the approximately 50 participants. Fourteen surveys were completed and returned to us after the forum with information from individual women about whether they had ever been asked to remove a face covering and their expectations about how this should best occur.

### 1.3.5 Issues paper and number of submissions received

We released an issues paper in December 2012 and received 12 submissions in response. One submission was from an individual, three were from Muslim organisations, two were from motorcycle clubs, four were from other non-government organisations and two were from government agencies.

We comprehensively reviewed all submissions and identified any issues related to the operation of the new law. Face coverings worn by some Muslim women were the only types of covering that were identified in submissions from representative organisations as raising significant issues when police exercise the new law. These types of coverings, rather than others such as motorcycle helmets or ski masks, were also the focus of any media and other commentary regarding the new law.

### 1.3.6 Information from other government agencies

The Deputy Ombudsman (Police and Compliance) met with Mr Stepan Kerkyasharian AO, Chairperson of the CRC, early in the review regarding consultations that had occurred when the new law was being drafted and the best consultation process for the review. We continued to receive advice and information from the CRC during the course of the review.

We gathered information from the Australian Customs and Border Protection Service (a Commonwealth agency) and NSW agencies, including Roads and Maritime Services (RMS), Juvenile Justice NSW, Corrective Services NSW and the Department of Attorney General and Justice, regarding their policies and practices about identification and face coverings.

As the ACT was the only other Australian jurisdiction to enact similar legislation, we considered information from the Australian Federal Police (including the Chief Police Officer for the ACT).

As the CRC and RMS are mentioned in recommendations in chapter 7 of our report, we provided both agencies with an opportunity to comment on that chapter of our draft final report, on 3 May 2013. Both the CRC and RMS provided comments and these have been considered and taken into account in the findings, comments and recommendations that are made in this report.

### 1.3.7 Literature review

We reviewed the literature and media reports available regarding the issue of identification and face coverings and interviewed the author of one key academic article regarding the new law.

### 1.3.8 Laws related to identification

We researched laws in NSW that authorise police to require identification particulars from an individual, and make non-compliance an offence. The new law can only be exercised in circumstances where police already have the power to demand identification particulars, such as a demand lawfully made by a police officer under the *Road Transport (General) Act 2005* that the driver of a motor vehicle produce his or her driver licence. A table listing some of these laws is available on our website.<sup>6</sup>

### 1.3.9 Limitations

The limitations that we have identified in our research include the possibility that we may not be aware of all uses of the new power or instances of individuals removing a face covering for police, for the following reasons:

- It is possible that early uses were recorded on COPS but cannot be easily identified through searches (see section 4.7.1).
- Some officers informed us during the review that they were not aware of the new COPS category for recording uses, which was introduced in April 2012 (see section 4.7.2). This raises the possibility that some officers have used the power but not recorded it correctly.
- We became aware of instances where a person had uncovered their face for identification during random breath testing but, as there was no offence and there was no issue with compliance, this interaction was not recorded on COPS.
- Officers informed us of a limited number of instances where they had requested that a motorcyclist remove a helmet for identification purposes. Again, as there was no offence and there was no issue with compliance, this interaction was not recorded on COPS.

Additionally, where we have analysed uses of the power that are recorded on COPS, we have had the opportunity to interview only one of the women involved in these incidents. We therefore do not have access to the accounts of all people who were involved in these events.

A further limitation on our methods was that the power was used infrequently during the review period. We were therefore not able to draw any conclusions from any quantitative analysis relating to trends or recurring issues.

## Endnotes

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1. NSW Ombudsman, *Supplement to review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification*, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)
2. The Hon. Greg Smith SC MP, New South Wales Parliamentary Debates (NSWPD), (Hansard), Legislative Assembly, 25 August 2011, p. 4717.
3. *ibid.*, p. 4719.
4. Metropolitan and regional highway patrol cars are the only police cars equipped with in-car video cameras (ICV). As a consequence, ICV footage was only available for the five incidents where the officers concerned were driving these types of cars when the power was used.
5. NSW Ombudsman, *Removal of face coverings for identification purposes*, fact sheet, March 2012, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)
6. NSW Ombudsman, *Supplement to Review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification*, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

## Chapter 2. Events leading to the new law

The new law came into effect following a particular interaction between a female driver and a male police officer. The female driver was wearing a niqab, which is a face covering worn by a small percentage of Muslim women in NSW (please see section 5.5.1 or the glossary for information regarding the difference between a burqa, also worn by some Muslim women, and a niqab).

A complaint was lodged about the police officer's conduct during the interaction. The resulting court case raised issues regarding how police and other public officials verify someone's identity if their face is covered. After some public debate, the government introduced a new law that made it clear that police can require a person to uncover their face when they are verifying the person's identity.

### 2.1 Incident involving a driver and police officer

The incident took place in June 2010. It involved a male police officer and woman, Mrs G<sup>7</sup>, who was wearing a niqab while driving her car. The police in-car video (ICV) recorded much of what took place.<sup>8</sup>

The driver was stopped for breath testing. The officer requested her licence, which she provided. The officer then said: 'Can you just ...' while moving his hand up and down in front of his face. When he motioned a second time the driver replied: 'I'm not allowed.' The officer then stated: 'Yeah I just ... uh ... I just want to verify you ... your picture.' It appears the driver uncovered her face at this point (although this is not visible on the ICV) as the officer said something to the effect of 'Alright' or 'OK'.

While still holding the driver licence, the officer then reached into the driver-side window of the car with what appears to be a breathalyser device but quickly pulled it back out of the vehicle. He then told the driver that she had been stopped for breath testing and put the device back through the window and asked her to count to 10. The officer withdrew the device and there was further discussion with the driver relating to other issues to do with the car. There was some disagreement and at one point the driver came out of the car. At the end of the interaction the officer issued the driver with an infringement notice for failing to properly display her P plates.

### 2.2 The complaint made following the incident

The following day, a woman wearing a niqab took a statutory declaration to a Justice of the Peace (JP) for signing. The name on the statutory declaration was that of Mrs G. The JP witnessed the woman sign in the name of Mrs G. He did not ask her to uncover her face or otherwise confirm who she was.

A man, and a woman wearing a niqab, lodged a complaint, in the form of the statutory declaration, at Campbelltown Police Station.<sup>9</sup> They told officers that, when the female driver had been asked to uncover her face at the roadside, they had 'wanted a female officer down, only a female can ask to do that'.<sup>10</sup>

The complaint provided the following account of the traffic incident:

Then I gave him my license [sic] and he looked at it and then he stated to me 'I need to see your face', I felt very uncomfortable so I partly lifted the veil. He wasn't satisfied with that and then he moved closer to me in a threatening manner and moved his hand close to my veil where I felt he was going to rip it off my face ... I then in fear before lifting up my veil, I stated 'that I'm not allowed to show you my face' but he insisted, I then lifted my veil and stated to him 'you're just being racist'.<sup>11</sup>

The complaint also stated the view that the woman was targeted because she was wearing her traditional veil and that on a previous occasion she had been breath tested without being asked to remove her niqab.<sup>12</sup>

### 2.3 The charge of making a false complaint

Police reviewed the ICV footage in considering the complaint. They determined that the footage did not support the allegations that had been made. Police then charged Mrs G for knowingly making a false complaint against a police officer.<sup>13</sup> At trial, she was convicted for the offence and was sentenced to six months imprisonment.<sup>14</sup> She appealed to the District Court.

## 2.4 The appeal against the conviction and penalty

The appeal judge found that he could not conclude beyond a reasonable doubt that the woman who signed the statutory declaration and lodged the complaint was Mrs G. In particular, he noted that the JP had witnessed a woman sign the statutory declaration, but had not looked at her face to confirm her identity. The judge also observed that the signature on Mrs G's driver licence was not identical to the signature on the statutory declaration.<sup>15</sup>

The judge commented that, in any event, the prosecution would have failed to prove that the driver knew that the complaint was false. This was because, in his view, it was possible that the driver may have believed that the officer's actions, in briefly leaning into her car, were an attempt to remove her veil. In other words, it was possible that the complainant's perception of this aspect of the events was based on a misunderstanding or a different perspective on the events, rather than being 'knowingly false'.<sup>16</sup>

Mrs G later applied for costs and argued that the investigation had been conducted in an improper manner. But the District Court judge declined to award costs, finding that 'the appellant has not satisfied me that the proceedings in open court were initiated without reasonable cause' and that the police investigation had been initiated in 'reasonable faith'.

## 2.5 Media and public commentary on the incident and court case

The incident and resulting judicial decisions, particularly the appeals decision, sparked public debate and media coverage. The community and media expressed strong opinions about the incident and the issues it highlighted, including the alleged false complaint, race and religious relations, face coverings such as the burqa and police powers to require that they be removed during traffic stops.<sup>17</sup>

Within two days of the complaint being made to police, a television news report showed footage of a woman claiming to be Mrs G, saying, 'I felt he was actually going to rip my veil off my face. I really felt, I actually had a lot of fear in me.' The news reporter then stated that the officer appeared to do nothing wrong and that police ICV contradicted her claims and showed that it was only after she was issued with a ticket that she called the officer racist. The reporter stated: 'The incident does highlight the complexities of policing in heavily populated Muslim areas in Sydney, at a time where the wearing of the burqa is in the world spotlight'.<sup>18</sup>

Immediately following the appeals decision, it was reported that 'Muslim supporters' linked arms and chanted as they 'stormed out of Downing Centre Court' and that they then 'began jostling with police after several members of the group attacked cameramen'.<sup>19</sup> One journalist commented that the case involving Mrs G 'escalated from a simple traffic fine to a public show of needless aggression'.<sup>20</sup>

The *Daily Telegraph* also ran an online poll that asked, 'Should police have the power to demand women remove a burqa?' It reported that 'almost 12,000 people had participated in the online poll ... with 96.57 per cent ... voting yes and 3.43 per cent ... voting no', and concluded that 'online readers have voted overwhelmingly in favour of the police with an overwhelming majority voting that police should have the power to demand women remove a burqa'.<sup>21</sup>

Some Islamic organisations and scholars responded to the case by holding a meeting in Lakemba<sup>22</sup> and issuing a press release stating their collective position on face covering and identification. The statement indicated that it was unanimously resolved that:

...

- All Australians, irrespective of ethnicity or faith shall respect and abide by the constitutional law of this country.
- Islamically, for purposes of legally identifying an individual, a woman can remove her face covering, in the presence of a male.
- In an event where a woman refuses to remove the face covering the following could be considered:
  - a. Woman offered to reveal face in front of a female officer if a female officer is available on site
  - b. Where a female officer is not on site, and the individual refuses to cooperate, the woman could be escorted to the nearest police station where a female officer could verify her identity.<sup>23</sup>

However, there was also a sense among some members of the Muslim community (and also the broader community) that the issue had been blown out of proportion. The president of the Lebanese Muslim Association commented that:

We are not saying that the Muslim community should be treated any differently, but we live in a multicultural society and we just need to be wise and calm about how we can address this.<sup>24</sup>

One Muslim lawyer was reported as commenting that one person's interaction with the law was driving knee-jerk policy decisions. She added:

I think if you spoke to most Muslim women who wear the face veil - and again it's such a small minority - I honestly think that most of them would not have an issue [removing it] if it was done sensibly, if it was required by the law.<sup>25</sup>

The President of the Police Association of NSW was reported as calling for new laws to allow police to ask for the removal of a veil or a helmet.<sup>26</sup>

## 2.6 Government response to the court case (a new law)

It was reported that the Police Commissioner held priority meetings with the Premier, Minister for Police and the Attorney General to discuss issues raised by the court case, as well as perceived weaknesses and loopholes in the law.<sup>27</sup> The Commissioner publicly stated:

Whether you're wearing a veil, whether you're wearing a full-face motorcycle helmet, a ski balaclava in the snowfields - if there is a lawful reason, if there is a need for police to actually identify the person, then this should not be in the grey. It should be something everyone clearly understands.<sup>28</sup>

The Minister for Police, the Hon. Michael Gallacher, also stated publicly that 'he had spoken to rank and file police who wanted the situation clarified' and that 'police powers in relation to face coverings are not clear' and 'it's time to address that'.<sup>29</sup>

To address some of the concerns raised about any proposed new law, the government, through the CRC, consulted with the Muslim community.

On 25 August 2011, the Attorney General and Minister for Justice introduced the proposed new law, the Identification Legislation Amendment Bill 2011, into Parliament, stating:

This bill is about ensuring that police, juvenile justice officers, officers authorised by Corrective Services and court security officers have the power to require that a person remove a face covering to enable the person's face to be seen for the purpose of identification. The new powers are designed so that these officers are able to function effectively to ensure the security and safety of our community and its citizens.<sup>30</sup>

## 2.7 Parliamentary consideration of the Bill for the new law

The legislation review committee reviewed the Bill and concluded that 'powers conferred by provisions in this Bill that require an individual to remove a face covering may trespass on personal rights and liberties'<sup>31</sup>, but that the safeguards in the Bill limited the impacts in this respect.

Concerns raised about the content of the new law during parliamentary debate included a lack of clarity about the precise circumstances when the demand could be made to remove facial coverings<sup>32</sup> and the potentially broad scope of the powers that would be given to police as a result of inclusion of the term 'required or requested'.<sup>33</sup>

Eight parliamentarians indicated that the Ombudsman's oversight of the Bill would ensure that police exercise of the powers would be independently scrutinised and identify if the new law was abused. Seventeen parliamentarians also referred to extensive consultation that the government had undertaken with the Muslim community to ensure that the laws were culturally and religiously sensitive.

## 2.8 Community response to proposed new police powers

The community, including organisations like the Federation of Islamic Councils of Australia, were reported to support the government's decision to give police the power to require the removal of face coverings including the burqa and niqab.<sup>34</sup> The Muslim Women's Association reportedly said the laws were not surprising and were inevitable because 'identity is such a critical part of all of our interactions legally'.<sup>35</sup> It was also accepted that a 'balance must be struck between an Islamic woman's right to wear a face covering and situations of potential criminality where identity may be at issue'.<sup>36</sup>

However, there were a number of concerns that were expressed by some within the Muslim community. For example, one woman was reported as stating that she was concerned that the new law was part of a renewed push to ban women from wearing it. In the report, she is quoted as saying, 'Absolutely I'm worried, I'm worried I won't be able to wear my niqab.' The report goes on to say that she also stated she had no problem showing the police her face, saying, 'If that is the law, no problem, that's OK'.<sup>37</sup>

Others expressed concerns that the new law was politically motivated. A media spokesperson for Hizb ut-Tahrir, an Islamic political organisation, reportedly commented that 'for us it's a case of political intimidation'. He added, 'It's not a police issue, it's the fact that a non-issue has been turned into an issue'.<sup>38</sup>



Similar comments were made by the national president of the Australian Lawyers Alliance who described the new law as a needless political stunt. He stated that the new law 'won't do anything to enhance justice in NSW,' adding, 'Is there any evidence that without this law there would be some big crime problem going on? I don't think so.'<sup>39</sup>

Mr David Bernie, Vice-President of the NSW Council for Civil Liberties also observed that the new law 'has all been a result of one court case that wasn't even about the traffic incident itself'.<sup>40</sup> He added that, in his view:

[t]here just doesn't seem to be much of a case for bringing in new laws. If they are to be restricted to really serious security situations or significant criminal allegations where someone might be refusing to allow themselves to be seen, even to a female officer, then perhaps that's a circumstance that might require a law.<sup>41</sup>

## 2.9 Passing of a new law

The Bill was adopted by Parliament on 15 September 2011 and the new law came into effect on 1 November 2011.

## 2.10 Comparable laws

In the wake of the controversy, some other Australian states also considered adopting laws similar to the NSW law. The Australian Capital Territory (ACT) is the only other jurisdiction that has passed similar legislation (at the time of writing).

Bills on the topic are under consideration by the Western Australian and Queensland Parliaments at the time of writing. These Bills are the same as earlier Bills introduced into those two Parliaments between 2010 and 2012. Details about these Bills are included in Appendix C.

In Victoria, the Police Minister reportedly sought advice from the Victoria Police and the Department of Justice to determine whether the *Crimes Act 1958* needed to be amended and concluded that 'current broad Victorian legislative powers are sufficient to allow police to request a person remove headwear for identification purposes' and further that 'if a person refuses to reveal their face, the police can currently arrest the person until they prove their identity'.<sup>42</sup>

In the ACT's *Road Transport (General) Act 1999*, police are authorised to direct a person to remove anything that covers all or part of their face to confirm their identity. It is an offence for a person to fail to uncover their face when directed by police, with a maximum penalty of 30 penalty units<sup>43</sup> or \$3,300.<sup>44</sup> Like the NSW law, it is a defence to a prosecution for this offence that a person had a medical reason for failing to remove the thing covering their face.<sup>45</sup>

Some key differences between the ACT law and the new law in NSW are as follows:

- The ACT law is limited to exercises of functions under the ACT's road transport laws and related drug and alcohol testing laws.<sup>46</sup>
- The ACT law expressly allows for a person to request that an officer of the same sex view their face if they are wearing a face covering for genuine religious and cultural reasons.<sup>47</sup> An officer must take reasonable steps to comply with this request.
- The ACT law requires that privacy must be provided 'at a place or in a way (or both)' requested by the individual who is asked to remove their face covering.<sup>48</sup> An officer must take reasonable steps to comply with this request.
- The ACT law states that a failure to comply with the safeguards does not affect the validity of a request to remove a face covering or the liability of a person who refuses to remove their face covering.<sup>49</sup>
- The NSW law provides that a person's face should be viewed as quickly as reasonably practicable. The ACT law is silent on this issue.
- The maximum penalty in the ACT for an offence under the law is much higher than in NSW (30 penalty units compared with two penalty units in NSW for the basic offence).

