

REBUTTING THE BAN THE BURQA RHETORIC: A CRITICAL ANALYSIS OF THE ARGUMENTS FOR A BAN ON THE ISLAMIC FACE VEIL IN AUSTRALIA

ABSTRACT

The re-emergence of the ban the burqa campaign in Australia and the short-lived Commonwealth parliamentary ban on the wearing of face coverings in Parliament House highlight the ongoing hysteria surrounding the veil and the dangers of responding to that hysteria. This article critically examines the arguments put forward in support of a ban on the burqa. Arguments examined include that the wearing of a full face veil is not a religious requirement in Islam, that the veil is oppressive to women, that it is un-Australian, that the veil poses a security risk, that a ban is necessary for facial identification and that banning the veil is consistent with Australian society's treatment of other forms of face covering. The article concludes that these arguments do not provide a justification for a ban in Australia, either alone or in concert. Further, it demonstrates that many of the arguments put forward in support of a ban are counterproductive and contradictory. It argues that instead Australia should strive to identify where limited restrictions may be necessary and that any restrictions on the wearing of the face veil should be as minimally invasive as possible.

I INTRODUCTION

In the wake of the rise of the terrorist organisation Islamic State (IS),¹ Muslims around the world have become the target of vitriol by private individuals, public officials and states.² Similar reactions were seen in the aftermath of the

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¹ Also known as ISIL, ISIS and Daesh among others.

² Heath Aston, 'Dozens of Anti-Muslim Attacks as Islamic Leaders Warn of Community Fear', *The Sydney Morning Herald* (online), 9 October 2014 <<http://www.smh.com.au/national/dozens-of-antimuslim-attacks-as-islamic-leaders-warn-of-community-fear-20141009-113tmk.html>>.

September 11 terrorist attacks and the London and Bali bombings.³ As with these earlier incidents, it is Muslim women, most visible as a result of their distinctive head and face coverings, who have borne the brunt of this backlash.⁴

In Australia, the backlash against IS has been manifested most visibly in the renewed debate over the wearing of Islamic face veils, commonly referred to as the burqa and niqab.⁵ As recently as 2014, Australian politicians Cory Bernardi, Jacqui Lambie, Fred Nile and Pauline Hanson all called for the Islamic face veil to be banned.⁶ The debate culminated in the Speaker of the House of Representatives and the President of the Senate agreeing to prevent people who ‘do not wish to be readily identified’ from sitting in the open public galleries.⁷ Instead, these people were relegated to the glassed viewing galleries, usually reserved for school children.

Those who call for the banning of the Islamic face veil in public offer a litany of reasons for their stance. These include: assertions that the face veil is not part of Islam; gender equality; the success of the ban in France in the European Court of Human Rights;⁸ claims that the burqa is un-Australian; and security concerns. Many of these arguments are not unique to the Australian debate. They have been well rehearsed in debates over the Islamic face veil in both North America and Europe.⁹ However, these arguments do not stand up to close scrutiny, either in Australia, North America or Europe. While there may be some justification to restrict the wearing of face coverings in limited circumstances, a blanket ban is disproportionate to the aims it seeks to achieve.

³ Alice Aslan, *Islamophobia in Australia* (Agora Press, 2009) 69–81.

⁴ Heath Aston, ‘Dozens of Anti-Muslim Attacks as Islamic Leaders Warn of Community Fear’, *The Sydney Morning Herald* (online), 9 October 2014 <<http://www.smh.com.au/national/dozens-of-antimuslim-attacks-as-islamic-leaders-warn-of-community-fear-20141009-113tmk.html>>. See also Alison Caldwell, ‘Victoria Police Reveals Rise in Unreported Attacks on Muslim Women as Terror Suspect Abdul Numan Haider Farewelled’, *ABC News* (online), 26 September 2014 <<http://www.abc.net.au/news/2014-09-26/police-reveal-rise-in-attacks-as-terror-suspect-farewelled/5772942>>.

⁵ In this article I will refer to the burqa and niqab collectively as the Islamic face veil. The burqa is a form of veiling which covers the wearer’s face with a mesh covering the eyes, while the niqab leaves a slit open for the eyes. In Australia, the niqab is the more common of the two garments, although popular media usually refers to both garments as the burqa.

