



# issues backgrounder

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NSW Parliamentary Library Research Service

## Identification Legislation Amendment Bill 2011

The [Identification Legislation Amendment Bill 2011](#) (the Bill) was introduced into the NSW Parliament on 25 August 2011. In the [Agreement in Principle speech](#), the NSW Attorney General said:

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. The bill also provides that a police officer can request a person to identify himself or herself when the officer proposes to give that person a move-on direction.

The Attorney General continued:

The Government has consulted with members of the community on how these powers are to be exercised and is committed to working with and educating the community about the new powers, and individual rights and responsibilities regarding their application. The bill contains appropriate safeguards and a monitoring mechanism to ensure that the application of the power to require the removal of a face covering is both sensitive and accountable. The bill also requires a person witnessing a statutory declaration or affidavit to identify the person swearing the declaration or affidavit and to certify that they have done so.

### Background to the Bill

The immediate background to the Bill is the controversy relating to Carnita Matthews. She was charged with knowingly making a false complaint to police pursuant to Part 8A of the *Police Act 1990*, specifically against a highway patrol officer who, it was claimed, handled her in an attempt to see her veiled face following a traffic incident in June 2010 when Mrs Matthews was stopped for a random breath test. In-car video camera evidence placed the veracity of the complaint in doubt. In the Campbelltown Local Court in November 2010 magistrate Robert Rabbidge rejected Mrs Matthews' claim that she was not responsible for making what was judged to be a false allegation and she was sentenced to six months imprisonment.

In June 2011 that decision was overturned on appeal. Identifying the matter of law at issue, District Court Judge Clive Jeffreys said that the Crown had to prove "a deliberate falsehood, that is the statement was false to the knowledge of the person who made it at the time it was made". His Honour continued:

At the commencement of the hearing before me the Crown particularised the falsity relied upon. The falsity relied upon is that part of the statutory declaration contended by the Crown to have been made by the appellant, the relevant part being:

“(2) The police officer attempted to forcibly remove my hijab/veil and I told him that it’s a racist action”.

That is particularised in the document in this way:

“I gave him my licence 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 ‘I’m not allowed to show you my face’ but he insisted. I then lifted my veil.”

To prove that the complaint was made by Carnita Matthews, the Crown relied on a number of evidentiary grounds, including that the signature on the complaint was the same signature on Mrs Matthews' driver's licence, as shown on the in-car video. After considering the evidence, District Court Judge Jeffreys ruled:

So far as the circumstances are concerned I am not satisfied beyond reasonable doubt that the only rational hypothesis available on the evidence from the circumstances is that the appellant made the statutory declaration. The material before me shows that, in my view, a female presented to the Justice of the Peace, signed a statutory declaration and later a female, together with others, went with that statutory declaration to the police station. I am unable to conclude beyond reasonable doubt that the female who made the statutory declaration before the Justice of the Peace was the appellant. And I am unable to conclude beyond reasonable doubt that the female who attended with the others with the statutory declaration and handed it to the police in the police station, was the appellant.

His Honour added:

So far as the element or ingredient the appellant made the statutory declaration is concerned I am not satisfied beyond reasonable doubt. Even if I were satisfied beyond reasonable doubt that it was the appellant who in fact made the statutory declaration, it must be remembered that the prosecution needs to prove that the appellant knew that the complaint made was false. Having looked at the in-car video, considered the evidence of Constable Fogarty, which I accept, and the other material, I am not satisfied beyond reasonable doubt that the appellant knew that the actions of Constable Fogarty did not amount, in the circumstances, to an attempt to remove her veil or niqab. Accordingly I am not satisfied beyond reasonable doubt the ingredients or elements of the offence are made out and I acquit the appellant.

[Matthews v R](#) District Court of NSW, 22 June 2011 (unreported 2010/230655)

### **Overview of the Bill**

The Bill amends five NSW statutes (and two regulations), basically for the purpose of requiring a person to remove "any face covering" in certain circumstances, to ensure that the person is appropriately identified. Speaking of the extension of the power to

remove face coverings beyond the police, Premier Barry O'Farrell is [reported](#) as saying:

Our message to people is clear. When asked to provide proper identification, comply with the request to remove any face covering or face tough penalties...It's important in courts that identification be proven. It's important in juvenile detention centres and prisons that when people are visiting that their identification is established. This is about putting in place sensible and appropriate powers for Government officials, whether police, whether court officials, whether correction facility officers.

The Bill would amend the *Law Enforcement (Powers and Responsibilities) Act 2002* to provide police with the power to require the removal of any face covering for identification purposes. This would be in addition to the present power in defined statutory contexts to require a person's name and address or photographic identification such as a driver's licence.