The office of the Chief Police Officer for the ACT advised us in November 2012 that the new law had not yet been used and that there had been no issues identified regarding implementation.<sup>50</sup>

## 2.11 Policies of other government agencies on face coverings

Around the time the new law was introduced, the NSW Department of Premier and Cabinet issued a Policy on Identification and Full Face Coverings for NSW Public Sector Agencies. The policy was developed by the CRC 'in consultation with community and religious leaders and relevant public sector agencies'.<sup>51</sup> It provided broad guidelines to address situations such as the photographing of individuals for licences, as conducted by RMS in NSW.

The policy noted that unlike police, most other public officers cannot require removal of a face covering in the course of providing a service to members of the public. For these other officials, the policy advised that:

... a person who wishes to access a service or facility where it is necessary to ascertain their identity may be requested to remove a face covering. It should be explained to the person that they may choose not to remove a face covering, however they may be denied access to that service or facility.<sup>52</sup>

In relation to privacy, the policy states:

Where operationally feasible, a face covering worn for reasons of modesty should only be removed in the presence of persons of the same gender, preferably in a place where only the identifier can view the face of the person to be identified.<sup>53</sup>

Other government agencies such as the Australian Customs and Border Protection Service may, in the course of their operations, require a person to remove a face covering. When completing an immigration clearance for a female traveller with a cultural or religious face covering, customs officers will offer the traveller a number of options. These include escorting the traveller to a private room so that a female officer may check her identity and having a 'significant other' male person present during the process. These options are provided whether or not the traveller expresses a preference for privacy.<sup>54</sup>

## Endnotes

7. We use this pseudonym to refer to the woman involved in the court case.
8. Our office was provided with in-car video footage of the incident by the NSW Police Force.
9. We note that when a person submits a complaint to police 'in-person', electronically or by post, they are not required to disclose or prove their identity.
10. Transcript of Proceedings, *R v Carnita Matthews* (Local Court of Campbelltown, Mr Rabbidge LCM, 19 November 2010), p. 3.
11. *ibid.*, p. 13.
12. *ibid.*, p. 11.
13. Section 167A of the *Police Act 1990* makes it an offence to knowingly make a false complaint about the conduct of a police officer.
14. Transcript of Proceedings, *R v Carnita Matthews* (Local Court of Campbelltown, Mr Rabbidge LCM, 19 November 2010).
15. Transcript of Proceedings, *Carnita Matthews v R* (District Court of NSW, Jeffreys J, 22 June 2011).
16. *ibid.*
17. See for example, 'A burqa with lies means Jail for driver', *Daily Telegraph* (online), 20 November 2010, viewed 13 December 2012, <http://www.heraldsun.com.au/ipad/a-burqa-with-lies-means-jail-for-driver/story-fn6bfmgc-1225957001541>; M Devine, 'Racism card up the sleeve of niqab' (Column), *Daily Telegraph* (online), 24 November 2010, viewed 15 April 2013, [http://blogs.news.com.au/dailytelegraph/mirandadevine/index.php/dailytelegraph/comments/racism\\_card\\_up\\_the\\_sleeve\\_of\\_niqab/asc/P20](http://blogs.news.com.au/dailytelegraph/mirandadevine/index.php/dailytelegraph/comments/racism_card_up_the_sleeve_of_niqab/asc/P20) and J Fife-Yeomans & P Kent, 'Muslim woman Carnita Matthews escapes jail by remaining behind her burqa', *Daily Telegraph* (online), 21 June 2011, viewed 13 December 2012, <http://www.dailytelegraph.com.au/news/judge-could-not-be-sure-who-was-behind-the-veil/story-e6freuy9-1226078801032>.
18. *NSW cop accused of racism*, Seven News, Sydney, 9 June 2010, viewed 17 April 2013, <http://www.youtube.com/watch?v=7RaXu-1WvyE>.
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20. M Devine, 'Court theatrics sees Islam rear its ugly head again' (Opinion), *Sydney Morning Herald* (online), 23 June 2011, viewed 15 April 2013, <http://www.heraldsun.com.au/opinion/we-need-to-stop-islams-ugly-voice/story-e6frfhqf-1226080251177>.
21. A Dale, 'Judge defends decision to dismiss burqa wearing woman Carnita Matthews' conviction', *Daily Telegraph* (online), 22 June 2011, viewed 22 March 2012, <http://www.dailytelegraph.com.au/news/judge-defends-decision-to-dismiss-burqa-wearing-woman-carnita-matthews-conviction/story-e6freuy9-1226080078415>.
22. A Patty & L McKenny, 'Police seek law change to lift veils', *Sydney Morning Herald* (online), 24 June 2011, viewed 13 December 2012, <http://www.smh.com.au/nsw/police-look-for-law-change-to-lift-veils-20110623-1ghmi.html>.
23. *Press release on the position of ICNSW and other Muslim organisations regarding face covering and identification*, media release, Islamic Council of NSW, 23 June 2011, viewed 17 April 2013, <http://muslimvillage.com/forums/topic/64511-press-release-230611-icnsw-niqab/>.
24. A Patty & L McKenny, 'Police seek law change to lift veils', *Sydney Morning Herald* (online), 24 June 2011, viewed 13 December 2012, <http://www.smh.com.au/nsw/police-look-for-law-change-to-lift-veils-20110623-1ghmi.html>.
25. *ibid.*
26. *ibid.*
27. C Harvey, 'Police Commissioner Andrew Scipione calls for new powers to force women to remove their veils', *Sunday Telegraph* (online), 03 July 2011, viewed 13 December 2012, <http://www.dailytelegraph.com.au/news/police-commissioner-andrew-scipione-calls-for-new-powers-to-force-women-to-remove-their-veils/story-e6freuy9-1226086279235>.
28. *ibid.*
29. J Fife-Yeomans & P Kent, 'Muslim woman Carnita Matthews escapes jail by remaining behind her burqa', *Daily Telegraph* (online), 21 June 2011, viewed 13 December 2012, <http://www.dailytelegraph.com.au/news/judge-could-not-be-sure-who-was-behind-the-veil/story-e6freuy9-1226078801032>.
30. The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 25 August 2011, p. 4716.
31. Legislation Review Committee, *Legislation Review Digest No. 3/55*, NSW Parliament, 6 September 2011, p. 8.
32. The Hon. Paul Lynch MP, NSWPD, (Hansard), Legislative Assembly, 12 September 2011, p. 5457. See also, the Hon. Lynda Voltz MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5768.
33. Mr David Shoebridge MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5771.
34. S Lunn, 'Facing up to questions of identity', *The Australian* (online), 6 July 2011, viewed 23 January 2012, <http://www.theaustralian.com.au/news/features/facing-up-to-questions-of-identity/story-e6frg6z6-1226088349667>.
35. L Metherell and staff, 'Islamic leaders accept police burka powers', ABC News (online), 11 July 2011 viewed 13 December 2011, <http://www.abc.net.au/news/2011-07-05/islamic-leaders-accept-police-burka-powers/2782648>.
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38. S Lunn, 'Facing up to questions of identity', *The Australian* (online), 6 July 2011, viewed 23 January 2012, <http://www.theaustralian.com.au/news/features/facing-up-to-questions-of-identity/story-e6frg6z6-1226088349667>.
39. *ibid.*
40. *ibid.*
41. *ibid.*
42. A Gardiner, 'Victorian Police have power to demand Muslim women remove face veils', *Herald Sun* (online), 29 August 2011, viewed 13 December 2012, <http://www.heraldsun.com.au/news/victoria/victoria-police-has-power-to-demand-muslim-women-remove-face-veils/story-fn7x8me2-1226124035730>.
43. *Road Transport (General) Act 1999* (ACT), s. 58B(6).
44. Section 133 of the *Legislation Act 2001* (ACT) states that a penalty unit is \$110.
45. *Road Transport (General) Act 1999* (ACT), s. 58B(8).
46. The Hon. Simon Corbell MLA, ACT Parliament, Explanatory Statement, ACT Legislative Assembly, 8 December 2011, p. 1.
47. *Road Transport (General) Act 1999* (ACT), s. 58B(2) and (3).
48. *Road Transport (General) Act 1999* (ACT), s. 58B3(b).
49. *Road Transport (General) Act 1999* (ACT), s. 58B(5).
50. Correspondence and discussion with office of Mr R Quaedvlieg, Chief Police Officer for the ACT, ACT Police, 20-29 November 2012.
51. The policy is available from the Department of Premier and Cabinet website: [http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2012/m2012-01\\_policy\\_on\\_identity\\_and\\_full\\_face\\_coverings\\_for\\_nsw\\_public\\_sector\\_agencies](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-01_policy_on_identity_and_full_face_coverings_for_nsw_public_sector_agencies).
52. Department of Premier and Cabinet, *Policy on Identification and Full Face Coverings for NSW Public Sector Agencies (M2012-01)*, January 2012, [http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2012/m2012-01\\_policy\\_on\\_identity\\_and\\_full\\_face\\_coverings\\_for\\_nsw\\_public\\_sector\\_agencies](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-01_policy_on_identity_and_full_face_coverings_for_nsw_public_sector_agencies).
53. *ibid.*
54. Correspondence from Ms R Miller, Acting National Director, Australian Customs and Border Protection Service to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 16 July 2012.

## Chapter 3. Overview of the new law and police policy

In this chapter, we outline the changes to the law that were made, including details about the power, pre-conditions for its use, warnings that must be given should a person not comply straight away and the penalties for non-compliance. We also discuss policies and information documents that police have put in place to assist officers in using the new law.

### 3.1 Identification Legislation Amendment Act 2011

The *Identification Legislation Amendment Act 2011* (the Amendment Act) commenced on 1 November 2011. The Amendment Act was designed to change a range of laws in NSW to give police and other public officials the authority to require a person wearing a face covering, such as a veil, mask or helmet, to remove it so that their identity can be verified.

Schedule 1 of the Amendment Act inserted into the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) a number of provisions, including a new Division into Part 3 of the Act (see Appendix A), to give police two new identification powers:

1. a power to request that a person disclose his or her identity if the officer proposes to direct the person to leave a public place because of their behaviour (a move-on direction)<sup>55</sup>
2. a power to require a person to remove any item worn over their face if it prevents an officer from seeing their face and identifying them.<sup>56</sup>

Schedule 2 of the Amendment Act inserted similar provisions into the *Court Security Act 2005*,<sup>57</sup> the *Children (Detention Centres) Act 1987*,<sup>58</sup> the *Children (Detention Centres) Regulation 2010*,<sup>59</sup> the *Crimes (Administration of Sentences) Act 1999*,<sup>60</sup> and the *Crimes (Administration of Sentences) Regulation 2008*<sup>61</sup> to give other public officials working in courts and gaols comparable powers to use, for example, if they need to identify a visitor to the institution. Schedule 2 also changed the *Oaths Act 1900*<sup>62</sup> to require authorised witnesses, such as lawyers and justices of the peace to verify a person's identity, including viewing their face, when witnessing their affidavit or statutory declaration.

Our review is limited to examining how police have used their powers under LEPRA to require people to uncover their faces for identification purposes.

### 3.2 Police powers to require a person to uncover their face to be identified

#### 3.2.1 Prerequisites for the use of the power

Section 19A(1) of LEPRA gives a police officer the power to require a person to uncover his or her face so it can be seen by the officer or another officer to verify the person's identity, if the officer has already required the person to:

1. provide photographic identification (for example, a driver licence, NSW Photo Card or passport)<sup>63</sup>
2. identify himself or herself or provide their identification details (for example, by stating their name, address and other personal information).

We have listed some of the laws that allow officers to require these types of identification, and can therefore trigger use of the new law, in a supplementary table available on our website.<sup>64</sup> A person's failure to comply with an officer's initial request to disclose their identity (for example, by stating their name) does not prevent the officer from using their power to require the person to uncover their face. An officer only needs to show that they have first lawfully asked for identification before making the requirement to uncover their face to be identified.<sup>65</sup>

The new law defines the face as being the area from the top of their forehead to the bottom of their chin, and between (but not including) their ears.<sup>66</sup> A face covering is defined as a veil, helmet, mask or other item of clothing that is worn over the face and prevents it from being seen.<sup>67</sup>

The new law explicitly states that a request to remove a face covering under this section is not a search.<sup>68</sup>

A person only needs to keep their face uncovered for as long as it takes for the officer to look at it to establish identification.<sup>69</sup> The new power does not authorise police to use force to remove a face covering.

### 3.2.2 Steps that an officer must follow under LEPR

Before an officer requires a person to uncover their face they must provide the person with:

- evidence that they are a police officer (unless they are in uniform),
- their name and place of duty, and
- the reason why they are asking the person to uncover their face (for example, to verify the person's identity by comparing their face to a photo on a driver licence).<sup>70</sup>

The relevant sections of LEPR are set out in Appendix D (Safeguards relating to powers).

When an officer asks a person to uncover their face they must, as far as reasonably practicable:

- ask the person for their cooperation,
- provide the person with reasonable privacy if they request it, and
- view the person's face as quickly as possible.<sup>71</sup>

### 3.2.3 Warnings if a person does not comply

If a person does not take steps to uncover their face when required, an officer must warn the person that the law requires them to uncover their face.<sup>72</sup>

If the person continues to keep their face covered, the officer must then give a warning that it is an offence for the person to refuse to uncover their face.<sup>73</sup>

### 3.2.4 Penalties for not complying

It is an offence to refuse or fail to remove a face covering when required under the new law.<sup>74</sup> A person could be fined up to \$220 for committing this offence<sup>75</sup> except if the offence is committed in circumstances where the police have required the person's identification because they suspect on reasonable grounds that the vehicle in which the person is travelling 'is being, or was, or may have been used in or in connection with an indictable offence'. For this offence, they can be fined up to \$5,500 and/or be sentenced to 12 months imprisonment.<sup>76</sup>

## 3.3 Lawful justification for not complying

The new law provides that a person has a 'special justification' for not removing a face covering if the person has a legitimate medical reason.<sup>77</sup> There is provision for the regulations to prescribe other justified excuses for not removing a face covering when required.<sup>78</sup> However, no related regulation has been made to date.

## 3.4 Scope of the power

The purpose of the new power is very narrow. It can only be used in a situation where a police officer has a power to require a person to identify him or herself but is unable to do so because the person's face is covered. Once a person's identity is established they may cover their face again.

## 3.5 Police policies and information documents

The NSW Police Force has developed a range of materials to inform and guide officers specifically about the new law including:

- *Commissioner's Policy Notice: Power to Require Removal of Face Coverings for Identification Purposes* - released 1 November 2011.<sup>79</sup>
- Nemesis email message: Recording of Power used - 19A LEPR - Removal of Face Coverings - released 13 January 2012.<sup>80</sup>
- Chapter F, *NSW Police Force Handbook: Power to require for identification purposes* - released 16 November 2011.<sup>81</sup>
- Commissioner's Instruction, *NSW Police Monthly* (NSW Police Gazette): Power to Require Removal of Face Coverings for Identification Purposes.<sup>82</sup>
- Six-minute intensive training: Power to require removal of face covering for identification purposes (PA042).<sup>83</sup>
- Six-minute intensive training: Facial coverings and identification (PA043).<sup>84</sup>

- *Policing Issues and Practice Journal: New Law - Power to require the removal of face coverings for identification purposes.*<sup>85</sup>
- *COPS Tricks and Tips Newsletter: Powers Require Face Covering Removal.*<sup>86</sup>
- Police Powers Lecture, Highway Patrol Education Course (Phase 3) - s. 19A Power of police officer to require removal of face covering - held 6 June 2012.

All of these policies and information documents provide officers with information about the content of the law. The Commissioner's Policy Notice (referred to above) also provides officers with the following advice that is not directly stated in the law:

A face covering is ... only items that are worn by the person so therefore it does not include hair, beard etc...

There is no power for police to forcibly remove the face covering if the wearer refuses to do so ...

Failure to remove the face covering after this warning is an offence under s.19B of LEPR, unless the person has "special justification" for not removing it. A person has special justification only if there is a legitimate medical reason for keeping the covering in place; cultural or religious reasons are not sufficient. However police should be mindful of cultural, religious or similar sensitivities when exercising this power.<sup>87</sup>

A NSW Police Force *South West Sydney Islamic Information Guide* was also finalised in 2012 that includes a section on face coverings.<sup>88</sup> This guide is the only NSW Police Force document that provides more detailed information about how officers should apply the law in different situations. The guide recommends, but does not require, that when requiring a Muslim person, such as a woman wearing a niqab or burqa, to uncover their face for identification purposes, officers should consider:

- Clearly explaining the reasons for needing to remove any item of clothing. For example, if the purpose for removing a niqab or burqa is identification, clearly explain that it is for the purposes of comparing her face with that on the driver's licence photograph and that it will only take several seconds.
- Using a police officer of the same gender as the subject if possible when items of clothing need to be removed for identification or searching purposes.
- Ensuring that any removal of clothing for policing procedures is done in a private space and not in public. If you need to identify a Muslim woman in public, attempt to ensure that identification occurs out of the view of onlookers.
- Allowing, if requested and where appropriate, a close male relative to be present when identifying a Muslim woman.
- Respectfully handling jewellery, particularly those of Islamic symbolism or significance.<sup>89</sup>

The guide is not a formal policy document and is an 'information guide intended for probationary constables as part of their orientation to South West Sydney'.<sup>90</sup>

In addition to these materials, officers exercising their new powers need to do so in ways that are consistent with the NSW Police Force Code of Practice, the NSW Police Force Code of Conduct and Ethics and the NSW Police Force Customer Service Charter.