⁶ Renae Barker, ‘Banning the Burqa Is Not the Answer to Fears about Public Safety’, *The Conversation* (online), 22 September 2014 <<https://theconversation.com/banning-the-burqa-is-not-the-answer-to-fears-about-public-safety-31628>>; Farinaz Zamani Ashni and Paula Gerber, ‘Burqa: Human Right or Human Wrong?’ (2014) 39 *Alternative Law Journal* 231, 231.

⁷ Commonwealth, *Parliamentary Debates*, Senate, 2 October 2014, 7660 (Stephen Parry).

⁸ *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014).

⁹ See, eg, Natasha Bakht, ‘Veiled Objections: Facing Public Opposition to the Niqab’ in Lori G Beaman (ed), *Reasonable Accommodation: Managing Religious Diversity* (UBC Press, 2012) 70.

Further, a ban violates the fundamental human right to freedom of religion.¹⁰ While freedom of religion is not absolute in either Australian or international law, curtailing this fundamental freedom requires extraordinary justification.¹¹ The arguments so far advanced for a ban on the Islamic face veil in Australia do not offer such a justification. Despite this, a growing number of Australians are in favour of a ban on the Islamic face veil in public. In 2014, a Morgan poll showed 55.5 per cent of Australians were in favour of a ban on the burqa in public places, up 3.5 per cent from 2010.¹² It is therefore important that the weaknesses and contradictions in the arguments in support of a ban are clearly articulated.

This article will critically examine each of the arguments that have been put forward to support a ban on the Islamic face veil in Australia. It will demonstrate that these arguments do not provide a justification, either alone or when taken together, for a ban on the Islamic face veil in Australia. Before doing so, the article will put the most recent debate into the context of the wider Australian experience of the niqab and burqa in the public sphere.

II A RENEWED DEBATE

Debate around the place of traditional female Islamic dress generally — and the Islamic face veil specifically — in the public sphere in Australia is not new. As early as 2002, New South Wales Christian Democrat Party MLC the Reverend Fred Nile called for the banning of the chador in public places, while in 2005, federal MPs Bronwyn Bishop and Sophie Panopoulos called for the banning of the hijab in schools.¹³ More recently, in 2010, federal Liberal Senator Cory Bernardi and Nile both called for the banning of the Islamic face veil in Australia.¹⁴ While no legislation was introduced at the federal level, Nile introduced a private member's Bill in New South Wales that, if passed, would have banned the wearing of face coverings

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 18.

¹¹ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses Case*').

¹² Roy Morgan Research, *Increasing Majority of Australians Say 'No' to the Burka — Up from August 2010* (23 September 2014) <<http://www.roymorgan.com/findings/5825-australian-attitudes-to-wearing-burka-september-2014-201409230736>>.

¹³ Tanja Dreher and Christina Ho, 'Introduction: New Conversations on Gender, Race and Religion' in Tanja Dreher and Christina Ho (eds), *Beyond the Hijab Debates: New Conversations on Gender, Race and Religion* (Cambridge Scholars Publishing, 2009) 1, 3. Sophie Panopoulos is also known by her married name Mirabella. The MPs' call for a ban on the wearing of the hijab in schools followed France's 2004 decision to ban the wearing of 'ostentatious signs or dress by which pupils openly manifested a religious affiliation' including hijabs: see Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge, 2012) 2.

¹⁴ Renae Barker, 'The Full Face Covering Debate: An Australian Perspective' (2012) 36(1) *University of Western Australia Law Review* 143, 144–6.

in public in a similar way to the laws in France and Belgium.¹⁵ While Nile has so far been unsuccessful in having laws of this nature passed, he has persisted in his attempts. In 2011 and 2014, he again introduced Bills to ban the wearing of face coverings in public.¹⁶ His most recent attempt came in the wake of the rise of IS and the decision by the European Court of Human Rights that the ban in France did not breach art 9 of the *European Convention on Human Rights*.¹⁷ However, the introduction of Nile's latest Bill garnered little public attention. By contrast, Bernardi's renewed call for the banning of the burqa, along with those by the then newly elected Palmer United Senator Jacqui Lambie, grabbed national headlines.

