

**Issues Paper: *Law Enforcement (Powers and Responsibilities) Act 2002* Part 3,  
Division 4: Removal of Face Coverings for Identification Purposes**

**Submission of Legal Aid NSW  
to Ombudsman New South Wales  
February 2013**

**About Legal Aid NSW**

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.

The Legal Aid NSW criminal law practice provides legal assistance and representation in criminal courts at each jurisdictional level throughout the State, including proceedings in Local Courts and Children's Courts, Committals, Indictable sentences and trials, and appeals. Our specialist criminal law services include the Children's Legal Service, the Prisoners' Legal Service and the Drug Court.

Legal Aid NSW welcomes the opportunity to provide comments on the Issues Paper: *Law Enforcement (Powers and Responsibilities) Act 2002* Part 3, Division 4: Removal of Face Coverings for Identification Purposes. Should you require further information, please contact Samantha Lee, Senior Policy Officer, Legal Policy Branch at [sam.lee@legalaid.nsw.gov.au](mailto:sam.lee@legalaid.nsw.gov.au) or by telephone on (02) 9219 5776 or Annmarie Lumsden, Executive Director, Strategic Policy Planning and Management Reporting Division at [annmarie.lumsden@legalaid.nsw.gov.au](mailto:annmarie.lumsden@legalaid.nsw.gov.au) or by telephone on (02) 9219 6324.

## INTRODUCTION

Legal Aid NSW welcomes the opportunity to provide comments on the Ombudsman's review of how police have exercised their functions under Part 3, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) which authorises police officers to require that a person remove a face covering when officers are lawfully checking that person's identification. The Legal Aid NSW submission is in response to the questions as set out in the Issues Paper, excluding questions 1 and 2, which are concerned with personal experiences of removing face covering for identification.

## QUESTIONS

### Standard Operating Procedures

#### **3. In your view, is there a need for the NSWPF to develop SOPs related to the new law. If yes, what matters should be addressed in the SOPs?**

Legal Aid NSW is of the view that there a need for the NSWPF to develop SOPs related to the new law. Standard Operating Procedures (SOPs) establish principles to be followed by all officers in the performance of their duties in a given operational context. SOPs enable consistency in decision making and service delivery and a failure to comply with such procedure may result in disciplinary action.

SOPs are particularly beneficial for providing directives in circumstances that are highly culturally sensitive and which require a level of informed knowledge and understanding to deal with situations that may arise.

The SOPs should include the directives in the Commissioners Policy Notice and NSW Police force Handbook. They should also include all of the information contained in the NSWPF *South West Sydney Islamic Information Guide* (the Guide), including information describing hair and face coverings.

The SOPS should require police to comply with the matters which the Guide currently recommends police consider to assist in the process of requesting people to remove items of clothing for identification or searching purposes. Specifically, police should:

- Clearly explain 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.
- Use 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.
- Ensure 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.
- Allow, if requested and where appropriate, a close male relative to be present when identifying a Muslim woman.

- Respectfully handle jewellery, particularly those of Islamic symbolism or *significance*.

In practical terms, it would be useful for various written directive of the NSWPF to be consolidated in one document.

### **Safeguards relating to privacy**

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

Legal Aid NSW is of the view that police officers should be required, as a matter of policy, to offer privacy to a women wearing a face covering for religious reasons, as far as reasonably practicable, when officers require removal of such a face covering under section 19A LEPRA.

Under section 19A(3) the viewing of the person's face must be conducted in a way that provides reasonable privacy only if the person requests it. Not all persons have the confidence to assert their need for privacy, especially to a police officer. In addition, a person may not know that they can request privacy. For these reason police should be required to offer privacy to a woman wearing a face covering for religious reasons, regardless of whether she requests it or not.

### **Viewing of a person's face by an officer of the same sex**

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

Legal Aid NSW is of the view that LEPRA should be amended to require that, where a person requests that an officer of the same sex be made available to view their face, such an officer should be made available, if reasonably practicable.

#### **6. In your view, what further guidance or directive, if any, should be provided to police officers regarding whether to offer an officer of the same sex to view a person's face and how to respond if a person makes such a request?**

Legal Aid NSW is of the view the SOPs should provide guidance or directives to police regarding whether to offer an officer of the same sex to view a person's face and how to respond if a person makes such a request.

As indicated above the SOPS should require police to comply with the matters which the Guide currently recommends police consider to assist in the process of requesting people to remove items of clothing for identification or searching purposes.

## Warnings

**7. 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?**

As the Issues Paper indicates, a police officer needs to be satisfied of the identity of a person who has committed an offence before they can issue a CAN and, if unable to issue a CAN for a section 9B offence, they may have no option but to arrest the person under section 99(3)(a) of LEPRA in order to ensure a person's appearance before the court in respect of the offence.

Given the consequence of arrest and time in custody, Legal aid NSW is of the view that LEPRA should 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.