## Endnotes

55. *Law Enforcement Powers and Responsibilities Act 2002* (LEPRA), s. 11(2).
56. LEPRA, Part 3, Division 4, ss. 19A-19C.
57. *Court Security Act 2005*, s. 13A.
58. *Children (Detention Centres) Act 1987*, s. 32A.
59. Children (Detention Centres) Regulation 2010, cl. 34A.
60. *Crimes (Administration of Sentences) Act 1999*, ss. 79 and 106ZA.
61. Crimes (Administration of Sentences) Regulation 2008, cl. 89.
62. *Oaths Act 1900*, s. 34.
63. Section 19A(6) of LEPRA provides a definition of 'photographic identification'.
64. NSW Ombudsman, *Supplement to review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification*, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).
65. LEPRA, s. 19A(2).
66. Sections 3 and 19A(4) of LEPRA, extracted in Appendix A of this report, provide further information regarding the term 'face'.
67. LEPRA, s. 3.
68. LEPRA, s. 19A(5).
69. LEPRA, s. 19A(3)(ii).
70. LEPRA, s. 201(1).
71. LEPRA, s. 19A(3).
72. LEPRA, s. 201(2C)(a).
73. LEPRA, s. 201(2C)(b).
74. LEPRA, s. 19B(1).
75. LEPRA, s. 19B(1)(b).
76. LEPRA, s. 14 and s19B(1)(a).
77. LEPRA, s. 19B(2)(a).
78. LEPRA, s. 19B(2)(b).
79. NSW Police Force, *Commissioner's Policy Notice: Power to Require Removal of Face Coverings for Identification Purposes*, 1 November 2011.
80. Email from Alan Clarke, Acting Deputy Commissioner, Field Operations to all NSW police officers, 13 January 2012. The title of this email was 'Power used-19A LEPRA-Removal of Face Coverings'.
81. NSW Police Force, *NSW Police Force Handbook*, 16 November 2011. See Chapter F: Face Coverings (Power to require removal for identification purposes).
82. NSW Police Force, 'Commissioner's Instruction: Power to Require Removal of Face Coverings for Identification Purposes', *NSW Police Monthly*, November 2011, p. 36.
83. NSW Police Force, *PA042: Power to require removal of face covering for identification purposes*, six-minute intensive training, 16 November 2011, updated 3 February 2012.
84. NSW Police Force, *PA043: Facial coverings and identification*, six-minute intensive training, 16 November 2011, updated 9 February 2012.
85. NSW Police Force, 'New Law - Power to require the removal of face coverings for identification', *Policing Issues & Practice Journal*, Vol. 20, No. 1, April 2012, pp. 66-70.
86. NSW Police Force, 'Powers Require Face Covering Removal Issue', *COPS Tips and Tricks Newsletter*, Issue 155, April 2012, pp. 3-6.
87. NSW Police Force, *Commissioner's Policy Notice: Power to Require Removal of Face Coverings for Identification Purposes*, 1 November 2011.
88. NSW Police Force, *South West Sydney Islamic Information Guide*, Education & Training Command (Field Support Command), 17 October 2012. See in particular, 'Rituals and Traditions', pp. 21-28.
89. NSW Police Force, *South West Sydney Islamic Information Guide*, Education & Training Command (Field Support Command), 17 October 2012, p. 26.
90. Correspondence from Mr N Kaldas, Deputy Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 3 June 2013.

## Chapter 4. Use of the new law by the NSW Police Force

During the review period, police advised us of eight recorded uses of the new power, which we examined. The details of those uses are outlined in the following sections. In this chapter we also discuss the systems for recording uses of the new law that were implemented by the NSW Police Force during the review period. In our review we found some evidence that the new law was used on more occasions, but this use was not formally recorded. It appears, however, that the number of times this happened would be small.

### 4.1 Frequency of the use of the power

During the review period, police advised that they identified eight recorded uses of the new law.<sup>91</sup> The first event occurred on 24 November 2011 and the last on 20 August 2012. Five of these events were also filmed by police in-car video (ICV) cameras.

### 4.2 People subject to the new power

Seven of the eight people in relation to whom the new law was used were women aged between 18 and 44 years, all of whom were wearing a niqab while driving a car. The law was used for the purpose of identifying the driver. The eighth person was a young man aged 18 years (who had been part of a group of young people) whose face was covered by a T-shirt. There were no uses of the law recorded that related to circumstances where a motorcyclist was required to take off his or her helmet.

In the seven events involving a woman, all except one resulted in the driver receiving a Traffic Infringement Notice for a minor traffic offence (for example, driving with an expired licence). In the most serious matter, the driver was issued a field court attendance notice<sup>92</sup> for 10 different traffic offences. Please see case study 6 (in section 6.2.2) for more details about this case.

One woman who was required to uncover her face during the review period agreed to speak with us. In terms of her experience, she felt that the male officers involved were polite but she was uncomfortable that her face was viewed by more than one of them during the process. Please see case study 7 (in section 6.2.2) for further discussion about this case.

#### 4.2.1 The individual wearing a T-shirt over his head

The only time the power was used other than in relation to a woman wearing a niqab involved a group of young men who were intoxicated and wearing T-shirts over their heads, leaving only their eyes visible. Please see case study 2 later in this chapter.

### 4.3 Officers who used the power

Officers who recorded using the power were all male and ranged in rank from Constable to Sergeant. They were working in the following circumstances:

- in four matters the officer was alone on patrol
- in three matters the officer was on patrol with another male officer
- in one matter the officer was on patrol with a female officer.

Female officers were involved in two matters and verified the identity of the driver in each instance. In one matter the female officer was on patrol with a male officer (see case study 1 below) and in the second matter the female officer was called to the scene to verify the identity of the driver. Further details about this matter are provided in case study 4 (in section 6.1.4).



### Case study 1

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**A male and female police officer were on patrol when they identified a vehicle owned by a suspended driver. The officers signalled the vehicle to pull over and stop. When they approached the driver they noticed she was wearing a niqab. The officers asked her for her licence and after speaking with her for some time, returned to their patrol car to do some checks. While doing so, the male officer asked his female colleague to verify the driver's identity by viewing her face. The female officer asked the driver to lift her niqab, which she did without any hesitation. The driver was fined for not displaying her P plates and cautioned about her children's car seats.**

Three of the six officers who recorded using the new power were members of the Traffic and Highway Patrol Command. This Command includes all officers whose primary role is to perform traffic duties and some of its officers are stationed within Local Area Commands (LAC). The three officers from the Traffic and Highway Patrol Command who recorded using the power were stationed within Rosehill or Bankstown LACs.

Two of the officers who recorded using the power perform general duties and were attached to Flemington and Tweed Heads LACs. One officer who recorded using the power was a member of the Regional Enforcement Squad for the South West Metropolitan Region.

## 4.4 Compliance with legal procedural requirements

As outlined in chapter 3, when using the new power, officers are required to comply with certain requirements under the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA). These are that officers must:

- only use the new power where they already have a lawful reason to request or require a person's identification<sup>93</sup>
- as far as reasonably practicable, ask for the person's cooperation<sup>94</sup>
- as far as reasonably practicable, view the person's face:
  - in a way that provides reasonable privacy if the person requests it, and
  - as quickly as reasonably practicable<sup>95</sup>
- only require that a person uncover their face from the top of their forehead to their chin and between (but not including) their ears<sup>96</sup>
- provide their name and place of duty (and proof they are an officer if not in uniform)<sup>97</sup>
- provide their reason for requiring that a person uncover their face<sup>98</sup>
- if the person does not immediately comply with the requirement to uncover their face, warn them that they are required by law to comply, as soon as reasonably practicable<sup>99</sup>
- if the person continues to fail to comply, warn them that this is an offence.<sup>100</sup>

We made the following assessment in relation to officers' implementation of these requirements during the review period.

### 4.4.1 Requirement to have a lawful reason to use the new law

On seven of the eight occasions officers had a lawful reason to use the power. On one occasion, the officers asked for the removal of the clothing covering the person's face without first using any of the laws giving them the power to require his identification (see case study 2 below). In that case, the police requested the removal of the face covering *before* they requested any identification.

## Case study 2

A group of intoxicated young men wore T-shirts wrapped around their heads, showing only their eyes, as they walked through Byron Bay. Police were concerned that they were intimidating other members of the public and directed them to uncover their faces by removing the T-shirts. This was recorded as a use of the new law.

Two of the young men refused, so the officers asked them for identification, which they reluctantly provided. When the officers then directed them to move on from the CBD area, they argued with them. The officers asked a second time. One of the young men complied, the other kept arguing. After being warned a number of times that if he did not leave he would be committing an offence, the young man was taken into custody and fined \$200.

It was our view that it would have been more appropriate in these circumstances for police to have used a public order directions power<sup>101</sup>, which could have included a direction that the men permanently remove the T-shirts covering their faces. We communicated our views to the Local Area Commander who agreed that the officer should have used a power other than those under the new law. Additional advice and guidance was provided to the officer involved about when the new law can be used.<sup>102</sup>

### 4.4.2 Requirements about privacy and preserving dignity

On three occasions a woman requested an arrangement that provided additional privacy or officers offered to provide additional privacy. On other occasions some privacy was afforded by virtue of the fact that the woman was sitting in her car when she uncovered her face.

On the seven occasions where the officer had a lawful reason to use the power, they required removal of the face covering for only a brief period of time.

On one occasion, the officer's account suggested that he had asked to see more than a woman's face, in that he had asked her to reveal a bit of her hairline so that he could see her hair colour, to help him confirm her identity (see case study 7 in section 6.2.2).

### 4.4.3 Requirements for identification and providing reasons

On two of the seven occasions where the officer had a lawful reason to use the power, the officer did not give his name and place of duty to the driver before requiring that she uncover her face.

On one other occasion the officer did not provide the driver with a reason why he was requesting that she uncover her face.

## 4.5 Legal action in relation to an offence under the new law

The NSW Police Force has not recorded any offences under the new law and consequently no related legal action has been taken.

## 4.6 Informal or unrecorded requests for a person to uncover their face

Through information gathered during our consultations, it appears that there were at least three occasions where police requested that a person remove their face covering, but these were not recorded on the police Computerised Operational Policing System (COPS) as a use of the power. The occasions involved identification checks done as part of random breath testing, where no offence was committed and the woman immediately complied with the officer's request.

Some officers also advised us that they had occasionally requested that a motorcyclist remove their helmet, although it was not clear whether any of these occasions had definitely occurred during the 12 month review period.

## 4.7 Maintaining records of uses

### 4.7.1 System for recording

Between 1 November 2011 and 12 January 2012 officers were required to record any uses of the new law in the 'free text' narrative section of COPS. On 13 January 2012, officers were given more specific instructions to include 'FCR' or 'remove face covering' in the narrative, so that any uses could be more easily tracked by a manual search using key words.

After we requested that police develop a new COPS category to allow for more systematic recording, a new 'tick box' incident category called 'Require Face Covering Removal' was added to COPS. All officers were advised through the police messaging system Nemesis on 2 April 2012 that from 4 April 2012 they were required to use this new category to record any use of the new law. Details about how to use the new category were also included for officers in the April 2012 *COPS Tips and Tricks Newsletter*.

When officers use the new incident category they are prompted to specify the location of the request, the person's name and other associated factors.<sup>103</sup> They also need to indicate the reason for the use of the power, the type of face covering and whether privacy was requested and achieved.<sup>104</sup>

New Law Part Codes were also created in COPS to record any legal action that police take in relation to an offence under the new law.

### 4.7.2 Reliability of recorded data

A number of factors may have affected the reliability of data available, including:

- possible difficulties in tracking any early uses of the power recorded in the narrative section of COPS
- lack of awareness about the new COPS category, as reported to us by some officers after it was introduced
- the practice on the part of some officers of not recording an incident as involving a use of the power, where a person has immediately complied with a request to uncover their face and there was no offence of any type involved.

Although these factors may have affected the data recorded and captured for our review, given the consistent anecdotal evidence that the new law is used infrequently and the lack of complaints about any uses, in our view these factors do not materially impact on the findings of our review.

## 4.8 Conclusion

Overall, it appears that officers are using the new power appropriately. In a few notable instances the officers took particular care to ensure that they afforded privacy or made a female officer available where this was requested or the officer recognised it would be appropriate. In three of the seven cases, some components of LEPRAs safeguards were not followed. We discuss our views on the adequacy of the current procedural requirements, particularly relating to female officers and privacy issues, in chapter 6.

We also found a small number of cases where it appeared the new law had been used, but that use had not been recorded. There were some other factors we observed that affected the reliability of the records kept in relation to uses of the new law. We discuss our views about these issues in chapter 6.

## Endnotes

91. Please note that one of the eight uses of the power was recorded by the in-car video and brought to our attention by the officer involved. The COPS record, however, did not record the incident as involving a use of the new law. Nonetheless, we have included this event in our count of the number of times a use of the law was recorded.
92. A field court attendance notice is a notice requiring a person to attend court to have their charges dealt with by a magistrate.
93. *Law Enforcement Powers and Responsibilities Act 2002* (LEPRA), s. 19A(1).
94. LEPRA, s. 19A(3)(a).
95. LEPRA, s. 19A(b).
96. LEPRA, ss. 3 and 19A(4).
97. LEPRA, ss. 201(1)(a) and (b).
98. LEPRA, s. 201(1)(c).
99. LEPRA, s. 201(2C)(a).
100. LEPRA, s. 201(2C)(b).
101. For example, s. 197 of LEPRA.
102. Email from NSW Police Force officer, 19 October 2012.
103. NSW Police Force, 'Powers Require Face Covering Removal Issue', *COPS Tips and Tricks Newsletter*, Issue 155, April 2012, pp. 3-6.
104. *ibid*.

## Chapter 5. Is the new law beneficial?

When the government announced it would be introducing new police powers related to face coverings there was some criticism that the laws were unnecessary and constituted a 'political stunt' rather than an enhancement of the justice system.<sup>105</sup>

In this chapter we set out police powers and practice before the new law and consider whether the new law has improved the process of identification for police and for those individuals being identified. As the population most affected by the law would seem to be Muslim women who wear a niqab, we give particular consideration to their current experiences with police.

### 5.1 The law and police practice before the introduction of the new law

In NSW, police have always been able to use a range of laws to require that people identify themselves in certain circumstances.<sup>106</sup> For example, section 171(1) of the *Road Transport (General) Act 2005* authorises police to require a driver to produce their licence and/or their name and address, if police are executing a function under the road transport legislation. Section 11(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) also authorises police to require a person to identify themselves if police believe the person can assist them in the investigation of an alleged indictable offence.<sup>107</sup>

Prior to the enactment of the new law, police would occasionally ask a person to uncover their face when using these identification laws. One example is the incident that led to the court case discussed in chapter 2. In another example recounted to us by a male police officer, the woman's identity was only verified after she accompanied the officer to the police station and showed her face to a female officer (see case study 3 below).

#### Case study 3

**A male officer pulled over a car for a traffic matter. The driver was wearing a face covering with just her eyes showing. He asked her to remove her face covering, but she said that it was 'against her religion.' He explained that, 'I need to know who I'm dealing with' and she asked for a female officer to view her face. He couldn't arrange this and told her, 'I can charge you but you can come back as well'.**

**The woman accompanied him to the station, was identified by a female officer and received a ticket for the traffic matter.**

The officer who told us this story explained that he was frustrated as he already knew what the woman's face looked like from her licence photo, so he did not understand why it was so different for him to look briefly at her actual face to verify that the photo was of her. This view was shared by some other officers. In section 6.9 we explore the explanation given by some women about why they regard these two processes as different.

In other accounts we received, the woman involved agreed for an officer to view her face, sometimes after a female officer was made available. The information we have also indicates that officers did not always require that a woman remove her niqab to verify her identity.

### 5.2 Police powers before the new law

One academic commentator<sup>108</sup> and some officers that we interviewed were of the view that before the new law, police may already have had an implied legal authority to require a person to uncover their face to be identified. That is, if police have a power to require individuals to identify themselves, then police would implicitly have the power to take reasonable steps to satisfy themselves that the information relates to the individual they want to identify.

In practice, this might involve asking questions to see if the person can recall their date of birth and address details from a licence. If the person's face is covered, an officer might not be satisfied of their identification unless they can compare the person's face to their licence photo. They might then take the step of requesting that the person uncover their face to assist identification.

Following this argument, the authority for officers to take these or other (reasonable) extra steps is contained, though not directly stated, within any law that authorises them to require identification information. Police also have a longstanding power of arrest that, arguably, could also have been applied if, before the new law, a person had refused to uncover their face so that an officer could verify their identity.

While the majority of officers that we consulted preferred working with the new law, a small number suggested that these pre-existing implied powers had always been, and remained, sufficient for the purpose of identifying a person wearing a face covering. Their views included that any changes needed as a result of the court case could have been achieved through training and that the new law was unduly complicated.

In contrast, at least one officer to whom we spoke was of the view that there had not been an implied power and that in the past officers may have instead been using a form of 'consent policing'. This is a term used to describe situations where an officer asks a person to voluntarily do something, rather than making a direction or requirement using a particular legal power. In the past, women may have voluntarily (but possibly reluctantly) removed their niqab, not knowing whether or not the police had the power to require them to do so.

### 5.3 Power of arrest before the new law

Police also have a longstanding power, currently in section 99(3)(a) of LEPRA, to arrest a person if the person has committed or is committing an offence, and police are doing so to ensure that the person appears in court. With a number of traffic and public order offences, police have the option of issuing a fine in the form of a Traffic Infringement Notice or a Criminal Infringement Notice. However, this can only be done if the officer can determine the identity of the offender to accurately address the notice. If this cannot be done, police have the power to arrest a person to ensure their appearance in court.

This issue was explored in the court case discussed in chapter 2, where the prosecution, in cross examination, enquired:

Q. And if someone refused to move a face covering at a roadside incident or refused to remove a face covering perhaps pursuant to the powers under the [law], for someone to identify themselves, the police officer is quite within their rights to arrest that person and take them to a police station, you'd agree with that proposition?

A. Yes depending on the matter, the police officer who is investigating all the circumstances— ...

Q. That's right and at the police station they can compel someone to identify themselves by removing a facial covering if that is so required under law?