The primary difference in the media coverage was timing. Bernardi and Lambie both called for the banning of the Islamic face veil in the aftermath of some of the largest anti-terrorist raids ever seen in Australia.¹⁸ Bernardi struck first; tweeting on 18 September: 'Note burqa wearers in some of the houses raided this morning? This shroud of oppression and flag of fundamentalism is not right in [Australia]'.¹⁹ Lambie followed, posting a photo on her Facebook page showing a woman in a burqa pointing a handgun with the words: 'For security reasons it's now time to ban the burqa'.²⁰ It was later revealed that the image was of the first female police officer in Afghanistan, Malalai Kakar, who was killed by the Taliban. The use of the photo in this way by Lambie and others was criticised by the photographer, Lana Slezic, as an insult to Kakar and a desecration of her memory.²¹

While the calls to ban Islamic face veils by Nile, Lambie and Bernardi have been in response to specific domestic and international incidents, public hostility towards Muslims — and Muslim women in particular — is an ongoing issue in Australia. The

¹⁵ Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011.

¹⁶ Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2011 (NSW); Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW).

¹⁷ *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 9.

¹⁸ 'Authorities Thwart "Beheading" Plot in Australia's Biggest Ever Counter-Terrorism Raids', *ABC News* (online), 19 September 2014 <<http://www.abc.net.au/news/2014-09-18/authorities-thwart-beheading-plot-in-australias-biggest-raid/5754276>>.

¹⁹ Simon Cullen, 'Cory Bernardi Renews Calls For Burka Ban After Sydney, Brisbane Anti-Terror Raids', *ABC News* (online), 18 September 2014 <<http://www.abc.net.au/news/2014-09-18/cory-bernardi-renews-call-for-burqa-ban/5752784>>. See also Barker, 'Banning the Burqa Is Not the Answer to Fears About Public Safety', above n 6.

²⁰ 'PUP Senator Jacqui Lambie Says She Would Not Let Burka Wearers into Her Office; Backs Calls For Ban', *ABC News* (online), 19 September 2014 <<http://www.abc.net.au/news/2014-09-19/jacqui-lambie-calls-for-ban-on-burkas-in-public/5756136>>.

²¹ Sally Sara, 'Ban the Burka Photo Shared by PUP Senator Jacqui Lambie Is of Afghan Policewoman Killed by Taliban', *ABC News* (online), 20 September 2014 <<http://www.abc.net.au/news/2014-09-19/jacqui-lambie-ban-the-burka-photo-believed-to-be-policewoman/5757438>>.

call to ban the burqa is just the latest evolution of this hostility. As noted above, there have previously been calls to ban less covering forms of Islamic dress worn by some Muslim women such as the chador and hijab.²²

In 1991, the Australian Human Rights and Equal Opportunity Commission identified hostility towards Muslims as an area of concern. In its report *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, the Commission noted

a generalised identification of Arabs and Muslims with violence (such as terrorism and the taking of hostages), a stereotyped identification of Arabs and Muslims with ‘un-Australian values’ (for example, religious fundamentalism, conservative views about women and moral issues, dietary restrictions, conservative and conspicuous clothing, prohibitions on alcohol, and a desire for a separate cultural identity), media coverage reinforcing these perceptions, and responses by some groups within the Arab and Muslim communities which have the effect of reinforcing these stereotypes (for example, calls for the death of Salman Rushdie).²³

While the report found that such sentiments had increased in the wake of the Gulf War, ‘the Inquiry received evidence of verbal and physical violence against Arab and Muslim Australians, and their property, well before the Gulf crisis.’²⁴ Specific incidents of harassment and violence towards Muslims were also recorded in the report, including the subjection of Muslim school children to harassment and rejection at school, attempts to remove women’s hijabs, verbal and physical threats and vandalism and arson at Islamic centres, schools and mosques.²⁵ Further, ‘[t]he Inquiry received evidence, during the Gulf War, of Arab and Muslim people, particularly women, feeling afraid to leave their homes, and of parents believing that it was too dangerous for their children to do so.’²⁶

Seven years later, in its 1998 report *Article 18: Freedom of Religion and Belief*, the Human Rights and Equal Opportunity Commission again identified vilification and harassment of Muslims as an area of concern.²⁷ In particular, this report highlighted the consistent negative media portrayal of Muslims and Islam. As Salaheddin Bendak submitted to the Inquiry on behalf of the Islamic Council of Victoria:

In newspapers and on radio and TV channels in Australia, we are bombarded daily with tens of lies about Islam and Muslims, while there appears to be no legal way to stop this. To clarify this point, ... [a] person who tried to kill his

²² The chador and hijab cover the wearer’s head and hair and, in the case of the chador, the wearer’s upper body. In both cases the wearer’s face is left uncovered.