The Bill similarly amends relevant statutes where identification needs to be established in defined contexts. The power to remove face coverings would be provided to:

- Juvenile justice officers in respect to visitors to a juvenile detention centre (*Children (Detention Centres) Act 1987*);
- Court security officers in respect to persons seeking to enter the court premises, or any person arrested under the *Court Security Act 2005*.
- An authorised officer in respect to visitors to an adult correctional centre (*Crimes (Administration of Sentences) Act 1999*).

In addition, the *Oaths Act 1900* would be amended to provide that an "authorised witness" who takes and receives a statutory declaration or affidavit in NSW must see the person's face and must either know the person or confirm their identity. For this purpose, an authorised witness "may request" the removal of a face covering.

In respect to all the above statutes, the word **face** is defined by the Bill to mean 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.

The phrase **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).

The proposed amendments to the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) are considered in more detail.

### **Amending the *Law Enforcement (Powers and Responsibilities) Act 2002***

The Bill would amend the *LEPRA* to provide police with additional powers in respect to requiring disclosure of identification. There are basically two limbs to these amendments. One relates specifically to the disclosure of identity in respect to the power to give directions. The second limb is broader in scope and provides a power to require the removal of face coverings for identification purposes.

**The current position:** Currently, police powers to require disclosure of a person's identity are provided under Part 3 of the Act (ss 11-19). Part 3 provides:

- A power to require that a person's identity be disclosed where police suspect on reasonable grounds that the person may be able to assist in the investigation of an indictable offence (s 11). Indictable offences are to be contrasted with summary offences. Indictable offences are more serious offences which, at common law, could be tried by judge and jury. In the current statutory context, the [NSW Judicial Commission](#) explains:

An indictable offence may be a strictly indictable offence or be an indictable offence as provided in the *Criminal Procedure Act*. That Act provides that an offence listed in Table 1 Sch 1 *Criminal Procedure Act* is an indictable offence which is to be dealt with summarily unless the prosecuting authority or the person charged elects otherwise. An offence listed in Table 2 Sch 1 is an indictable offence which is to be dealt with summarily unless the prosecuting authority elects otherwise.

- Offence provisions apply where a person fails or refuses, without reasonable excuse, to comply with the request (s 12), or where false or misleading information is provided (s 13). In both cases the onus of proof of reasonable excuse lies on the person accused of the offence (s 236).
- A specific power is provided in respect to a suspected AVO defendant (ss 13A-13C).
- Specific powers also relate to the disclosure of the identity of drivers, passengers and owners of vehicles which a police officer suspects on reasonable grounds were used in connection with an indictable offence (ss 14-18).
- A power to require proof of identity (s 19).

For a commentary on Part 3 of LEPR see – AM Blackmore and GS Hosking, *Criminal Law NSW 2009, Volume 2*, pages 725-732.

Recent case law on ss 11 and 12 of LEPR includes [DPP \(NSW\) v Horwood](#) [2009] NSWSC 1447. In that case police responded to a complaint that the window of a car had been smashed when parked in a suburban street. Four men, answering the descriptions provided by a witness, were found in a nearby hotel. Horwood was asked to provide his name but refused. The police officer said in evidence that he wanted Horwood's particulars, and those of the other men, because he believed that that had been witnesses to the offence. At first instance, the magistrate dismissed the charge against Horwood on the basis that he was a suspect and was entitled to refuse to comply with the request in the exercise of his common law right to silence.

In the Supreme Court, in respect to s 11, Fullerton J concluded that "Parliament intended to abrogate the right to silence to the extent that a person is required to provide their identification details to police in the circumstances provided for in the section". She continued at para 35:

I am also satisfied that unless and until a person who police believe was present when an indictable offence is committed is arrested and charged with committing the offence, that person, even if he or she may be regarded as a suspect or potential suspect, is obliged to provide their identification details if requested by a police officer who believes that the person may be able to assist police in their investigation. It also

follows that if they refuse, otherwise than on reasonable grounds, they are liable to be convicted of an offence against s 12.

Further, Fullerton J was satisfied that the police officer was "empowered under s 11 to require the defendant to answer his questions, albeit expressly limited to the provision of his name and address" [para 36].

**Current s 201 and safeguards:** Part 3 of LEPPRA operates in conjunction with s 201, which sets out the safeguards as to the manner in which a range of police powers are to be exercised. These powers, which refer to supplying police officers with "details and giving warnings", are set out in s 201(3) and include:

- a power to request a person to disclose his or her identity or the identity of another person (s 201(3)(g)); and
- a power to give a direction to a person (s 201(3)(i)).

**First limb - Disclosure of identity and power to give directions:** By proposed s 11(2), a specific power would be provided for a police officer to require a person to disclose their identity to a police officer where the officer proposes to give that person a direction to leave a public place. The power to give directions is found in Part 14 of the Act (ss 197-200) and it includes the power to give a "move on" direction to an intoxicated person (s 198).