A. Yes.<sup>109</sup>

### 5.4 What the new law requires above existing laws

It appears that, following the case discussed in chapter 2, the government formed a view that the existing laws were not clear, either about the precise power that police had in relation to face coverings or about how they were to exercise any such power (for example, whether certain safeguards, such as warnings, needed to be given). The new law adds the following to any pre-existing police powers:

- it specifically states that police may require a person to remove a face covering only in circumstances where they are also using a power to require the person's identification
- it introduces new requirements that have to be met when making such a requirement (for example, providing privacy if requested and restricting the time the person's face must remain uncovered to only as long as required for identification)
- it extends the application of the general safeguards in section 201 of LEPRA (that is, for an officer to identify him or herself, and to explain the reasons for the requirement) to circumstances where the new law is used<sup>110</sup>
- it introduces an offence and penalties if a person failed to comply with the requirement
- it specifies that a legitimate medical reason may be special justification for a person to refuse to remove their face covering.

These new measures put beyond doubt the question of the extent of police powers in this area and, with the introduction of safeguards, the procedures that police must follow when they use these powers.

### 5.5 Importance of the new law for the most affected part of the community

An important point when considering the necessity and suitability of the new law is its effect on those groups most likely to be affected by its use. Our consultations suggested that motorcycle riders are less affected, as they generally remove their helmets before any request from an officer or immediately after a request is made. Because helmets are worn for safety reasons, their removal by a stationary rider does not raise any cultural or religious issues or sensitivities. The organisations that represent motorcycle riders and that made submissions also did not raise any significant issues or concerns regarding how the new law would affect their members or any other motorcycle riders.

This is very different from a situation involving a face covering such as a niqab, which is worn in accordance with deeply held religious beliefs about modesty and female dress. Requiring the removal of a niqab is therefore not a straightforward exercise, as the woman will wish to, as far as possible, maintain her modesty and dignity when she removes it. There is an additional barrier when the person who wishes to look at the woman's face is a man, or where male passers-by could see the woman's face when she uncovers it.

It is also relevant to note that the Muslim population in Australia is increasing<sup>111</sup>, and it has been estimated more generally that the world's Muslim population is expected to increase by about 35% in the next 20 years.<sup>112</sup> So in considering or assessing the operation and adequacy of the new law, it should also be noted that in coming years, the use of the new law will likely increase rather than remain the same or decrease.

### 5.5.1 Why some Muslim women cover certain parts of their body

Covering is, for many Muslim women, 'an important act of their spirituality'.<sup>113</sup> Mehmet Ozalp has described the theological basis for covering as follows:

It is deemed a command of God in the Qur'ān and was part of the practice of the Prophet ﷺ and his companions. The obligation to cover the body for both males and females, and additionally the hair for women, is a position that has met with consensus among most Muslim jurists. ...The current practice for the majority of Muslims does not include covering the face. Some women might choose to do so as an expression of greater piety.<sup>114</sup>

Most Muslim women in NSW who wear some type of covering wear the hijab, which involves loose clothing that also covers a woman's hair and ears,<sup>115</sup> including the hairline but leaving the rest of her face visible. When worn this way, the new law does not give officers a power to require a woman to take off her hijab.

A niqab is a separate garment designed to cover a woman's face, which is often tied over a hair covering. This means a woman can uncover her face by removing her niqab, while still keeping her hair and ears covered.

Other coverings such as the burqa or chador<sup>116</sup> are enveloping outer garments that are typically worn over the top of a woman's clothing. They extend from the top of a woman's head to the floor, and may have a mesh-like piece sewn into the area covering the face. If a woman wearing a burqa was required to uncover her face to be identified she would need to lift the entire front of the garment to reveal her face to an officer. This could cause her significant distress if the clothing she is wearing under the burqa is not modest and loose fitting, but form-fitting and intended for wear in her home, not to be seen by any men, except close male relatives.

### 5.5.2 How many women in NSW wear clothing that covers their face?

It appears that the number of women in NSW who wear a niqab is very small, an issue that was recognised by several members of Parliament during debates about the new law.<sup>117</sup> We have been unable to find real data on the numbers. However, some estimates put the number at around 1,000.<sup>118</sup>

We have not found any specific estimates of the number of Muslim women in NSW who wear a burqa, but we have been informed during consultations that the burqa and other such extensive coverings are worn much less than a niqab and by very few women living in this state.

We have not been made aware of any instance where a woman in a burqa or similarly extensive covering has been required to uncover her face in NSW, either before or after the new law was introduced.

### 5.5.3 Attitude to being identified

None of the women we consulted raised any objections to police lawfully checking their identity. Some commented that 'we are clear on wanting to work with the law, not against it'<sup>119</sup> and they understood why they need to be identified.<sup>120</sup>

When the new law was first introduced, a number of Muslim organisations, including the Australian National Imams Council, noted that in some circumstances it is appropriate for a male police officer to view a woman's face for the purposes of identification:

In a situation where there is no officer of the same gender to perform security and identification checks then the Shariah (Islamic Law) allows a Muslim woman to remove her face veil as needed in order to have her identity verified. For instance, if an officer has to verify the identity of a woman who wears the Niqab whilst she is travelling in the street and there is no female officer(s) present then she may remove the face covering for the purpose and duration of identification. However, fixed points where identity checks are required, such as airports and so on, there should be female officers employed to perform the necessary checks.<sup>121</sup>

Many women that we have spoken to mentioned this type of ruling when explaining their acceptance of the need to be identified from time to time by a male officer. However, they did have strong views that the identification should be conducted by a female officer where possible, and in a way that shielded their face from the view of any males

present who were not close male relatives. All the women we consulted were very clear that they found the process of showing their face to a male officer to be invasive. They unanimously agreed that having any such identification conducted by a female officer would be more compatible with their religious beliefs.

However, it appeared to us that many women may be hesitant in asking a male police officer if a female officer was available to view their face, because few knew what the new law provided in these circumstances.

Indeed, some of the women were concerned that some male police officers might misunderstand their request as defiant, a challenge to the officer's authority, or an escalation of the situation, none of which would be their intention.<sup>122</sup> The possibility of a male officer reacting in this way caused a number of women further anxiety about doing things that may bring them into contact with a male police officer. Some women explained that this was such an issue for them that they avoided driving out of their suburb in case they encountered male officers who were not used to interacting with women wearing a niqab, and who might not be willing to call over a female officer to conduct the identity check.

#### **5.5.4 Summary of impact of the new law on women who wear a niqab**

The information available to us shows that women wearing a niqab generally uncover their face when requested to do so by a police officer, even those who are male. This includes five of the cases that occurred in the review period, but also a number of the cases that happened before the introduction of the new law. It also appears that knowledge of the procedural requirements around the new law is generally very low amongst women who wear a niqab. It therefore does not appear that the law has made much difference to the expectations or levels of compliance of this group of people when they interact with police.

One important aspect of the new law is the privacy safeguard. It is not clear whether these procedural requirements have affected police practice in ensuring that the woman's face is uncovered in a way that ensures her privacy. Although some element of privacy was afforded in all seven cases during the review period, we do not have information to determine if similar levels of privacy were already being provided prior to the introduction of the new law. It also does not appear to us that this aspect of the new law has assisted the women affected to be able to uncover their face with the level of privacy they prefer.

The barriers faced by these women to be more assertive about their privacy could be due to the low levels of understanding about the new law amongst this group of people, and their generally high levels of compliance with requests from police officers in traffic situations.

We have also found that the new law has caused anxiety and confusion for some women. In particular, many of the women we consulted recalled the controversy around the court case discussed in chapter 2, but were unclear about how any changes to the law affected them. They were also unsure about their precise role and responsibilities when having these interactions with officers. Some women expressed anxiety about what might happen if they refused to show their face to a male officer, but offered to show it to a female officer or provide some other form of identification instead.

### **5.6 Police perspective on the new law**

The vast majority of officers whom we interviewed thought the new law was necessary and a welcome clarification of their powers. For example, one officer suggested he thought women were now more aware that they must uncover their face when being identified. On one occasion, after the law was introduced, he asked a woman to uncover her face and she replied 'I have to, yeah?' He perceived this kind of response was different to previous occasions, prior to the new law, where he had made similar requests.

We found that one factor assisting compliance was the way the officer concerned handled the interaction, including recognising that some privacy would make the woman concerned feel more comfortable.

### **5.7 Has the new law been beneficial?**

Questions were raised about the necessity of the new law during public debate before it was passed by Parliament. As set out in chapter 2 and Appendix C, some other Australian governments also looked closely at this area of law, and decided that a new law regarding face coverings and identification, similar to that in NSW, was not warranted. This view was shared by a small number of officers we consulted (see discussion earlier in this chapter).

We also noted that a majority of organisations that we consulted, including those representing women who routinely wear a niqab, supported the general introduction of the new law.

We are therefore of the view that the new law has provided needed clarity about the power of police in circumstances where they need to identify someone wearing a face covering. Additionally, the express safeguards included in the new law, particularly to provide privacy if requested, recognise that section of the community which may be most

affected by the new law – Muslim women who wear niqab who have religious constraints about showing their face publicly.

However, concerns were raised in our consultations about the adequacy of the requirements that police have to follow when using the new law. In particular, a view was put forward that there should be some provision that a female officer be made available where practicable, and that more responsibility should be placed on police officers to ensure privacy, rather than expecting the woman involved to request it.

Also, it appears that community knowledge that any request for privacy should be accommodated where practicable, is low. Therefore, the benefits of having this additional safeguard will only be realised by raising community awareness of this aspect of the new law.

This is also a section of the community where language barriers and understanding of legal requirements may present challenges for police and people who may be required to uncover their face in the future.

As we have reported, the new law has been used infrequently. However, the importance or benefit of any new law should be measured against a range of factors, not solely on the frequency of its use. The process of requiring a woman to remove a face covering worn for religious reasons so she can be identified can be straightforward. The importance of ensuring that this process is as smooth and efficient as possible should not be underestimated.

The incident which prompted the introduction of the new law (see chapter 2) highlighted the public prominence that can be given to these types of interactions. It is critical that the new law ensures that police can adequately deal with every type of foreseeable interaction and discharge their duties unhindered, while still affording appropriate safeguards to the women affected.

For these reasons, and as discussed in chapter 6, we have made recommendations to improve the law and police policy and information documents, for the purposes of overcoming some of the difficulties that can arise, particularly in situations where a male police officer seeks to verify the identity of a woman wearing a niqab, burqa or chador.

## Endnotes

105. S Lunn, 'Facing up to questions of identity', *The Australian* (online), 6 July 2011, viewed 23 January 2012, <http://www.theaustralian.com.au/news/features/facing-up-to-questions-of-identity/story-e6frg6z6-1226088349667>.
106. R Barker, 'The Full Face Covering Debate: An Australian Perspective', *University of Western Australia Law Review*, Vol. 36, No. 1, November 2012, p. 152.
107. For more information on the circumstances where police can require a person to identify themselves, please see *Supplement to review of Division 4, Part 3, of the Law Enforcement (Powers and Responsibilities) Act 2002: face coverings and identification*, [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au).
108. R Barker, 'The Full Face Covering Debate: An Australian Perspective', *University of Western Australia Law Review*, Vol. 36, No. 1, November 2012, p. 152.
109. Transcript of Proceedings, *R v Carnita Matthews* (Local Court of Campbelltown, Mr Rabbidge LCM, 19 November 2010), p. 17.
110. Prior to the new law, these safeguards would not have applied if police had required removal of a face covering using identification powers under any of the Acts set out in Schedule 1 of LEPR, including certain Acts that police may use to require identification in traffic-related matters (see section 201(6) LEPR).
111. Australian Bureau of Statistics, *2011.0: Reflecting a Nation: Stories from the 2011 Census, 2012–2013*, 21 June 2012, viewed 4 April 2013, <http://www.abs.gov.au/ausstats/abs@.nsw/Lookup/2011.0main+features902012-2013>. See, in particular, the section on religious affiliation.
112. Pew Research Centre Forum on Religion and Public Life, *The Future of the Global Muslim Population: Projections for 2010-2030*, January 2011, p. 13.
113. M Ozalp, *Islam between tradition and modernity: an Australian perspective*, Barton Books, Canberra, 2012, p.193.
114. *ibid.*, pp. 193-194.
115. Department of Immigration and Citizenship, *The civil and social participation of Australian Muslim women in Australian community life*, prepared by H McCue, July 2008, p. 12.
116. M Ozalp, *Islam between tradition and modernity: an Australian perspective*, Barton Books, Canberra, 2012, p. 194.
117. See the Hon. Paul Lynch MP, (NSWPD), (Hansard), Legislative Assembly, 12 September 2011, p. 5456; the Hon. Marie Ficarra MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5758; and the Hon. Helen Westwood MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5766.
118. During consultations with leaders in the Muslim community, a few commented that the figure is likely to be less than 1% of the number of Muslim women in NSW (which was counted in the 2011 Australian Bureau of Statistics Census at around 105,000).
119. Daar Aisha Shariah College submission, 21 February 2013.
120. Interview with woman subject to the new law during the review period, 8 February 2013.
121. M Saleem, *Re: niqab*, press statement, Australian National Imams Council, 24 June 2011, viewed on 23 November 2012. [http://www.crescentsofbrisbane.org/00%20Files%20%20Images/CCN347/110624%20ANIC\\_Press\\_Release\\_Niqab.pdf](http://www.crescentsofbrisbane.org/00%20Files%20%20Images/CCN347/110624%20ANIC_Press_Release_Niqab.pdf)
122. See section 6.2.6 of this report for further discussion about issues relating to the reluctance of some women who wear niqab to be assertive during interactions with police officers.



## Chapter 6. Improving and clarifying the operation and implementation of the new law

In our review we have identified a number of issues relating to the use of the new law, which we discuss in this chapter. Women who cover their face for religious reasons are the group most affected by the new law, and are most likely to be required to comply with it in the future. The issues arise primarily from a tension between the values and beliefs of this group of women (that their face should not be seen in a public setting) and a societal and legal expectation that they should show their face to a police officer if the officer needs to see who they are.

We found that there are a number of practical barriers for this group of women to feel secure and comfortable uncovering their face, particularly for a male officer, but also where male bystanders may be able to see. A key practical issue is therefore how the new law should be best applied in a situation involving male police officers and/or male bystanders.

It is our view that, by making a few adjustments to the law and police policy and information documents, these barriers can generally be overcome. For police, this would make the process of identifying a woman wearing a niqab almost as straightforward as situations where the person's face can be seen.

The issues we discuss in this chapter are:

- making a female officer available to check the woman's identity where practicable
- ensuring that privacy is afforded when a woman is uncovering her face where practicable
- warnings relating to non-compliance
- consistency and the use of discretion by police.

We also make comments and recommendations about the following:

- the need for officers to comply with procedural requirements when using the new law, and to record their uses where an offence has been committed
- guidance for officers when interacting with women wearing a niqab, particularly when conducting random breath tests
- information for officers to understand why a woman who wears a niqab considers that a male police officer looking at her face is different from him looking at her photo identification.

### 6.1 Requiring a female officer for identification where possible

The key issue for those women we consulted who routinely wear a niqab was that they held a profound belief that their face should not be viewed by a male officer, whenever possible. They all clearly expressed the view that they found the process of showing their face to a male officer invasive. For example, one woman described the feelings she would have in this situation as follows:

The concern of women who wear niqab and find themselves in such a situation is that it becomes a personal/private experience and the officer requesting its removal is in effect tearing open something which is so personal so private and so sacred to her. When a woman is placed in this situation she dreads it, and whilst it conforms with and is consistent with the Islamic position (i.e. a woman would have to unveil in an Islamic court, in line with Shariah Law), it is nevertheless a very difficult thing for her to do.

The new law does not include any requirement that a female police officer be made available in this situation. In contrast, the laws that give other public officials (such as correctional and court security officers) the power to require a face covering to be removed include a requirement that a female officer be made available:

- where the visitor requests this, and
- where it is reasonably practicable.

Discussions in Parliament do not give clear guidance as to why these otherwise similar provisions are different.<sup>123</sup> It is possible that the work of police officers in public spaces and on traffic patrols, often working with only one or two other officers, was considered to be distinct from the work of those other public officials, who primarily work in buildings with numerous colleagues.<sup>124</sup>

Interestingly, the new law specifies that when a police officer uses the new law, this is not a search. However, the safeguards around use of the search powers may provide a useful comparison on this issue.

### 6.1.1 Searches

Officers use the new law to require that a person remove a specific item of clothing. They make a similar requirement when using powers to conduct a search of a person's body, for example, in situations where they suspect that the person is carrying stolen items.

An ordinary search includes requiring the person to remove for examination outer clothing, such as an overcoat or jacket, gloves, shoes or hat.<sup>125</sup> Other more invasive searches include frisk searches and strip searches.

The requirements that officers must follow when conducting all levels of search are in section 32 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) entitled 'Preservation of privacy and dignity during search.' One important requirement is that an officer of the same sex should conduct the search, where reasonably practicable under the circumstances.<sup>126</sup> This requirement must be followed regardless of the extent of the search or the location of the search, including at a location away from a police station and in circumstances where a female officer may not be present.

This requirement appears to recognise that the removal of clothing is somewhat invasive and personal. It is arguable that a requirement to remove a niqab is no different from a requirement to remove any other piece of outer clothing. In fact, the evidence we have shows that women required to remove their niqab to show their face to a man feel this is a very invasive process, and there is no evidence to show that people required to remove an overcoat or gloves, for example, feel the same levels of discomfort. It is therefore arguable that the same or a similar requirement should be made of police officers when they use the new law.

### 6.1.2 Experiences with other government agencies

The information we have indicates that women wearing a niqab have experienced fewer issues in relation to identification when interacting with government services that are provided from a central location and where privacy or a female staff member, or both, have been willingly and easily made available.

As discussed in chapter 2, it has been recognised by the NSW Government that, 'where operationally feasible' it is government policy to ask someone to remove a 'face covering worn for reasons of modesty' only in the presence of someone of the same gender.<sup>127</sup> It appears that, in practice, government agencies will generally accommodate the wishes of women who routinely wear a niqab with whom they have dealings.