²³ Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, Report (1991) 145.

²⁴ *Ibid.*

²⁵ *Ibid* 145–6.

²⁶ *Ibid* 145.

²⁷ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, Report (1998) 116.

daughter in Melbourne two years ago was marked by newspapers to have done this because of his Islamic beliefs (although in this specific case, the same man allegedly converted to Catholicism years before he tried to kill his daughter, a fact that was never mentioned in these newspapers). Although the Islamic faith prohibits its followers from harming any creature (not even a harmless insect!), these newspapers could get away with this lie. Later, newspapers were bombarded with hundreds of protesting letters, but failed to publish any.²⁸

The 1998 report was followed up in 2011 by a report entitled *Freedom of Religion and Belief in 21st Century Australia*. As with the preceding two reports, negative sentiments towards Muslims were reported.²⁹ In relation to media reporting, the report noted ‘Muslims and Sikhs in particular ... reported being misrepresented and denigrated or neglected by the mainstream media.’³⁰

Most recently, the Australian Human Rights Commission released its consultation report, *Rights and Responsibilities*, ahead of its planned round table on freedom of religion. While the report does not make general comment on negative sentiments directed towards Muslims and Islam, it does comment on the impact the public debate to ban the burqa has had on Muslim women.³¹ The United Muslim Women’s Association in their submission was particularly concerned that

the rhetoric in public discourse and call for prohibitions against Muslim women’s dress is impinging on a Muslim woman’s right to freedom of religion. We are also concerned that fear in relation to safety concerns as a result of such treatment will further compromise the right to freedom of movement for Muslim women ...³²

Preliminary findings by the Islamophobia Register Australia indicate that the primary targets of Islamophobia are ‘women wearing religious headwear’.³³ They also noted that there was a spike in reported incidents following specific events such as the September 2014 anti-terror raids, federal Parliament’s temporary ban on face coverings in Parliament, the Martin Place siege, former Prime Minister Tony Abbott’s national security statement, the April 2015 Reclaim Australia rallies and the Paris terrorist attacks.³⁴ Anecdotal evidence reported by the media supports this

²⁸ Ibid 118.

²⁹ Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia*, Research Report (2011) 81.

³⁰ Ibid 82.

³¹ Australian Human Rights Commission, *Rights and Responsibilities*, Consultation Report (2015) 27–8.

³² Ibid 27.

³³ Islamophobia Register Australia, ‘Preliminary Findings Report’ (Press Release, 1 December 2015) <<https://www.facebook.com/islamophobiaregisteraustralia/posts/812147742241503>>. The Islamophobia Register Australia was set up in 2014 by lawyer and community rights advocate Mariam Veiszadeh, and facilitates the reporting of incidents of Islamophobia in Australia. The Register plans to release a full report of their findings in 2016. See <<http://www.islamophobia.com.au/>>.

³⁴ Veiszadeh, above n 33.

finding. For example, following the September 2014 anti-terror raids, Islamic leaders reported a spike in attacks against Muslim women wearing Islamic head coverings.³⁵ A similar spike in incidents was seen after the November 2015 Paris terrorist attacks, including threats against workers at an Optus store that had an advertisement in Arabic, forcing the store to remove the sign.³⁶

The campaign to ban the burqa is therefore one element in the public hostility faced by Australian Muslims, which also includes anti-refugee sentiments,³⁷ the Reclaim Australia rallies,³⁸ anti-halal campaigns³⁹ and individual instances of racial and religious vilification directed against individuals and Islamic institutions.