Note that proposed s 11(2) does not make express reference to the removal of face coverings for the purpose of the exercise of the power to give directions. However, the removal of face coverings would apply to that power, that is, where the person has been lawfully required to remove the covering pursuant to proposed s 19A(1) (see below).

**Second limb - Disclosure of identity and the removal of face coverings:** The Bill would insert new Division 4 into Part 3 of LEPPRA, headed "Removal of face coverings for identification purposes" (proposed ss 19A-19C). This would apply to any circumstance where the person is required under NSW statutory law to provide identification to a police officer. Proposed Division 4 of Part 3 would not however extend that requirement beyond the current categories of relevant statutory offences, for example, to any summary or common law offences to which the power to require identification does not apply at present.

In summary, proposed Division 4 of Part 3 of LEPPRA:

- Provides a police officer with the power to require a person to remove "any face covering" to allow the officer (or another police officer) to see the person's face. This applies in circumstances where the person has been lawfully required under statutory law to remove the covering to: (a) "provide photographic identification"; or (b) "identify himself or herself"; or (c) "provide other identification particulars" (proposed s 19A(1)(a) and (b)). The term "lawfully required" is defined to refer to where a failure/refusal to comply with such a request/requirement "may constitute an offence".
- The power may be exercised with or without the person's compliance (proposed s 19A(2)).

- The person need only remove "so much of the face covering as prevents the person's face from being seen" (proposed s 19A(4)).
- The exercise of this power does not constitute a "search" for the purposes of LEPR (proposed s 19A(5)), with the result that none of the powers and safeguards relating to searches would apply.
- Proposed s 19B of the Bill is the penalty provision, for which an exception of "special justification" for not removing a face covering applies, notably where there is a "legitimate medical reason". The onus of proof of a special justification lies on the person claiming it (proposed s 19B(3)).

In respect to the penalties proposed under the Bill, the [Agreement in Principle speech](#) explained:

In most cases, the penalty for failing to comply with a police requirement to remove a face covering will be a maximum fine of \$220, or two penalty units. Where police are exercising the power when requesting identification in relation to vehicles used in or in connection with indictable offences, as provided by section 14 of the Law Enforcement (Powers and Responsibilities) Act, the penalty matches the higher penalty that non-compliance with section 14 attracts, which is a maximum fine of \$5,500 or 12 months' imprisonment.

**Safeguards under proposed s 19A(3):** Certain safeguards are provided under the Bill in relation to the power to require the removal of face coverings.

As noted, the power to remove face coverings can be exercised without the person's compliance. However, by proposed s 19A(3), as far as is reasonably practicable, the police officer must ensure that certain procedures are adhered to, including asking for the person's co-operation.

Further procedural safeguards relating to privacy would also apply under proposed s 19A(3)(b). Thus, where the person requests privacy, the viewing of their face must be conducted "in a way that provides reasonable privacy"; and "as quickly as is reasonably practicable".

The fact that proposed s 19A(1) would enable "the officer *or another police officer*" (emphasis added) to view the person's face leaves open the possibility that a female officer could be called upon in appropriate circumstances. In this respect, the arrangements under LEPR would in fact differ from those proposed for the statutes relating to correctional services, juvenile detention centres and court security, in relation to which express reference is made to the viewing of a person's face by an officer of the same gender. But of course these powers would operate in different contexts to LEPR. For example, in respect to the "move on" powers, the privacy safeguards would operate in the context of a public place, where it can be assumed that the "move on" power must operate to immediate effect.

**Safeguards under s 201:** Both the power to give directions and the more general power to require the removal of face coverings are made subject to the requirements of s 201(1), so that, for example, the police officer must disclose their own name and the reason for the exercise of the power. Where 2 or more persons are the subject are involved, the police officer must only comply with s 201(1) before or at the time of exercising the power "if it is practicable to do so"; otherwise, the section must be

complied with "as soon as is reasonably practicable after exercising the power" (s 201(2B)).

Section 201 currently applies to "a power to give a direction to a person" (s 201(3)(i)). In respect to the power to remove any face coverings under proposed s 19A, the Bill would amend s 201(3)(g) to read:

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.*** (emphasis added)

**Review by Ombudsman:** Proposed s 242B would insert a monitoring regime for Division 4 of Part 3 of LEPRA for the first 12 months of its operation, to be undertaken by the Ombudsman. For that purpose the Ombudsman is empowered to require the Commissioner for Police to provide relevant information. The Ombudsman's report may recommend to the Minister amendments to Division 4 of Part 3 and this report is to be tabled before the Houses of the NSW Parliament. The Ombudsman is also empowered to make a special report at any time on the operation of Division 4 of Part 3.