For example, some of the women we consulted told us that when having their driver licence photo taken, they had either gone to the Roads and Maritime Services office as it opened, or before opening time, in an effort to be photographed when there were fewer people in the office. They found that staff were generally happy to try to accommodate their wish for the photo to be taken with as few as possible male staff or clients being able to see their faces. They also reported positive experiences when going through Customs at the airport, as female customs officers were made available to view their face to be identified.

### 6.1.3 Current police policy and information documents

The NSW Police Force has not developed any SOPs following the introduction of the new law. However, the current 2012 NSW Police Force *South West Sydney Islamic Information Guide* states that police officers may consider 'using a police officer of the same gender as the subject if possible when items of clothing need to be removed for identification or searching purposes.'<sup>128</sup> The guide is available to all officers on the police intranet but is not currently provided to any particular officers as a matter of course. It is recommended, but not required, that officers consider the advice provided.

After the court case, and at the time the NSW Government was considering introducing legislation to address some of the issues raised, one LAC developed an interim SOPs regarding face coverings and identification. They provided guidance for situations where an officer needed to identify a woman wearing a niqab, including:

- Explain clearly to the woman the reason it is necessary to establish her identification,
- Explain that one of the following options will be exercised,
  - Request the woman to remove her veil for the purpose of making the statement ... ,
  - Arrange where possible the viewing of the woman is done by a female police officer,
  - Arrange where possible the viewing occurs in a private location,
  - Arrange where possible the viewing is done in the presence of a male relative.<sup>129</sup>

Following the introduction of the new law, officers in that LAC do not continue to refer to these SOPs for guidance.

### 6.1.4 Police practice when the power was used

In seven recorded uses of the power, a male officer made the initial request that the woman concerned, who was wearing a niqab, produce her driver licence. In two of these matters a female officer then viewed the woman's face to verify her identity.

In one matter a female officer was already present at the scene. The male officer asked the female officer to view the woman's face to complete the process of verifying her identification (see case study 1 in section 4.3). In the other matter, the woman demonstrated her reluctance to uncover her face by asking if she could show the male officers present her signature instead. The male officers responded by offering to call a female officer to the scene to verify the woman's identity (see case study 4 below).

#### Case study 4

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**Police officers stopped a vehicle to conduct a breath test. As they approached the vehicle they observed that the driver was wearing a niqab. The officers (who were all male) identified themselves. They told the driver that she had been stopped for a random breath test, and asked for her licence. She gave it to them.**

**The officers observed that the driver licence was a P-class licence, but there were no P plates displayed on the vehicle as required. They told the driver that her identity needed to be verified and that the law required her to uncover her face so this could be done.**

**The woman asked if they could verify her identity if she provided them with a sample of her signature instead. The officers explained that this would not be enough for them to identify her. The officers then offered to call for a female officer to come to the scene to perform the identity check. This was arranged and they waited 20 minutes for the female officer to arrive. Police placed a raincoat over the windscreen of the woman's car for additional privacy. The female officer verified the woman's identity and she was fined for failing to comply with the conditions of her P-class licence.**

In a third matter, the woman concerned queried whether a female officer might be present, suggesting that she would have preferred for the identification to be done by a female officer (see case study 5 below). In contrast to case study 4, the officer's response to the driver's hesitant expression of her wishes was to remind the woman of his lawful power to make the requirement.

#### Case study 5

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**A male officer pulled over a car for a minor traffic offence. The driver was wearing a niqab. The officer asked for her licence and said, 'Can you remove your veil so I can see this is you?' The driver asked, 'You don't have a female with you?' and the officer replied 'No'. The officer started to say, 'OK it's the law that you ...' then said 'OK' as it appears the driver lifted her veil at that point. The driver was issued with a traffic infringement notice for a minor offence.**

### 6.1.5 Police practice on other occasions

In our consultations, people related other examples of instances where a female officer was made available to view a woman's face. These were not recorded on the police Computerised Operational Policing System (COPS) and some may have occurred before the new law was introduced. Most involved a stationary random breath test site where a female officer was already present at the scene.

All the male officers we interviewed indicated that if a woman wearing a niqab requested a female officer, and there was one already present, they would, as far as practicable, arrange for that officer to view the woman's face. However, they gave varying views about what they would do if they did not have a female officer with them. As we have reported, this is the most common type of situation where the new law has been used.

Some officers thought it would be too inconvenient and impractical to enquire if a female officer could attend, or wait for one to come. One view was that having to wait would divert traffic officers from their other duties.

On the other hand, one officer acknowledged that this kind of inconvenience would be tolerated for a search, and another thought it was essentially no different from a search situation.

Other officers seem to take a pragmatic approach, informed by an understanding that these interactions formed part of a wider relationship with the public. One officer said that he is happy to call for a female officer in this circumstance, and that there is no point in offending someone's culture just to get the job done five minutes quicker.

There was some indication that a small number of officers might perceive a request for a female officer as a challenge to their authority. A small number also did not see a woman briefly uncovering her face as a particularly invasive process. This may make it difficult for them to understand a woman's reluctance to uncover her face for a male officer.

Some women commented that officers were polite and respectful when verifying identification. For example, one woman directed an email to the Office of the NSW Police Commissioner describing her positive experience with police:

I wear the full face veil and wanted to commend your officers on the polite and civil exchange that occurred. Two women asked the police officer coming to my car, to take the next car and I was attended to by two very respectful women to whom I uncovered my face and completed the breathalyzer test.

[W]ith all the bad press that was my first ever personal encounter with police in my 12 years of wearing the face veil. I found them courteous, polite and civil. I am now making a point to explain to the women I know who also wear the face veil that my experience proves you really can't allow the media to cloud your perceptions. We are all human and civility and mutual understanding and respect as human beings is the best solution.<sup>130</sup>

Some women also commented on past negative experiences with police and were concerned that this would be repeated in future interactions of a similar nature. However, we have not been made aware of any examples during the review period that raised any significant issues.

### 6.1.6 Submissions about amending LEPR

In our issues paper, we asked the question:

In your view, should LEPR be amended to require that, where a person requests that a police officer of the same sex be made available to view their face, such an officer should be made available, if reasonably practicable?

We received a number of submissions in support of changing the law in this way. For example, Daar Aisha Shariah College advised that participants who attended its consultation and workshop all indicated that they preferred that a female officer was made available to view their face where possible.

The United Muslim Women's Association wrote in its submission that:

The inclusion of such a requirement provides consistency between the various legislative provisions in NSW that confer powers to request the removal of face covering. Furthermore, it safeguards a person's right to privacy and ensures a consistent approach in the implementation of the powers. At present, the decision as to whether or not a police officer of the same sex should be made available is entirely up to the discretion of the particular officer.<sup>131</sup>

Legal Aid NSW, the Women's Legal Service and the NSW Council for Civil Liberties also supported this amendment, with the Council for Civil Liberties noting that:

Police should be instructed to make that offer themselves where an officer of the same sex is already available, or where the person objects to raising a veil without actually making the request for an officer of the same sex to be involved. The person, after all, may not be aware of the detail of the law.<sup>132</sup>

The NSW Police Force did not support any change, for the following reasons:

- The privacy safeguard and the *South West Sydney Islamic Information Guide* are sufficient to allow police officers to appropriately respond to situations where women request a female officer to view their face.
- It would place an unnecessary burden on police resources.
- An obligation to provide an officer of the same sex is not reasonable in all situations involving face coverings. Such an obligation might be exploited as a delaying tactic by individuals or groups who wear face coverings for reasons other than modesty.
- Officers would need to balance different factors in order to decide whether it was 'reasonably practicable' to wait for a female officer in a particular situation. Adding a further safeguard where they need to make such a decision increases the chance of their decisions then being retrospectively criticised by judicial officers<sup>133</sup>
- The Australian National Imams Council view, noted in its press statement (see 5.5.3), that 'Islamic women may remove their face covering to a male police officer for identification purposes if no female officer is present'.<sup>134</sup>

### 6.1.7 Recommendation to amend LEPR

We found that some officers already arrange for a female officer to view a woman's face, or check if someone is available, when the woman shows some reluctance to uncover her face (for example, see case study 4). Police information documents suggest that officers can consider this course of action, however we also found that some officers were less willing than others.

Under the current law, if the woman concerned feels insufficiently empowered to request a female officer, there is no requirement for a male police officer to offer one. Even if a woman makes such a request, there is no obligation for a male officer to consider it. So, even if it were reasonably practicable for a female officer to be made available, the male officer can insist that the woman show her face to him and he is not obliged to call a female colleague.

If the law was changed, it is possible police may receive more requests for a female officer and be obliged to consider whether these requests are reasonably practicable under the circumstances. As police have only recorded eight uses of the law over 12 months, and in some cases police already turn their minds to whether a female officer can be made available, we believe that any impact on resources would be insignificant.

Statements made by various Muslim organisations indicate that where a female officer is not available or present, it is acceptable for a woman to reveal her face to a male officer (see 2.5 and 5.5.3). However, the way in which these statements should be interpreted and applied to each particular operational situation that police encounter will vary. Additionally, it is possible that not all Muslim people will have the same theological interpretations on this issue. Consequently, the most advisable approach for police is, if a woman requests a female officer to view her face, to accept that her request is consistent with her personal religious beliefs and then decide whether it is reasonably practicable under the circumstances to satisfy her request.

We are of the view that treating women who need to remove their niqab for the purposes of identification in a similar way to people who need to remove their clothing for the purposes of being searched is a sound approach. As the impact on resources would be minimal, police officers should be in a position no different from other public officials faced with similar circumstances. We also note that the comparable ACT legislation includes a provision that a person may request that an officer of the same sex be made available, and an officer must take reasonable steps to comply with any such request.<sup>135</sup>

The NSW Police Force submitted that any new safeguard could be used to deliberately delay police operations. The evidence we have indicates that where the new law has been used, any delay to police operations is due to genuinely held concerns about being seen by a man, not due to any desire to deliberately obstruct police in carrying out their duties. However, noting the police submission that this may not always be the case in the future, our recommendation (see below) particularly emphasises that the proposed new safeguard would be limited in its application to women wearing a face covering for religious reasons. Additionally, as we have included the terms 'where practicable under the circumstances', the proposed safeguard would only be enforceable where it could be achieved under the operational conditions at the time.

We make the following recommendation:

## Recommendation

- The Attorney General consider amending the *Law Enforcement (Powers and Responsibilities) Act 2002* to include an extra safeguard that, where a woman wearing an item of clothing that covers her face for religious reasons requests that a female police officer be made available to check her identity, one will be made available if this is reasonably practicable under the circumstances.**

## 6.2 Privacy

Privacy is extremely important to women who routinely wear a niqab. Generally, people do understand that, if a female officer is not available, they have little choice but to uncover their face for a male officer. The information we have also shows that these interactions progress more smoothly where the officer is mindful of the need to check the woman's identity with as much privacy as possible.

When the new law was proposed, it was recognised that it was important for police to be respectful of people's need for privacy because of religious or cultural reasons.<sup>136</sup> There is a current safeguard in the new law that states that the viewing of the person's face must be conducted:

- in a way that provides reasonable privacy for the person if the person requests privacy, and
- as quickly as is reasonably practicable.<sup>137</sup>

During Parliamentary debate the Attorney General described the purpose of this safeguard as follows:

The bill provides that, as far as is reasonably practicable, police will endeavour to meet requests for privacy. For example, police may be investigating a serious assault in a public space. A witness, who is required to remove a face covering may request that they be taken back to a police station to afford them some privacy. This may or may not be reasonably practicable, depending on the circumstances ...

In such instances, police may have to decline the specific request but, to a practicable extent, may afford that privacy. They may be able to shield the person at the scene or find somewhere close where privacy can be provided. These legislative safeguards will be supported by a commissioner's direction explaining the bill and reinforcing the need to respect an individual's right to dignity and privacy.<sup>138</sup>

The Minister for Citizenship and Communities also explained that the issue of privacy was raised during community consultations:

... [we] talked about ensuring that the approach was non-discriminatory and also took into account the sensitivities of women wearing a burqa or niqab. I believe those discussions have been fruitful. The community asked for the legislation to be in no way discriminatory – and it is not – and for privacy considerations to be accounted for, and they have been ... as developed in discussion with the Muslim community, those who want to be identified privately for cultural or religious reasons can request to go to a police station.<sup>139</sup>

The safeguard on the provision of privacy was supported by each member of Parliament who debated the new law,<sup>140</sup> with one MP observing that:

This legislation aims to give police and other people the power to do their job properly into the future at the same time as taking into account the privacy of people and ensuring that they are not subjected to any humiliation or undue duress.<sup>141</sup>

### 6.2.1 Current guidance to police about affording privacy

Current guidance to police officers regarding privacy simply restates or rephrases the new law and provides very limited practical guidance. For example, the Commissioner's Policy Notice states that 'viewing the person's face must where practicable be conducted in a way that provides reasonable privacy for the person if he or she requests privacy (for example, at a police station)' and that 'police should be mindful of cultural, religious or similar sensitivities when exercising this power'.

The NSW Police Force *South West Sydney Islamic Information Guide* provides the most specific guidance to officers about how to afford privacy when it recommends that:

Police consider: ensuring that any removal of clothing for policing procedures is done in a private place and not in public. If you need to identify a Muslim woman in public, attempt to ensure that identification occurs out of the view of onlookers.<sup>142</sup>

### 6.2.2 Police practice during the review period

We found that some form of privacy was afforded in six of the seven cases where a woman was required to remove her niqab to be identified.

The most common method was to use a car to help shield the woman's face. In these matters the woman uncovered her face while sitting in the driver's seat of her car and looked out the window towards the officer standing outside. No bystanders would generally be able to see her face. On one occasion officers also placed a raincoat over the windscreen of the car to further shield the woman's face (see case study 4 in section 6.1.4).

In another matter, the positions were reversed so that the officer sat in the police car and the woman uncovered her face and looked in through the car window (see case study 6 below).

#### Case study 6

**Police pursued a vehicle that was apparently trying to avoid a stationary random breath testing site, and directed it to pull over.**

**When the officer approached the vehicle he observed that there were 10 passengers in the five-seater vehicle. There was a woman in the front passenger seat with a child in her arms and a number of people in the back seat, including children lying on the floor. No one was wearing a seatbelt.**

**The officer asked the driver, who was wearing a niqab, for her driver licence. He then asked her to uncover her face. She asked if this could be done behind a nearby house. The officer refused.**

**He did not pursue his requirement at that stage but asked her some other questions. It soon became evident that the driver's English was limited and two passers-by assisted by translating his questions.**

**Five minutes later, while sitting in the driver's seat of his vehicle, the officer asked one of the passers-by to call the woman over to his vehicle. The woman approached the passenger side window of the officer's vehicle and looked in. The officer again asked her to uncover her face so she could be identified. The woman asked the officer to close the rear window of the police vehicle, which was tinted, so her face was not visible to others. The officer did so, and confirmed her identity.**

**She was given a court attendance notice for 10 different traffic offences, which related to several passengers not wearing seatbelts, the condition of her vehicle and failing to comply with conditions of a P-class licence.**

In a further case, the woman had to show her face to more than one male officer. When we spoke with her about her experience, she told us that having more than one man looking at her face felt less private and more intrusive. She explained to us that 'they weren't rude or anything, they were polite' but she would have preferred that only one male officer had seen her face. She was new to wearing the niqab at the time and did not feel confident to raise this with the officers at the time. She explained that, after the incident, she thought about whether she should have asked the officers for more privacy and whether curiosity sometimes motivated officers to ask to see a woman's face (see case study 7 below).

### Case study 7

**Male officers pulled over a car for random breath testing. The driver was wearing a niqab and raised it for the random breath test. She later also uncovered her face so that her identity could be verified. More than one of the male officers saw her face during this process. One officer reported to us that he also asked to see the woman's hairline to check her hair colour.**

### 6.2.3 Definition of 'reasonable privacy'

Some women to whom we spoke were concerned that 'reasonable privacy' was not better defined in the new law. For example, one participant at the Daar Aisha Shariah College forum commented that:

The law is so vague. How do I know how many officers can view my face or what privacy I will be given? This should be in the law.<sup>143</sup>

The current privacy safeguard is consistent with other similar legislative provisions and the use of the word 'reasonable' is common in statute law. It is not unusual for police to apply laws drafted in this way. We have found no evidence that police officers have not exercised appropriate judgement in deciding how to provide people with 'reasonable privacy.' Moreover, more prescriptive wording might unnecessarily limit the options for officers to provide privacy.

For these reasons, we are of the view that the current privacy safeguard is couched appropriately.

### 6.2.4 How is reasonable privacy best afforded?

Some officers we interviewed who had not used the new law were unsure about how they would afford privacy in a public place. Other officers said that if women were in a car, anyone driving past would have their vision obscured.<sup>144</sup> They also suggested the back of a police truck, although they acknowledged the woman concerned may not be entirely comfortable in that space.<sup>145</sup>

Daar Aisha Shariah College suggested that identification procedures in a public space should be conducted in a woman's own vehicle, away from open spaces, or in a location where a woman can face an object that would shield her from the view of others.<sup>146</sup>

Although taking the woman concerned to a police station was discussed as an option in the parliamentary debates, none of the groups we consulted felt this would be preferable. It involves additional time and the complication of travelling back to a police station. However, it may be the only appropriate way to provide privacy to a woman wearing a floor length burqa, all of which would need to be lifted for her face to be seen.

### 6.2.5 Good practice in affording privacy

We agree with the approach of the officer who observed that if the woman who needs to be identified is in a car, and the police officer is looking in, this affords a practical level of privacy. The key elements are that:

- if the officers are all male, then only one of them should perform the identity check
- the identity check be performed so that the woman's face is out of the sight of passers-by
- if there are others present, the woman can face away from them and towards a wall or other structure.

In our view, police officers would benefit from additional information in guidance material that explains easy and practical ways that privacy can be provided and the reasons why privacy is particularly important to women who wear a niqab.