III I'M GOING TO TELL YOU WHAT YOUR RELIGION SAYS

A common argument put forward in support of a ban on Islamic face veils is that veiling is not a requirement of Islam. Lambie claimed:

I have been assured that the need to wear the burqa is not written in the Koran. Dr Raihan Ismail, lecturer in Middle East politics and Islamic studies at the Australian National University, states: 'The Koran does not explicitly say you have to cover yourself in this manner.'⁴⁰

However, the issue is more complex than presented by Lambie. The question of whether the face veil is obligatory, encouraged, permissible or discouraged by Islam is debated by Muslims. The requirement for veiling of some kind is based on five Qur'anic verses.⁴¹ These verses have been interpreted in a variety of ways over time and across Muslim communities.⁴² In addition, many women cite the example of the

³⁵ Aston, above n 2.

³⁶ ABC Radio National, 'Rise in Islamophobia in Australia since Paris Attacks', *The World Today*, 18 November 2015 (Lucy Carter).

³⁷ 'Warning Against Refugee Backlash after Paris Attacks', *SBS News* (online), 15 November 2015 <<http://www.sbs.com.au/news/article/2015/11/15/pm-turnbull-warns-against-refugee-backlash-after-paris-attacks>>.

³⁸ Troy Whitford, 'Reclaim Australia Re-Energises Radical Nationalism', *The Conversation* (online), 24 July 2015 <<https://theconversation.com/reclaim-australia-re-energises-radical-nationalism-45103>>.

³⁹ Senate Economics Reference Committee, Parliament of Australia, *Third Party Certification of Food* (2015) 20–5, 27–34, 39–54.

⁴⁰ Commonwealth, *Parliamentary Debates*, Senate, 30 September 2014, 7392 (Jacqui Lambie).

⁴¹ Roberta Aluffi Beck-Peccoz, 'Burqa and Islam' in Alessandro Ferrari and Silvio Pastorelli (eds), *The Burqa Affair Across Europe: Between Public and Private Space* (Ashgate, 2013) 13, 16.

⁴² Dominick McGoldrick, *Human Rights and Religion: The Islamic Headscarf Debate in Europe* (Hart Publishing, 2006) 6.

Prophet's wives as an inspiration for their own veiling.⁴³ However, the question of whether or not the wearing of the face veil is part of the orthodoxy of Islam is not the point.

In claiming that face veiling is not a part of Islam, proponents of a ban are attempting to sidestep the issue of freedom of religion. International and domestic laws protect the right of an individual to freedom of religion. For example, art 18 of the *Universal Declaration of Human Rights* states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.⁴⁴

In Australia, s 116 of the *Australian Constitution* prohibits the Commonwealth from, inter alia, making any laws 'for prohibiting the free exercise of any religion'.⁴⁵

Restrictions can be placed on freedom of religion; however, such restrictions must be 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.'⁴⁶ As Zamani and Gerber explain, '[c]alls to ban the burqa

⁴³ Naima Bouteldja, 'France vs England' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014) 115, 140–1.

⁴⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 18.

⁴⁵ See generally Tony Blackshield, 'Religion and Australian Constitutional Law' in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds), *Law and Religion: God, the State and the Common Law* (Routledge, 2005) 81; Clifford Pannam, 'Traveling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start For Section 116' (1992) 18 *Monash University Law Review* 207; Kate Boland, 'Interpreting the Constitutional Freedom of Religion: How Australian Courts Might Define "Religion" and Interpret the "Free Exercise" Provision in the Future' (2010) 12 *Constitutional Law and Policy Review* 47; Carolyn Evans, 'Religion as Politics Not Law: The Religion Clauses in the Australian Constitution' (2008) 36 *Religion, State and Society* 283; F D Cumbrae-Stewart, 'Section 116 of the Constitution' (1946) 20 *Australian Law Journal* 207; Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53 *Australian Quarterly* 214; Gabriel Moens, 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195; Gabriel A Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' [1996] (4) *Brigham Young University Law Review* 787; Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139; Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27 *University of Tasmania Law Review* 161; Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33 *University of Queensland Law Journal* 153.