### **NSW parliamentary material**

Hon Shaoquett Moselmane, Religious Freedom, [ADJ](#), 23 June 2011

Rev the Hon Fred Nile, Identity concealment and Carnita Matthews, [QWN](#), 22 June 2011

Rev the Hon Fred Nile, Identity concealment and Carnita Matthews, [QWN](#), 25 November 2011

Legislation Review Committee, [Digest 3/55](#), 6 September 2011

### **Media Releases**

Barry O'Farrell, "[Cabinet approves new police powers on face coverings](#)", 4 July 2011

Rev the Hon Fred Nile, "[The Burqa 'Appeal'](#)", 24 June 2011

Rev the Hon Fred Nile, "[Burqa making mockery of Aussie law says Nile](#)", 21 June 2011

### **Research Service publications**

[The Summary Offence Amendment \(Full-Face Coverings Prohibition\) Bill 2010](#), Issues Backgrounder, August 2010

### **Selected media articles**

Ashley Gardiner, "Victorian police have power to demand Muslim women remove face veils", [Herald Sun](#), 29 August 2011

"Faces must be show to police", [Border Mail](#), 20 August 2011

AAP, "Police can order removal of face coverings under NSW law", [SMH](#), 19 August 2011

AAP, "Burka law ready for NSW", [The Australian](#), 19 August 2011

"Burka removal extended beyond police", [ABC Newcastle](#), 19 August 2011

"Jail for refusal to remove burqa in Australia", [AFP](#), 18 August 2011  
Tahinae Goldsworthy, "Burqa woman Carnita Matthews says sorry for accusing police of racism", [Macarthur Chronicle](#), 27 June 2011  
Janet Fife-Yeomans, "Burqa lawyer slams verdict", [Daily Telegraph](#), 19 July 2011  
Nathan Klein, "Sharing the joy of Islam", [Daily Telegraph](#), 15 July 2011  
Marianna Papadakis, "Burqa removal right gains support", [St George & Sutherland Shire Leader](#), 12 July 2011  
"Commentary: Face up to real issue of burkas", [The Australian](#), 7 July 2011  
AAP, "Top cop urged need for veil law", [Barrier Daily Truth](#), 6 July 2011  
Mick Roberts, "Veiling the truth", [Bankstown Canterbury Torch](#), 6 July 2011  
Tim Vollmer, "Full-face covering disguises their fear", [Daily Telegraph](#), 6 July 2011  
Stephen Lunn, "Facing up to questions of identity", [The Australian](#), 6 July  
Amy Corderoy, "Police given broad powers to remove facial coverings", [SMH](#), 5 July 2011  
Imre Salusinsky, "O'Farrell lets police order lifting of veil", [The Australian](#) 5 July 2011  
"Burqa loophole", [Auburn Review](#), 5 July 2011  
Janet Fife-Yeomans, "Veil of secrecy lifted", [Daily Telegraph](#), 1 July 2011  
Anna Patty and Leesha McKenny, "Police seek law change to lift veils", [SMH](#), 24 June 2011  
Janet Fife-Yeomans and Clementine Cuneo, "JP did not see face behind the burqa", [Daily Telegraph](#), 24 June 2011  
Miranda Devine, "Lifting the veil on cowardly extremism", [Daily Telegraph](#), 23 June 2011  
Anna Patty, "Fingerprints touted as way to check identity of burqa wearers", [SMH](#), 22 June 2011  
Janet Fife-Yeomans, "Wraps coming off new law on burqa", [Daily Telegraph](#), 22 June 2011  
Jodie Minus, "Fingerprints for veiled faces", [The Australian](#), 22 June 2011  
Natasha Wallace, "Woman convicted over veil claim declared innocent", [SMH](#), 21 June 2011  
AAP, "Woman appeals jail for veil claim", [SMH](#), 20 November 2010  
Tim Vollmer and Letitia Rowlands, "A burqa with lies", [Daily Telegraph](#), 20 November 2010  
Nathan Klein, "Not me in that burqa: accused", [Daily Telegraph](#), 19 November 2011

### **Other relevant sources**

[Islamic Council of NSW](#)

[NSW Council for Civil Liberties](#)

NSW Law Society [submission](#) to the 2009 review of LEPRA.

### **Recent Library acquisitions**

Jeremy Gans et al, *Criminal Process and Human Rights*, The Federation Press 2011  
Leila Ahmed, *A Quiet Revolution: The Veil's Resurgence from Middle East to America*, Yale University Press 2011  
Rex Ahdar and Nicholas Aroney eds, *Shari'a In the West*, Oxford University Press 2010  
David Clayton ed, *Islam: Human Rights and Public Policy*, Acorn Press 2009

Gareth Griffith

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