### 6.2.6 Should officers offer privacy whether or not it is requested?

In the submission from Daar Aisha Shariah College, they explain that:

An especially concerning element of this section of the Act is the obligation on an individual, who is asked by a police officer to remove their face covering for identification purposes, to have to 'request' of the police officer that privacy be afforded to them during the procedure. Consultation participants had a clear view about this stipulated requirement which we hope will be taken into consideration should any recommendations be made to Parliament on possible amendments to the legislation:

'So to have the person ... running the interaction, the police officer, who is actually the responsible party in that interaction, ... indicate to the person involved 'I understand what your circumstances are and let's work on this together,' come to the party first, sort of thing, I think will facilitate the process, rather than having the woman being the initiator of it – she may not know her rights, she may not be able to verbalise it, so if they go first – a whole lot better. We like that.<sup>147</sup>

As this issue was raised with us during our early consultations we posed the following question in our issues paper:

In your view, should police officers be required, as a matter of policy, to offer privacy to a woman wearing a face covering for religious reasons, as far as reasonably practicable, when officers require removal of such a face covering under section 19A LEPPRA?

Several submissions supported this change to the policy. For example, the Women's Legal Service wrote:

The experience of our clients demonstrates that many people in the community are unaware of their rights when they come into contact with the police. Additionally, women, particularly culturally and linguistically diverse (CALD) women, or women who have had previous negative engagement with authorities, may be reluctant to assert their rights by requesting privacy, even if they are aware that the law provides for such an entitlement.

We believe there will be little foreseeable burden placed upon police by making it a policy to offer privacy to people wearing face coverings as a matter of course, as far as is reasonably practicable.<sup>148</sup>

The United Muslim Women's Association commented that:

Australian Muslim women come from diverse educational, cultural and social backgrounds. These differences impact upon their understanding of the law and ability to seek their legal rights. It has been the experience of MWA that some Muslim women feel disenfranchised and are therefore uncomfortable seeking their rights or voicing their concerns. This is particularly compounded in circumstances when they are dealing with law officials.

Furthermore, some Muslim women come from cultural backgrounds in which there is a real fear and mistrust of Police and law enforcement officers. This militates against a Muslim woman's ability to request privacy when asked by a police officer to remove her face covering.<sup>149</sup>

The NSW Police Association suggested that any requirement to offer privacy 'could be addressed in guidelines or SOPs' but that 'it seems superfluous to require the officer to offer privacy if it is not requested. It is important, however, that the definition of privacy be flexible to take into account the practicalities of operational policing.'<sup>150</sup>

### 6.2.7 Views of the NSW Police Force

The NSW Police Force did not support any change to police policy that would require officers to offer privacy to a woman wearing a niqab for the following reasons:

- The intention of the legislation is to offer privacy when privacy is required and it would be inappropriate for police to put in place a policy that usurps the intention of the legislation. The legislation has dealt with this issue based on the operational setting in which police work, which may not always permit the viewing to be conducted in private.



- The requirement to offer privacy when it cannot reasonably be assured is not a realistic measure. Upon request an officer may explain why privacy is not reasonably practicable, but such an explanation of justification should not be made a matter of course when privacy has not been requested. Such a policy would then require an officer to explain why complete privacy was not being offered, even though it may not have been requested, and this could lead to further delay or disagreement.
- There are ... inherent difficulties in the NSW Police Force creating a different policy for use of legislative powers on a specific gender or cultural group. While each situation will need to be judged on its merits, the legislation must be applied equally. The proposal fails to acknowledge the broader application of face coverings, including on persons who cover their faces while operating motorcycles.
- The NSW Police Force already had in place several extensive multicultural programs that address interactions with women and certain cultural groups and it would be inappropriate to create a separate policy that attempted to apply a law differently to certain groups.<sup>151</sup>

A further submission that we received from Diversity Services, Department of Attorney General and Justice noted that 'if it becomes a requirement for police officers to offer such privacy, some individuals within the Muslim community could potentially abuse it thus making it difficult for police to carry out their duties.'<sup>152</sup>

### 6.2.8 Recommendation that officers should consider privacy

It is our view that police officers policing areas where the new law is more likely to be used would benefit from having guidance material explaining simple ways of achieving privacy, such as having the woman sit in her car while she uncovers her face, and explaining why having only one officer perform an identity check would be preferred and assist with compliance.

In a number of cases where the new law was used, the officers were aware of the need for privacy. We would expect that, with further education and guidance for officers, some form of privacy would be provided in most cases, whether or not it is requested.

Therefore, we make the following recommendations:

## Recommendations

2. **NSW Police Force policy should include the following requirements:**
  - that police should confirm with a woman wearing a face covering for religious reasons whether or not the physical circumstances in which she has been required to uncover her face to be identified provide adequate privacy
  - that any request made by any such woman for additional privacy be met if reasonably practicable
  - that a woman nonetheless be required to uncover her face in circumstances of limited privacy, if no provision for additional privacy is reasonably practicable.
3. **The NSW Police Force should include information in the *South West Sydney Islamic Information Guide* that, when viewing the face of a woman wearing a niqab to verify her identification:**
  - if the officers present are all male, where possible only one officer should view the woman's face
  - in a public space, possible methods for affording privacy include having the woman face towards a wall or sit in her car (if available).

## 6.3 Should people be warned that they can be arrested for not complying?

As discussed in chapter 3, when an officer exercises the power under the new law, they must follow certain procedures. These include giving certain warnings if the person does not immediately comply. Firstly, an officer must warn the person that they are required by law to comply with the request.<sup>153</sup> If they still do not comply, the officer must issue a second warning that a failure to comply is an offence.<sup>154</sup> The expectation is that, after being given this second warning, the person will be more likely to uncover their face.

### 6.3.1 What happened during the review period?

None of the seven women who were required to remove their niqab during the review period received a warning, as they complied before officers considered this necessary. In one instance, the officer began to say, 'It's the law ...' but stopped when the woman uncovered her face. In the eighth matter, a warning given to the young man was to do with

his failure to comply with the direction to move on. It is also possible, but unclear from police records, that the young man was warned in relation to his refusal to uncover his face.

### 6.3.2 Power of arrest

After an officer gives these warnings, as long as the person does not have any genuine medical reason for refusing to uncover their face,<sup>155</sup> a continuing refusal may constitute an offence. The officer could exercise their discretion and decide that they do not need to confirm the person's identity, or try to confirm it in a different way.

Alternatively, if the officer decides to penalise the person for committing the offence of refusing to comply with the requirement, the officer will then be faced with a somewhat circular dilemma, as they need to issue an infringement or court attendance notice but cannot confirm to whom they should address the notice. In practice, if the person has given them a driver licence, the officer could address the notice to the licence holder. However, this does carry the possibility that the penalty could be successfully challenged, on the basis that the person who committed the offence was not the licence holder. This is essentially what happened in the high profile case discussed in chapter 2.

Because of this, the only option at this point may be to arrest the person,<sup>156</sup> even though he or she may not have committed any other offence, or the other offence is minor (for example, to do with a traffic matter).

No incident of this type occurred during the review period. However, in our issues paper we discussed whether police should be required to communicate an additional warning – that the person could be arrested if they continued not to comply. One primary concern is that a woman may misunderstand that she can insist on having a female officer view her face, and refuse to uncover it for a male officer, not realising that she could be arrested for doing so. In our issues paper, we asked:

In your view, should LEPRA be amended to provide an additional warning to a person who refuses to remove their face covering (when required under section 19A) that the person's failure to comply with this requirement may result in their arrest?

### 6.3.3 Consultations and submissions

We found that most women we consulted knew of the existence of the new law, but did not have a detailed understanding of how it can be applied or the consequences for non-compliance. Most thought that they would simply be fined if they did not comply, but then queried how they could be fined if police had not seen their face.

They were not aware that they could be arrested for refusing to uncover their face, as many did not perceive it to be a crime, particularly in a situation involving a negative breath test, or if they had told an officer that they wished to be identified only by a female officer. Once this aspect of the law had been explained to her, one woman said:

I'm very confused, I'm very scared, I feel very vulnerable.... and I'm thinking if I'm very confused, so is everyone else. I do wear the face veil. I'm really scared to get out there and get in my car because I don't really know what's going to happen if I get in that car and the policeman spots me. The law is very vague ...<sup>157</sup>

All of the submissions from community organisations supported an amendment to LEPRA.

The Women's Legal Service NSW explained that:

Arrest may result in serious consequences for a person, both personally and professionally. It is good public policy to avoid arrests and charges being laid where it is reasonably practicable to do so.

It does not appear that requiring police to give such an additional warning prior to an arrest places any heavy burden on police in carrying out their duties. This is particularly so, given the relatively low number of times police have so far relied on their new powers under LEPRA.

In its submission, Daar Aisha Shariah College expressed its view that:

Yes, we view this as a critical component of a police officer's duty towards an individual who has been stopped for the purpose of having their identity established. An additional warning would be welcomed as comments and observations noted in the previous section of this report indicate that the majority of Muslim women who wear the face veil are not familiar with the legislation and may, in limited circumstances, perhaps through no fault of their own, place themselves at risk of arrest if they question or refuse the identification procedure. We believe that the harsh penalties which apply, should a person fail to comply with a requirement pertaining to the removal of a face covering, necessitate additional safeguards within the legislation to protect vulnerable members of the community who may not be familiar with its provisions.<sup>158</sup>

The Police Association also wrote:

Given the unique conditions of a possible offence under section 19B and the need to identify the person before the CAN [court attendance notice] can be issued, a further warning may be appropriate to potentially avoid the need for arrest.

### 6.3.4 View of the NSW Police Force

The NSW Police Force took the opposite view. They submitted that:

There is nothing to suggest that such an amendment is necessary. There have been no arrests in relation to section 19A and an additional warning would overcomplicate the series of warnings already required, including informing the subject person of the reason for exercising the power, asking for the person's cooperation, informing the person that they are required by law to comply with the requirement to remove the face covering and an additional warning that failure to comply is an offence. It should also be reasonably presumed that members of the community already know that they can be arrested for committing offences.

### 6.3.5 Conclusion

Although most stakeholders supported an amendment to LEPRA that introduced an additional warning regarding arrest, we also noted the NSW Police Force objection that such an additional warning would complicate the existing warnings. Further, we noted that no warnings have been given in relation to the new law to date, and no arrests have been made. We have therefore determined that there is insufficient evidence to support the inclusion of an additional warning regarding arrest in LEPRA at this point in time. The lack of awareness that has been identified regarding this issue is best addressed, at this stage, through the inclusion of information in community education strategies (see chapter 7).

## 6.4 Consistency of police practice

Police discretion is an important element of police practice. It gives police the flexibility to make decisions that are most appropriate in the circumstances. However, sometimes the way police exercise their discretion can be perceived by members of the public to lead to decisions that are inconsistent and confusing. Some of the women we consulted did not understand why they sometimes needed to provide identification when they were stopped by police, for example, for a random breath test, but not always. One woman said this made her feel uncertain about what the rules were, and what she was required to do. She described that on three different occasions where she was pulled over while driving her car:

- she was not asked for a licence or to uncover her face for identification after she participated in a random breath test
- she was asked for her licence (which she provided), but was not asked to uncover her face
- she was asked for her licence and to uncover her face (which she did). This was the only occasion where she had committed an offence.

In its submission, Daar Aisha Shariah College explained that some women who wear a niqab feel vulnerable as they cannot be certain as to what any particular officer that they encounter will require of them. The college gave further examples of 'the sheer diversity of experiences women have encountered' with police which included:

- A woman who, in a traffic situation, was pulled over and requested by a male police officer to remove her face covering for the purpose of having her identity established. The woman complied with the request, but was then asked to remove her face veil in front of two other male police officers also in attendance at the scene;
- A woman who was stopped by a male police officer for the purpose of undertaking a Random Breath Test (RBT) who subsequently called upon his female colleague to establish the woman's identity; and
- A woman who was stopped by a male police officer for the purpose of undertaking a RBT, but was not requested to remove her face-covering for the purpose of establishing her identity.

It does not appear to us that these perceptions indicate any unlawful police practices. In these kinds of situations, the factors that may affect an officer's decision about verification of a person's identity include:

- whether the person has committed an offence (for example, having passengers not wearing seatbelts)
- whether the driver licence provided is valid
- whether a female officer is readily available.

Promoting community awareness of the new law and the requirements that police must follow when exercising the power may help people better understand why they may have different experiences with different officers.

One purpose of the recommendations we have made in relation to female officers and privacy is that these procedural changes should help people feel more certain and less confused in future interactions with police of this kind.

## 6.5 Breadth of discretion under the law

Some people we consulted also held the view that the new power gave police too much discretion. They were concerned that some officers' personal views or lack of knowledge about the niqab might affect the way that they exercise this discretion.

People had a range of experiences with police. Some were positive, but others said their experiences led them to believe some police could show bias against them. At the time the new law was introduced there was also debate in NSW regarding whether face coverings, such as the burqa, should be banned altogether.<sup>159</sup> Although the new law was not designed to prohibit people from covering their faces, some women were concerned about the decision of government to interfere (in even a small way) with something so personal and private, that is a decision about what parts of their own body they choose not to show in public.

One woman explained how, although she saw the new law as reasonable, she was concerned it could still be used to make her show her face to an officer where he had no need to identify her:

... The car comes along, and it's a man or a woman ... does not wear the veil. So he comes and says I'm a police officer, I'm going to test you for that, here you go, breathe ... and they do, and go along on their way. I come along and he says I need to identify you, can you please unveil, and I will unveil, but why does he need to identify me before the breath-testing when the other person was not even asked what their name is or produce your licence. So I don't think the law is vilifying and I don't feel vilified, but in this circumstance I do, because the other person was not being asked to be identified - don't even need to know your name, don't even see your licence, but for you, you have to unveil for me and I have to identify your licence, and then breath-testing.<sup>160</sup>

Daar Aisha Shariah College, in its submission, expressed concerns that some provisions of the law, like the term 'reasonably practicable'<sup>161</sup> are 'wide open to interpretation by individual police officers'. The College commented that:

We would contend that the availability of such wide and discretionary powers with limited definition and restrictions necessitates a review as they create a significant degree of uncertainty in relation to the practicalities of the Act's application for the police, who are charged with enforcing the Act, and the individuals to whom the LEPR identification powers apply. From a cultural and religious perspective, this reality offers little comfort to Muslim women who are more likely to feel the brunt of the legislation than any other person or group of persons within the state of NSW.<sup>162</sup>

The College further commented that:

On the other hand, we appreciate that a certain degree of flexibility within the law is necessary to enable police officers to apply some discretion in the use of their powers as required. We would still maintain, however, that this approach needs to be balanced with a more structured and aligned legislative and policy framework - which guides police officers in their application of the LEPR - than is currently available. This is the safest means of ensuring that interactions between police officers and affected community members (some of whom may be particularly vulnerable due to language barriers or lack of confidence in dealing with authority figures including law enforcement officers etc.) are governed appropriately in all circumstances.<sup>163</sup>

We are of the view that none of the officers in the seven recorded uses of the law where a woman wearing a niqab was involved applied their discretion unfairly. However, we do not have sufficient evidence to draw any firm conclusions about how discretion in this area is being used by police.

The focus of our recommendations is about any future use of the new law. In our view, the changes we have recommended should give police more precise structure and guidance around how to undertake the routine task of verifying identification, and exercise their discretion around requests (such as for further privacy) in a respectful manner.

No laws or policy can guarantee a power will never be used inappropriately. However, the complaints process is the accountability mechanism through which such misconduct can be addressed. We will monitor, through our oversight of the police complaints process, whether there is any evidence in the future that police are using the new law in a way that is inappropriate.

## 6.6 Complying with current LEPR procedural requirements

There were three occasions where the new law was used during the review period where the officer involved did not provide all of the information to the driver that he was required to under LEPR. On two occasions the officer did not tell the driver his name and place of duty. On another occasion the officer did not tell the driver why he was requesting that she uncover her face.

We found that women who wear a niqab generally accept that, on occasion, they will need to uncover their face to be identified by a police officer. The purpose of LEPR procedural requirements are to ensure that a police officer properly communicates with the person to whom he or she is directing a requirement, so that the person can better understand what is happening. It therefore seems to us that the process of requiring removal of a face covering would be much clearer and respectful if it was made formally as an exercise of the power under the new law. This

level of formality means that procedural requirements under LEPRA should be followed, which gives both police officers and women wearing a niqab clear rules about each party's roles and responsibilities.

We therefore make the following recommendation:

## Recommendation

- 4. NSW Police Force officers should be reminded that they must apply section 201 LEPRA safeguards whenever they use the new law by requiring a person to uncover their face to be identified, including on occasions where they use it in conjunction with random breath testing.**

## 6.7 Recording future uses of the power

As reported in chapter 4, we received information that there had been occasions during the review period where the new law was used but no record was made of that use.

Given the sensitivities of the new law, and the fact that the review period may not have captured the full range of use of the power, it is recommended that the NSW Police Force maintain its existing policy that each instance where the new law is used must be recorded.

Each record should include details of the type of face covering and privacy issues, as required in the COPS incident category for the new law. Officers should be reminded that they are required to record any instances where the new law is used, including instances where there has been no offence committed.

## Recommendation

- 5. The NSW Police Force should remind officers that they are required to record, in the relevant Computerised Operational Policing system incident category, each instance where the new law is used, regardless of whether any type of offence is also recorded.**

## 6.8 Good practice when interacting with a woman wearing a face covering for religious reasons

### 6.8.1 Breath testing and identification

From the case studies and submissions, as well as the case discussed in chapter 2, it appears that random breath tests are one of the most common situations where women who wear a niqab may come into contact with police officers. In these situations, there is a potential for misunderstanding about whether the woman needs to uncover her face only to be identified, or also to speak or blow into the machine that tests alcohol content. There is also potential for a woman who is being tested for the first time (for example, a new driver) to misunderstand why the officer is reaching into her car window.