⁴⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

in Australia are unlikely to meet these strict standards'.⁴⁷ In Australia, the limits of freedom of religion were considered in the *Jehovah's Witnesses Case*.⁴⁸ Chief Justice Latham referred to s 116 of the *Constitution* as protecting against an 'undue infringement', finding that '[i]t is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.'⁴⁹ While such an interpretation necessarily narrows the protection for freedom of religion offered by s 116, it does not nullify it. Proponents of a ban at a Commonwealth level would still need to demonstrate the ban was necessary because the Islamic face veil was 'inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.'⁵⁰ This is not a low threshold. Section 116 of the *Constitution*, however, is usually interpreted narrowly by the High Court with emphasis placed on the purpose of the legislation, rather than its effect. Gray has argued that as a result of this narrow interpretation, a ban on Islamic face veils for the purpose of 'public safety', for example, may be found by the High Court to be legitimate.⁵¹ So long as the law itself was couched in neutral terms and applied not only to Islamic face veils but also to other forms of facial covering, an argument could be mounted that such a law did not have the purpose of prohibiting the free exercise of religion.

In claiming that the face veil is not part of Islam, supporters of a ban are attempting to get around freedom of religion provisions. If the veil is not a religious practice then it does not attract the protection of either art 18 or s 116. However, it is not the role of the courts or the Parliament in a secular society to be the arbiters of religious orthodoxy. As Murphy J in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*⁵² stated:

If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the numbers of adherents small, the leaders hypocrites, or because they seek to obtain the financial and other privileges which come with religious status. In the eyes of the law, religions are equal.⁵³

Administrators, judges and legislators must resist the temptation to hold that a practice is not religious because it does not comply with others' notions of what that religion requires. This position has been endorsed by Courts around the world, including

⁴⁷ Zamani and Gerber, above n 6, 234.

⁴⁸ (1943) 67 CLR 116.

⁴⁹ *Ibid* 131.

⁵⁰ *Ibid* 126–7, 131.

⁵¹ See Anthony Gray, 'Section 116 of the *Australian Constitution* and Dress Restrictions' (2011) 16 *Deakin Law Review* 293, 314–20.

⁵² (1982) 154 CLR 120 ('*Scientology Case*').

⁵³ *Ibid* 150.

the European Court of Human Rights and the House of Lords.⁵⁴ For example, in *R v Secretary of State for Education and Employment; Ex parte Williamson*,⁵⁵ Lord Bingham of Cornhill asserted that

emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its ‘validity’ by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant’s belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. ... [R]eligious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that ‘in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed.’ ... The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.⁵⁶

Variety within a religion should be expected and the existence of debate within a given faith as to the centrality of a particular practice is not an indication that the practice is not religious or is not required by a given religion.⁵⁷ As Latham CJ pointed out in the *Jehovah’s Witnesses Case*:

almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual — all of these may become part of religion.⁵⁸

Endless variety is therefore possible in how people practice their faith, both between and within religions. One only has to look at the remarkable variety found within Christianity, from the Southern Baptist snake handlers to the Russian Orthodox Church, from the Quakers to the Roman Catholics. Such variety should also be expected within other religions, including Islam. There are five major schools of thought within Islamic law, four Sunni and one Shia.⁵⁹ This only hints at the complex diversity within Islam. Just because one Islamic scholar, cherry-picked by Lambie to support her position, states that the wearing of the face veil is not required, does not mean that another scholar will necessarily adopt the same view.

⁵⁴ McGoldrick, above n 42, 8–10.

⁵⁵ [2005] UKHL 15 (24 February 2005) (*Williamson*).

⁵⁶ *Ibid* [22].

⁵⁷ Bakht, above n 9, 96–7.

⁵⁸ (1943) 67 CLR 116, 124.

⁵⁹ Jamila Hussain, *Islam: Its Laws and Society* (Federation Press, 3rd ed, 2011) 39.