In the incident discussed in section 2.1, which involved a breath test, the complainant alleged that the police officer had 'moved closer to [her] in a threatening manner' and that the way he 'moved his hand close to [her] veil' made her feel that 'he was going to rip it off [her] face', causing her 'fear'.<sup>164</sup> There was not complete ICV footage because the moments described by the complainant took place when the officer put his hand in through her car window, out of sight of the camera.

During our consultations, one traffic officer told us that as a result of viewing the video footage of that incident, he now advises other officers to be very cautious about placing their hand or body within the window of a car when interacting with a driver wearing a niqab. This kind of practice would be aimed at avoiding any misunderstanding about the reason they are placing their hand close to the person's face.

### 6.8.2 Police procedures for breath testing

The first stage of random breath testing often involves an officer administering a 'passive' breath test, by placing an alcoholizer device near the driver's mouth. The driver is asked to speak, for example to count to ten, and the device indicates whether any alcohol is detected. Before administering this passive test, the Police Handbook requires officers to 'instruct the driver to speak into the device so that a sample of their breath can be obtained'.<sup>165</sup>

If the passive test indicates that alcohol is present, officers administer a further 'direct' breath test. This involves the driver blowing through a mouthpiece attached to the alcoholizer. Before administering the direct test, officers are required to make the following demand:

In accordance with the provisions of the *Road Transport (Safety and Traffic Management) Act 1999*, I require you to undergo a breath test for the purpose of indicating the concentration of alcohol present in your blood and I direct you to exhale air from your lungs directly into this approved device until I direct you to stop.<sup>166</sup>

Many drivers, including some who wear a niqab, may not proceed past the passive test and so would not receive this formal demand.

### 6.8.3 Good practice

Officers should be mindful of the personal space of *all* members of the public, although we found this to be a particularly sensitive issue for women who wear a niqab. Any potential misunderstandings can be overcome if the officer communicates precisely what they are doing, what they are requiring the woman to do, and why.

We therefore made a draft recommendation that officers, when requiring that a woman uncover her face, should advise the woman when they have finished verifying her identification and that she may cover her face again. Further, that officers administering a random breath test to a woman who wears a niqab should advise the woman that, in order to administer the test, they will need to place their hand near the woman's mouth.

When we provided the NSW Police Force with our draft recommendation, Deputy Commissioner Kaldas responded that:

There is no evidence that such requirements are necessary. Furthermore, the form of demand for a random breath test coupled with the nature of the device makes it clear that the device needs to be placed near a person's mouth.<sup>167</sup>

While we agree that many people are likely to realise from an officer's instruction before a passive test that the device will be placed near their mouth, it is our view that breath testing, and verification of identification during this process, remains a situation where misunderstandings and confusion may arise. Rather than require specific actions or phrases of officers in this situation, we have recommended that police policy set out good practice in such interactions.

## Recommendation

6. NSW Police Force policy should contain the following advice in relation to interactions with women who wear a niqab:

- if an officer has required a woman to uncover her face, it is good practice to indicate when he or she has finished verifying the woman's identification and communicate that she can cover her face again
- if an officer is conducting passive breath testing, it is good practice to explain that he or she will need to place the alcoholizer device close to the woman's mouth to conduct the test.

## 6.9 Why viewing a photo is different to viewing a person's face

One issue raised by some officers during consultations was that, if they could already see a woman's face on her licence, they were not sure why the woman saw it as different, or worse, for them to see her actual face when they needed to identify her. We attempted to clarify this issue during our consultations, as it is potentially relevant to a male officer's willingness to call a female officer if requested, which was an issue raised by a number of women during consultations.

Some information that we received showed that some women who wear a niqab are sensitive to even having their identification photo seen by a man who is not a close relative. One woman commented she would prefer that a male officer did not see her licence photo as she felt this was equivalent to him seeing her face.

A male officer also described a situation that occurred after the introduction of the new law where he had asked a woman driver for her licence and her male passenger had unsuccessfully tried to prevent him seeing the photograph. Case study 8 (see below), drawn from an interview with a female officer, also demonstrates that viewing of a woman's photo may be a sensitive issue.

### Case study 8

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**A female officer attended a minor traffic collision and asked to see the licence of a woman wearing a niqab. The woman's husband was present and showed the female officer the licence, which had the photo obscured by tape. The husband agreed to peel back the tape so the female officer could view the woman's photo. The woman then uncovered her face as well, so the female officer could verify her identity. The female officer commented that a male officer in this situation may have encountered more obstacles in going through this process of identification.**

Other women did not have as strong objections to a male officer seeing their identification photo, with one describing the process of a male officer viewing her face, in contrast to her photo, as much more 'intimate'. In addition to the discomfort of having a man physically proximate to a woman's uncovered face, one woman explained that on any particular day, she may be wearing more jewellery or other adornments, or make up, than on the day her photo was taken. This meant that the man looking at her face could see extra adornments only meant to be viewed by her husband, that he would not have been able to see if he only checked her photo.

It may be useful for police to have a better understanding of why women who wear a niqab feel that an officer viewing their face in person is a more invasive process than looking at their photo. We therefore make the following recommendation:

### Recommendation

7. The NSW Police Force includes an explanation in the *South West Sydney Islamic Information Guide* as to why women who wear a niqab find an officer viewing their face as more invasive than viewing a driver licence photo.

## 6.10 Advice to officers regarding the *South West Sydney Islamic Information Guide*

As we noted in sections 3.5 and 6.1.3, the *South West Sydney Islamic Information Guide* is a guide, rather than an official policy, that is available to all police on the NSW Police Force intranet. Deputy Commissioner Kaldas has explained that this document is 'intended for probationary constables as part of their orientation to South West Sydney'.<sup>168</sup>

In our view any officers newly deployed in the South West Sydney Region would probably benefit from the information contained in the guide, as they may not be experienced in policing in areas with a higher proportion of residents who are Muslim. We have recommended that all such officers be made aware of the guide when they commence duties in that region. Noting that Traffic and Highway Patrol Command officers stationed within this region have been most likely to use the new law, we have included these officers in our recommendation.

### Recommendation

8. Officers newly deployed to locations in the South West Sydney Region, including those attached to Local Area Commands and those attached to Traffic and Highway Patrol Command who are based at police stations in this region, should be made aware of the *South West Sydney Islamic Information Guide*, and its location on the NSW Police Force intranet, when they commence duties.

## Endnotes

123. We note, however, that several members of Parliament made comments related to this issue. For example, the Hon. Pru Goward MP, NSWPD, (Hansard), Legislative Assembly, 14 September 2011, pp. 5635-5636; The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 25 August 2011, p. 4716 and the Hon. Helen Westwood AM MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5766.
124. For example, the Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 25 August 2011, p. 4717 and the Hon. Michael Gallacher MLC, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5752.
125. Section 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides a definition of 'ordinary search'.
126. See section 32(7) of LEPRA, which states that a search must be conducted by a police officer or other person of the same sex as the person searched or by a person of the same sex under the direction of the police officer or other person concerned.
127. See Department of Premier and Cabinet, *Policy on Identification and Full Face Coverings for NSW Public Sector Agencies (M2012-01)*, January 2012, [http://www.dpc.nsw.gov.au/announcements/ministerial\\_memoranda/2012/m2012-01\\_policy\\_on\\_identity\\_and\\_full\\_face\\_coverings\\_for\\_nsw\\_public\\_sector\\_agencies](http://www.dpc.nsw.gov.au/announcements/ministerial_memoranda/2012/m2012-01_policy_on_identity_and_full_face_coverings_for_nsw_public_sector_agencies). Also see chapter 2 of this report for further discussion about government policies.
128. Education & Training Command (Field Support Command), *South West Sydney Islamic Information Guide*, NSW Police Force, 17 October 2012, p. 26.
129. Campsie Local Area Command, *SOPs for viewing the face of a veiled woman*, 4 July 2011.
130. Email from Ms N Rose, Director, Office of the Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 25 September 2011.
131. United Muslim Women's Association submission, 22 February 2013.
132. NSW Council for Civil Liberties submission, 19 February 2013.
133. NSW Police Force submission, 28 February 2013.
134. Correspondence from Mr N Kaldas, Deputy Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman, 3 June 2013.
135. *Road Transport (General) Act 1999* (ACT), s58B(2), (3). See further details in chapter 2 of this report.
136. See the Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 25 August 2011, p. 4717 and the Hon. Victor Dominello MP, NSWPD, (Hansard), Legislative Assembly, 13 September 2011, p. 5515.
137. LEPRA, s19A(3)(b).
138. The Hon. Greg Smith SC MP, NSWPD, (Hansard), Legislative Assembly, 25 August 2011, p. 4717.
139. Mr Victor Dominello MP, NSWPD, (Hansard), Legislative Assembly, 13 September 2011, p. 5515.
140. For example, the Hon. Victor Dominello MP, NSWPD, (Hansard), Legislative Assembly, 13 September 2011, p. 5515; Mr Kevin Connolly MP, NSWPD, (Hansard), Legislative Assembly, 12 September 2011, p. 5459; Dr Geoff Lee MP, NSWPD (Hansard), Legislative Assembly, 12 September 2011, p. 5463; Mr Andrew Fraser MP, NSWPD (Hansard), Legislative Assembly, 14 September 2011, p. 5630.
141. Mr Chris Patterson MP, NSWPD, (Hansard), Legislative Council, 15 September 2011, p. 5633.
142. Education & Training Command (Field Support Command), *South West Sydney Islamic Information Guide*, NSW Police Force, 17 October 2012, p. 26.
143. Face Coverings and the Law Forum hosted by Daar Aisha Shariah College, Sydney (Auburn), 16 December 2012.
144. Interview with NSW Police Force officer, July 2012.
145. *ibid.*
146. Daar Aisha Shariah College submission, 21 February 2013.
147. *ibid.*
148. Women's Legal Service submission, 25 February 2013.
149. United Muslim Women's Association submission, 22 February 2013.
150. NSW Police Association submission, 6 February 2013.
151. Correspondence from Mr N Kaldas, Deputy Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 28 February 2013.
152. Submission from Diversity Services, Department of Attorney General and Justice, 1 March 2013.
153. LEPRA, s. 201(2C)(a).
154. LEPRA, s. 201(2C)(b).
155. LEPRA, ss. 19B(2) and (3).
156. Section 99(3)(a) of LEPRA authorises police to arrest a person to ensure the appearance of the person before a court in respect of the offence.
157. Face Coverings and the Law Forum hosted by Daar Aisha Shariah College, Sydney (Auburn), 16 December 2012.
158. *ibid.*
159. See for example, 'Ban the burqa protest offends Sydneysiders', *Seven News*, Sydney, 2 April 2012, <http://au.news.yahoo.com/a/-/newshome/13326305/ban-the-burqa-protest-offends-sydneysiders/>; M Khoury, 'The law speaks: Take off that burqa', *CNN Travel* (online), 5 July 2011, viewed on 22 April 2013, <http://travel.cnn.com/sydney/life/law-speaks-take-burqa-333128> and B Lane, "'Against policy' to ban burqa", *The Australian* (online), 5 November 2011, viewed on 22 April 2013, <http://www.theaustralian.com.au/higher-education/against-policy-to-ban-burqa/story-e6frgcjx-1226184768689>.
160. Face Coverings and the Law Forum hosted by Daar Aisha Shariah College, Sydney (Auburn), 16 December 2012.
161. Section 19A(3)(b)(ii) of LEPRA states that a person's face must be viewed as quickly as reasonably practicable in the circumstances.
162. Daar Aisha Shariah College submission, 21 February 2013.
163. *ibid.*
164. *R v Carnita Matthews* (Campbelltown Local Court, Mr Rabbidge LCM, 19 Nov 2010), p. 13.
165. NSW Police Force *Police Handbook*, Chapter B, Breath Tests and Analyses, 'Using Alcolizers'.
166. *ibid.*
167. Correspondence from Mr N Kaldas, Deputy Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 3 June 2013.
168. Correspondence from Mr N Kaldas, Deputy Commissioner, NSW Police Force, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 3 June 2013.



## Chapter 7. Awareness of the new law

Raising awareness of the new law and other laws relating to identification can help police officers achieve cooperation with requirements to remove a face covering. If people understand that the new law exists and why, it is less likely that either the women being asked to uncover their face, or concerned passers-by, will challenge the police's power to require that this be done. This makes the job of checking a person's identity much more straightforward, and reduces the potential for conflict.

We found during our consultations that knowledge and understanding of the new law was relatively low amongst women who wear a niqab. The need to increase awareness was previously raised at the CRC's Working Party prior to the new law and during parliamentary debate.

In this chapter we discuss ways that the community could be better educated about these issues.

### 7.1 Community awareness of the new law

When we spoke to police, some police officers expressed the view that women who wear a niqab and the broader Muslim community were aware of the new law because of the high profile case that led to it being introduced. Other officers who had used the power during the review period advised us that the women involved appeared to know of the new law, although they did not know the extent of the women's knowledge.

In contrast, the responses we received from the Muslim community suggested a minimal level of awareness among women who wear a niqab about the provisions of the new law. One Muslim women's group expressed concern about the lack of awareness of the new law amongst women who wear a niqab. They stated that:

[It] was one of the more prominent issues to have emerged from the consultation and workshop held with Muslim women, and it is of grave concern to us because of the disproportionate impact the LEPR has had on Muslim women to date and its likely continued effect into the future. Most participants were unaware that the legislation had even been passed by Parliament; only a small minority of women who were asked regarded themselves as having been well-informed about the law prior to attending the consultation.

Many women were not aware of specific provisions within the legislation such as the requirement that police need a valid reason to ask a person for their identification. Most were disheartened by the fact that little to no community engagement was facilitated by NSW Police, with the support of community leaders, to inform the groups most likely to be affected, about the introduction of the new law and what it would mean for them (and yet, according to Section 19 (A) (3) of the Act, a person who prefers to have their identification established privately must request this from the police officer carrying out the procedure).

We were advised by participants that they felt better informed about the LEPR as a result of having attended the consultation, and that they had since become more confident in dealing with situations where they would be required to remove their face veil for identification purposes.<sup>169</sup>

### 7.2 Need for further community education

There was agreement across every stakeholder group we consulted that there is a need to further educate women who wear a niqab and the wider Muslim community about the new law. For example, Daar Aisha Shariah College commented that:

We identified an unambiguous need for greater engagement between police and the community, and we are currently investigating ways in which we can facilitate this critical dialogue and relationship-building exercise - we are clear on wanting to work with the law, not against it!<sup>170</sup>

Similarly, the United Muslim Women's Association stated:

At the moment, there is some degree of uncertainty about the legislation's operation and implementation. Therefore, the MWA strongly recommends that information is made available to all affected stakeholders, especially the Police and Muslim women that can help them to better understand the legislative amendments and how they affect them.<sup>171</sup>

In this report we make a series of recommendations to place more responsibility on police to make the process of requiring a woman to remove her niqab easier for her. If people are aware of the responsibilities of police, for example, to provide privacy if requested and if it is reasonably practicable, then they may feel more confident to communicate what they would like, in order to feel most comfortable under the circumstances. Women who are wearing a face covering and any others present will also be clearer on the requirement to uncover their face under the law and the limits that may apply when they make requests for privacy.

Some people we consulted thought that police had a role to play in educating the Muslim community and women who wear a niqab about the new law. In our view, it is important that the relevant local community plays a key role in the development of any such strategy.

### 7.3 Current strategies for educating the community

During the past year, seminars and workshops have been arranged by organisations such as Daar Aisha Shariah College, with some participation from our office and the NSW Police Force, to inform women about the new law and how it operates. The college also liaised with us during the course of the review to inform us about the experiences that women have had with the new law.

We are also aware that the United Muslim Women's Association recently received a grant from the CRC to develop a resource kit that is aimed at the NSW Muslim community and other relevant stakeholders to assist their understanding of the new police powers and other laws related to face coverings and identification. The kit will be available in both print-form and online to make it accessible to a larger number of people. Information sessions are also planned.

### 7.4 Police involvement in community education

Many officers we spoke with reported that they have found that women who wear a niqab are generally law-abiding and compliant. This may be one factor that contributes to the low number of uses of the law and why a good proportion of the officers we interviewed indicated that the new law is relatively insignificant when compared to other policing issues and powers that they encounter on a daily basis.

The particular sensitivities associated with the new law do, however, present an opportunity for police to engage with women who wear a niqab and with the broader Muslim community. Although a number of the LACs we visited are engaging with their local communities through a range of programs and strategies, women who wear a niqab appear to be a group with whom police have had minimal contact. There also do not appear to be any existing programs and strategies that specifically focus on issues related to the new law.

It seems that there is scope for further police involvement in community education strategies, primarily through participation in education associated with the resource kit being developed by the United Muslim Women's Association.

### 7.5 Raising awareness

There are various strategies that can be pursued to raise community awareness of the new law, and how it may impact on certain groups of people, for example, disseminating information through the local media and community events.

It seems to us that engaging with the Muslim community about the process of identifying women who are wearing a niqab would be particularly useful. We noted that in some of the matters we reviewed, the woman's husband was part of the interaction. It is therefore important that the information is made available not only to women who routinely wear a niqab, but to their husbands and other members of their family, many of whom will be concerned that her dignity and modesty is preserved.

As the CRC has funded the development of a resource kit, and it is anticipated that information sessions will be run using this kit, it is important that police contribute their knowledge and perspective, where appropriate, to these strategies.

We have formed the view that police should also integrate information regarding the new law into their existing community engagement strategies for the Muslim communities in those key LACs with higher Muslim populations. We would suggest any such strategy involve consultation with the relevant local councils, mosques, community leaders, such as Muslim scholars, and community groups.

The information that we have gathered showed that the issues that women who wear a niqab were least knowledgeable about included the following:

- the new law does not require the police to make a female officer available to look at a woman's face
- the new law includes a requirement that the identity check should take place with privacy (if requested) and as quickly as possible, in the circumstances
- the circumstances in which women could be asked to uncover their face, which extend beyond situations where they are pulled over while they are in a car
- what could happen if a woman continued to refuse to uncover her face (including the potential to be arrested).

We would expect that any NSW Police Force communications strategy would take into account these findings.

We make the following recommendations:

## Recommendations:

9. **The NSW Police Force integrates information regarding the new law into their existing community engagement strategies for the Muslim communities in those key Local Area Commands with higher Muslim populations.**
10. **The NSW Police Force participates, where invited and appropriate, in any education strategies regarding the new law developed by relevant community groups, including those strategies associated with the resource kit that has been funded by the Community Relations Commission and is currently being developed by the United Muslim Women's Association.**

Another strategy that was suggested to us during consultations was the possibility of educating people who wear face coverings, in particular women who wear a niqab, about the new law when they obtain their driver licence. It was suggested that this could be done by Roads and Maritime Services (RMS). We wrote to RMS and asked whether the suggestion would be practicable. RMS advised that it:

... would be willing to provide advice to customers concerning removing their face covering if they are relying on their driver licence as proof of identification. RMS is also willing to provide information about the requirements of the driver licence holders to remove face coverings when required by the NSW Police Force. RMS is prepared to develop public education materials which would be available for customers at NSW motor registries at the time of enrolment and licence renewals.<sup>172</sup>

As most uses of the new law have involved traffic matters, the issuing of a new licence appears to be a key point in time when women who drive and who wear a niqab could receive information about the new law. We have therefore recommended that RMS develop public education materials, in consultation with the CRC and other relevant stakeholders that could be provided to women who wear a niqab at this time. RMS has indicated that it supports this recommendation.<sup>173</sup>

## Recommendation

11. **Roads and Maritime Services develops public education materials, in consultation with relevant stakeholders including the Community Relations Commission and representative organisations, to be distributed to women who wear a niqab when they are issued with a new driver licence.**

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## Endnotes

169. Daar Aisha Shariah College submission, 21 February 2013.

170. *ibid.*

171. United Muslim Women's Association submission, 22 February 2013.

172. Correspondence from Mr P Duncan, Chief Executive, Roads and Maritime Services, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 23 November 2012.

173. Correspondence from Mr P Duncan, Chief Executive, Roads and Maritime Services, to Ms Linda Waugh, Deputy Ombudsman (Police and Compliance), 5 June 2013.

## Chapter 8. Conclusion

Confirming a person's identity is usually a relatively straightforward process for police officers. The process is more complicated where a person's face cannot be readily seen. The new law was introduced to make it clear that police should not be hindered if they need a person to remove something that is covering their face.

In our review, we found that the new law was almost exclusively used to assist in the identification of Muslim women wearing a niqab. The evidence showed that if a female officer was available to perform the identification, the process would go smoothly, as long as the woman could uncover her face out of sight of any male bystanders. The main challenges arose when a male officer made the request.

It will not always be reasonably practicable for a female officer to perform the identification. All of the matters were traffic matters, where the officers involved were usually working in patrol cars or at random breath testing sites. We have therefore made recommendations to improve the process that will be primarily relevant for male officers who need to use the new law. In particular, we believe that clear and respectful communication, about what the officer requires and what steps can be taken to maintain the privacy and dignity of the woman, are the key.

While the new law has been used infrequently, the court case discussed in chapter 2 highlights how some situations where it may be used assume greater significance. It is therefore critical that police officers are equipped to handle these kinds of interactions skilfully. In this way, officers are best placed to avoid unnecessary conflict when carrying out a routine procedure.

To allow the NSW Police Force to monitor future use of the new law, and compliance by officers with procedural safeguards, we have recommended that officers be reminded that all uses of the new law should be recorded, even where no offence has been committed.

### Recommendations

12. **Within 12 months of the tabling of this reports, the NSW Police Force report to the NSW Ombudsman on the progress it has made to implement recommendations 2 to 10.**
13. **Within 12 months of the tabling of this reports, Roads and Maritime Services report to the NSW Ombudsman on the progress it has made to implement recommendation 11.**

# Appendices

## Appendix A: *Law Enforcement (Powers and Responsibilities) Act 2002 No 103*

### Part 1 Preliminary

#### 3. Interpretation

(1) In this Act: ...

**face** means a person's face:

- (a) from the top of the forehead to the bottom of the chin, and
- (b) between (but not including) the ears.

**face covering** means 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 partly).

### Part 3 Powers to require identity to be disclosed

#### Division 4 Removal of face coverings for identification purposes

##### 19A Power of police officer to require removal of face coverings for identification purposes

(1) A police officer may require a person to remove any face covering worn by the person so as to enable the officer or another police officer to see the person's face if:

- (a) the person has been lawfully required (whether under this or any other Act or a statutory instrument) by the officer requiring the removal of the covering to provide photographic identification, or
- (b) the person has otherwise been lawfully required (whether under this or any other Act or a statutory instrument) by the officer requiring the removal of the covering to identify himself or herself or provide other identification particulars.

**Note.** Section 201 and subsection (3) set out safeguards relating to such a requirement.

(2) A requirement may be made of a person under this section based on a lawful requirement of a kind referred to in subsection (1) (a) or (b) whether or not the person has complied with that lawful requirement.

(3) A police officer who requires a person to remove a face covering under this section must, as far as is reasonably practicable, ensure that the following procedures are followed:

- (a) the police officer must ask for the person's co-operation,
- (b) the viewing of the person's face must be conducted:
  - (i) in a way that provides reasonable privacy for the person if the person requests privacy, and
  - (ii) as quickly as is reasonably practicable.

(4) It is sufficient compliance with a requirement made under this section if only so much of the face covering as prevents the person's face from being seen is removed.

(5) The removal of a face covering in compliance with a requirement made under this section, or the viewing of a person's face following any such removal, does not constitute the carrying out of a search of a person for the purposes of this Act.

(6) In this section:

**lawfully required** means lawfully required or requested to provide the identification or information concerned in circumstances where a failure or refusal to comply with a requirement or request of that kind may constitute an offence.

**photographic identification** includes (but is not limited to) any of the following:

- (a) a driver licence (within the meaning of Part 2 of the *Road Transport (Safety and Traffic Management) Act 1999*),

- (b) a Photo Card (within the meaning of the *Photo Card Act 2005*) or any other kind of photo identity card (wherever issued),
- (c) a passport (wherever issued),
- (d) any other licence, permit or authority bearing a photograph of its holder (wherever issued),
- (e) any other identification with a photograph that is identification of a kind prescribed by the regulations.

#### **19B Failure of person to remove face covering when required**

- (1) A person who is required by a police officer in accordance with sections 19A and 201 to remove a face covering must not, without special justification, fail or refuse to comply with the requirement.  
Maximum penalty:
  - (a) in the case of a person who is required to remove a face covering following a request made to the person under section 14 (Power of police officer to request disclosure of driver or passenger identity)—50 penalty units or 12 months imprisonment, or both, or
  - (b) in any other case—2 penalty units.
- (2) A person has a special justification for not removing a face covering if (and only if):
  - (a) the person has a legitimate medical reason for not removing the face covering, or
  - (b) the person has any other excuse for not removing the face covering that is an excuse of a kind prescribed by the regulations.
- (3) The onus of proof of a special justification lies on the person claiming to have the special justification.

#### **19C Division does not limit other police powers**

The provisions of this Division do not limit any power that a police officer may have (apart from this Division) to require a person to remove a face covering.

### **Part 15 Safeguards relating to powers**

#### **201 Supplying police officer's details and giving warnings**

(cf *Crimes Act 1900*, s 563, *Police Powers (Vehicles) Act 1998*, s 6)

- .....
- (3) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):
- ...
- (g) a power to request a person to disclose his or her identity or the identity of another person (including a power to require the removal of a face covering for identification purposes) ...

**Note:** Please see Appendix D for more information on section 201.

## Appendix B: **Law Enforcement (Powers and Responsibilities) Act 2002 No 103**

### Part 19      **Miscellaneous**

#### **242B Monitoring of operation of Division 4 of Part 3 by Ombudsman**

- (1) For the period of 12 months after the commencement of Division 4 of Part 3, the Ombudsman is to keep under scrutiny the exercise of the functions conferred on police officers under that Division.
- (2) For that purpose, the Ombudsman may require the Commissioner of Police to provide information about the exercise of those functions.
- (3) The Ombudsman must, as soon as practicable after the expiration of that 12-month period, prepare a report of the Ombudsman's work and activities under this section and furnish a copy of the report to the Minister, the Minister for Police and Emergency Services and the Commissioner of Police.
- (4) The Ombudsman may in the report identify, and include recommendations for consideration by the Minister about, amendments that might appropriately be made to Division 4 of Part 3 with respect to the exercise of functions conferred on police officers under that Division.
- (5) The Ombudsman may at any time make a special report on any matter arising out of the operation of Division 4 of Part 3 to the Minister.
- (6) The Minister is to lay (or cause to be laid) a copy of any report made or furnished to the Minister under this section before both Houses of Parliament as soon as practicable after the Minister receives the report.
- (7) If a House of Parliament is not sitting when the Minister seeks to furnish a report to it, the Minister may present copies of the report to the Clerk of the House concerned.
- (8) A report presented to the Clerk of a House:
  - (a) is, on presentation and for all purposes, taken to have been laid before the House, and
  - (b) may be printed by authority of the Clerk of the House, and
  - (c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
  - (d) is to be recorded:
    - (i) in the case of the Legislative Council—in the Minutes of the Proceedings of the Legislative Council, and
    - (ii) in the case of the Legislative Assembly—in the Votes and Proceedings of the Legislative Assembly, on the first sitting day of the House after receipt of the report by the Clerk.

## Appendix C: Consideration of similar laws in other Australian jurisdictions

As discussed in chapter 2, in the wake of the court case involving a woman wearing a niqab and a police officer, Bills on the topic were introduced in Western Australia, Queensland and South Australia. None of them have yet become law. However, we set out details of them by way of comparison with the NSW legislation.

### Western Australia

In Western Australia the Criminal Investigation (Identifying People) Amendment Bill 2013 (the WA Bill) was introduced into Parliament by the Minister for Police on 20 June 2013.<sup>174</sup> This Bill is identical to a Bill with the same name introduced in 2012<sup>175</sup> but never passed. The WA Bill is under consideration by the Western Australian Parliament at the time of writing.

The WA Bill proposes to amend section 16 of the *Criminal Investigation (Identifying People) Act 2002* (WA) to enable police officers to require a person to remove any 'headwear' that they are wearing. The definition of 'headwear' includes a hat, helmet, mask or sunglasses. The proposed changes would authorise officers to 'do any other thing reasonably necessary to enable the officer to see the person's head or verify the correctness of any personal detail, or any evidence of any personal detail, given by the person'.<sup>176</sup> Officers would also be given the authority to detain a person for a reasonable period while they comply with the request to remove headwear or to verify personal details provided.<sup>177</sup>

The current penalty for failing to comply with a requirement under section 16 is 12 months imprisonment.<sup>178</sup> The WA Bill proposes that the same penalty would apply if a person refused to remove headwear when required.<sup>179</sup> This is different from the penalty provisions in NSW, where a person could instead be fined \$220 or \$5500 for this kind of offence.

One significant difference between the WA Bill and the NSW law is that the WA Bill proposes to allow police to require a person to remove an item of clothing even if it only covers their head but not their face, such as a hijab (a hair covering worn by many more Muslim women than wear a niqab). The WA Bill also does not provide an exemption, as in the NSW law, for a person who is wearing something to cover their head for medical reasons.

### Queensland

An Independent MP, Mr Peter Wellington, introduced the Identification Laws Amendment Bill 2013 (the Qld Bill) into the Queensland Parliament in August 2013.<sup>180</sup> This Bill is the same as a Bill he introduced in 2011,<sup>181</sup> which was not fully debated at that time because an election was called. The Qld Bill is under consideration by the Queensland Parliament at the time of writing.

The Qld Bill is based on the new law in NSW.<sup>182</sup> It proposes to amend five different laws to enable police officers, corrective services officers, certain other public officials and individuals witnessing statutory declarations to require a person to remove their face covering for identification purposes. It does not propose any specific penalty for failing to comply with such a requirement, but the explanatory notes observe that such a failure would be an offence under existing section 791 of the *Police Powers and Responsibilities Act 2000* (Qld).<sup>183</sup> This offence attracts a penalty of 40 penalty units or \$4,400.<sup>184</sup>

### South Australia

In July 2010, an Independent MP, Mr Robert Such, introduced the Facial Identification Bill 2010 into the South Australian House of Assembly. The Bill proposed a law to require any woman entering a designated building to remove any item covering her face entirely. The Bill was never passed by Parliament.

### Commonwealth

At the Commonwealth level, Liberal Senator Cory Bernardi called for a blanket ban on the burqa in 2010 which received widespread media coverage. Senator Bernardi did not, however, propose any legislation to implement such a policy.<sup>185</sup>

## Endnotes

- 174 Mrs L M Harvey, MLA, Western Australia Parliamentary Debates, (Hansard), Legislative Assembly, 20 June 2013, p. 1932c.  
 175 The Hon. Robert Johnson MLA, Western Australia Parliamentary Debates, (Hansard), Legislative Assembly, 28 February 2012, p. 376a.  
 176 Criminal Investigation (Identifying People) Amendment Bill 2013 (WA), clause 10.  
 177 *ibid.*  
 178 *Criminal Investigation (Identifying People) Act 2002* (WA), s. 16(8).  
 179 Criminal Investigation (Identifying People) Amendment Bill 2013 (WA), clause 10.  
 180 Mr P W Wellington MP, Qld Parliamentary Debates, (Hansard), Legislative Assembly, 8 August 2013, p. 2526.  
 181 Identification Laws Amendment Bill 2011 (Qld).  
 182 Identification Laws Amendment Bill 2013 (Qld), Explanatory Notes.  
 183 *ibid.*  
 184 *Penalties and Sentences Act 1992* (Qld), s. 5.  
 185 R Barker, 'The Full Face Covering Debate: An Australian Perspective', *University of Western Australia Law Review*, Vol. 36, No. 1, 2012, pp. 147-148.



## Appendix D: Law Enforcement (Powers and Responsibilities) Act 2002 No 103

### Part 15 Safeguards relating to powers

#### 201 Supplying police officer's details and giving warnings

(cf *Crimes Act 1900*, s 563, *Police Powers (Vehicles) Act 1998*, s 6)


- (1) A police officer must provide the person subject to the exercise of a power referred to in subsection (3) with the following:
  - (a) evidence that the police officer is a police officer (unless the police officer is in uniform),
  - (b) the name of the police officer and his or her place of duty,
  - (c) the reason for the exercise of the power.
  - (d) (Repealed)
- (2) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (other than subsection (3) (g), (i) or (j)):
  - (a) if it is practicable to do so, before or at the time of exercising the power, or
  - (b) if it is not practicable to do so before or at that time, as soon as is reasonably practicable after exercising the power.
- (2A) A police officer must comply with subsection (1) in relation to a power referred to in subsection (3) (g), (i) or (j) before exercising the power, except as otherwise provided by subsection (2B).
- (2B) If a police officer is exercising a power to give a direction to a person (as referred to in subsection (3) (i)) by giving the direction to a group of 2 or more persons, the police officer must comply with subsection (1) in relation to the power:
  - (a) if it is practicable to do so, before or at the time of exercising the power, or
  - (b) if it is not practicable to do so, as soon as is reasonably practicable after exercising the power.
- (2C) If a police officer exercises a power that involves the making of a request or direction that a person is required to comply with by law, the police officer must, as soon as is reasonably practicable after making the request or direction, provide the person the subject of the request or direction with:
  - (a) a warning that the person is required by law to comply with the request or direction (unless the person has already complied or is in the process of complying), and
  - (b) if the person does not comply with the request or direction after being given that warning, and the police officer believes that the failure to comply by the person is an offence, a warning that the failure to comply with the request or direction is an offence.
- (2D) In addition, if a police officer exercises a power that involves the making of a direction under section 198 on the grounds that a person is intoxicated and disorderly in a public place, the police officer must provide the person the subject of the direction with a warning that it is an offence to be intoxicated and disorderly in that or any other public place at any time within 6 hours after the direction is given.

**Note:** See section 9 of the *Summary Offences Act 1988*.

- (1) This section applies to the exercise of the following powers (whether or not conferred by or under this Act):
  - (a) a power to search or arrest a person,
  - (b) a power to search a vehicle, vessel or aircraft,
  - (c) a power to enter premises (not being a public place),
  - (d) a power to search premises (not being a public place),
  - (e) a power to seize any property,
  - (f) a power to stop or detain a person (other than a power to detain a person under Part 16) or a vehicle, vessel or aircraft,
  - (g) a power to request a person to disclose his or her identity or the identity of another person (including a power to require the removal of a face covering for identification purposes),
  - (h) a power to establish a crime scene at premises (not being a public place),

- (i) a power to give a direction to a person,
  - (j) a power under section 21A to request a person to open his or her mouth or shake or move his or her hair,
  - (k) a power under section 26 to request a person to submit to a frisk search or to produce a dangerous implement or metallic object.
- (3AA) Despite subsection (3), this section does not apply to the exercise of a power to enter premises or to search premises or a vehicle, vessel or aircraft that is conferred by a covert search warrant.
- (3A) If a police officer is exercising more than one power to which this section applies on a single occasion, and in relation to the same person, the police officer is required to comply with subsection (1) (a) and (b) in relation to that person only once on that occasion.
- (4) If 2 or more police officers are exercising a power to which this section applies, only one officer present is required to comply with this section.
- (5) However, if a person asks another police officer present for information as to the name of the police officer and his or her place of duty, the police officer must give to the person the information requested.
- (6) This section does not apply to the exercise of a power that is conferred by an Act or regulation specified in Schedule 1.

**Note:** See section 5 (1), which provides that this Act does not limit the functions of a police officer under an Act or regulation specified in Schedule 1.



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