Even if the wearing of the veil is not required by Islam, this does not excuse banning the practice. As the European Court of Human Rights has noted, it is the subjective understanding of individual adherents as to their religious duties and obligations, rather than the views of religious authorities or scholars, that is important in determining whether or not a practice is religious.⁶⁰ Religions often contain practices that are optional, not described in the founding religious text or only followed by some adherents. The fact that a practice is not compulsory does not make it any less religious, nor its practice, by those who choose to observe it, any less important.⁶¹

IV PLAYING THE FEMINIST CARD

Another common argument made in support of a ban on the wearing of Islamic face veils is that they are oppressive to women. Nile has repeated this assertion on each occasion he has sought to enact a ban in New South Wales.⁶² France also advanced this argument before the European Court of Human Rights.⁶³

Women who wear the niqab and burqa have fervently rejected any suggestion that they are forced to wear the veil or that it is oppressive. The woman at the centre of the European Court of Human Rights case strongly rejected any suggestion that she was forced to wear the Islamic face veil. As the European Court of Human Rights observed:

She argued that, according to a well-established feminist position, the wearing of the veil often denoted women's emancipation, self-assertion and participation in society, and that, as far as she was concerned, it was not a question of pleasing men but of satisfying herself and her conscience.⁶⁴

The Court therefore rejected France's argument on this point, noting: 'The Court takes the view, however, that a State Party cannot invoke gender equality in order to ban a practice that is defended by women ...'.⁶⁵

For these women, a ban such as that proposed by Nile, Bernardi and Lambie would 'force them to make [an] unenviable choice. Obey the law and deny their faith. Obey

⁶⁰ *Leyla Şahin v Turkey* (2005) XI Eur Court HR 173, [78]; *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 28–9 [55]–[56], 46 [110].

⁶¹ The wearing of a cross by some Christians is a good example of a practice of this type: see *Eweida v United Kingdom* (European Court of Human Rights, Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

⁶² New South Wales, *Parliamentary Debates*, Legislative Council, 22 June 2010, 24 404–7 (Fred Nile); New South Wales, *Parliamentary Debates*, Legislative Council, 11 September 2014, 310–14 (Fred Nile).

⁶³ *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 35, 37–8.

⁶⁴ *Ibid* 35 [77].

⁶⁵ *Ibid* 48 [119].

their faith and risk criminal charges. Stay at home and become isolated from the community.⁶⁶

In interviews conducted with wearers of the Islamic face veil in both France and England, Bouteldja found no evidence of ‘domineering parents, forcing their daughters to wear the face veil.’⁶⁷ While she did find some evidence that a small number of women had been coerced by their husbands to wear the face veil, this was not the experience of the majority. Some women even chose to begin and continue wearing the veil despite the objections of their parents and/or husband.⁶⁸ One interviewee reported that she delayed beginning to wear the face veil until her husband was comfortable with her decision.⁶⁹

Even if the claim that the Islamic face veil is oppressive to women is correct, a blanket ban is unlikely to have the desired effect. The laws proposed by Nile are premised on the idea that women are forced to wear the burqa and niqab, presumably by male family members. His proposed amendments to the *Summary Offences Act 1988* (NSW) imposed a penalty both on those who wear full face coverings in public and ‘[a] person who compels another person, by means of a threat that the other person could not reasonably be expected to resist’ to wear a full face covering.⁷⁰ The penalty for the latter was proposed to be twice that for those who simply wear a face covering in public. This would seem to imply that it is the oppressors who are the real target of these laws. France’s law similarly imposes a heavier penalty on those who force another to cover their face than on the person whose face is covered.⁷¹ However, a blanket ban would not have the desired effect of releasing these women from oppression. As I have argued previously, ‘banning the face veil [would] not result in oppressed women throwing off their veils and revelling in their new-found freedom. Instead, the more likely result is their exclusion from society as their oppressors force them to remain at home.’⁷² A ban would not only be counter-productive but could further oppress these women.⁷³

⁶⁶ Barker, ‘Banning the Burqa Is Not the Answer to Fears About Public Safety’, above n 6.

⁶⁷ Bouteldja, above n 43, 131.

⁶⁸ Ibid 131–40.

⁶⁹ Ibid 133–4.

⁷⁰ Summary Offences Amendment (Full-Face Coverings Prohibition) Bill 2014 (NSW).

⁷¹ *Code Pénal* [Criminal Code] (France) arts 131-35–131-44; *Loi n° 2010-1192 du 11 octobre 2010* [Law No 2010-1192 of 11 October 2010] (France) JO, 11 April 2011, 24 art 225-4-10; *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 10.

⁷² Barker, ‘Banning the Burqa Is Not the Answer to Fears About Public Safety’, above n 6.

⁷³ Erica Howard, ‘Islamic Veil Bans: The Gender Equality Justification and Empirical Evidence’ in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014) 206, 212.

One of the women interviewed by Bouteldja commented on this dichotomous approach to wearers of the Islamic face veil in recounting an incident where she had been abused while in public.

They tell us that we are submissive to our husband and all of that, but I say to myself that if we are really oppressed women then it's sadness that you should have for us. But in the end it's pure rage that they have for us. It's spite, while they should pity us if they think we are being beaten!⁷⁴

As Bouteldja observed, '[the interviewee] couldn't understand how she could be perceived as an oppressed victim and yet at the same time be constantly treated to verbal assault in public places.'⁷⁵

Those who oppose the Islamic face veil appear to believe that these Muslim women are oppressed, and therefore unable to exercise a true choice, while simultaneously believing that these women are consciously refusing to conform to social norms.⁷⁶ It is no wonder the women in Bouteldja's study were confused.

It must, however, be acknowledged that women's oppression in the feminist sense is not about individual choices of women but rather about 'women's conditions in society to determine their life choices'.⁷⁷ Feminists argue that simply because women may choose to wear the face veil does not indicate that they are not oppressed, but that their choices have been 'hetero-designed and serialized'.⁷⁸ However, even if it is accepted that women who voluntarily choose to wear the veil are oppressed by the limitation on their choices afforded to them by society, it does not necessarily follow that the face veil should be banned. As Taramundi explains:

these bans target a group of women ... who would be by law obliged to adopt higher standards of compliance with the principle of sex equality than any other group of women involved in patriarchal or oppressive practices, from top models to battered women who do not make official complaints, from women who marry for money or to secure a social position to fashion victims and surgery addicts, with the possible exception of prostitutes, who are still criminalized in certain countries but certainly not for not being emancipated enough.⁷⁹

⁷⁴ Bouteldja, above n 43, 155.

⁷⁵ Ibid.

⁷⁶ Pascale Fournier and Erica See, 'The "Naked Face" of Secular Exclusion: Bill 94 and the Privatization of Belief' in Solange Lefebvre and Lori G Beaman (eds), *Religion in the Public Sphere: Canadian Case Studies* (University of Toronto Press, 2014) 275, 284.

⁷⁷ Dolores Morondo Taramundi, 'Women's Oppression and Face-Veil Bans: A Feminist Assessment' in Eva Brems (ed), *The Experience of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2004) 218, 229. For a discussion of oppression as a social construct see Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990) 40–2. For a discussion of feminist theory see Rosemarie Putnam Tong, *Feminist Thought: A More Comprehensive Introduction* (Westview Press, 4th ed, 2014).

⁷⁸ Morondo Taramundi, above n 77, 223.

⁷⁹ Ibid 229.

Criminalising the wearing of the face veil is an extreme step that will not benefit Muslim women, oppressed or otherwise. If these women are oppressed, then banning the wearing of the face veil is akin to blaming a victim of domestic violence for their own abuse because they did not leave their abuser.

Another gender-related argument put forward in support of a ban of Islamic face veils is the difficulties in accommodating the need for veiled women to be identified by another woman. Many Muslim women who wear the veil believe that they may only remove the veil in front of their husband, other women and mahram male relatives.⁸⁰ There are, however, numerous instances where it may be necessary for a person wearing an Islamic face veil to be identified via comparison with photographic identification; for example when passing through immigration, while giving evidence in court, or during a roadside stop by police. Several states already have laws that require a person wearing a full face covering to remove their veil for the purpose of identification by police officers.⁸¹ However, only the laws in the Australian Capital Territory provide a right for women who wear the veil for religious reasons to have their identity verified by a person of the same gender.⁸² A review of the New South Wales laws by the State Ombudsman recommended that the laws be amended to provide such a right, noting that although some police officers already turned their mind to this problem, others had expressed reluctance to accommodate a request for a woman to have her face viewed by someone of the same gender.⁸³ The New South Wales police did not support such a change. They expressed concern that such a requirement would place unnecessary burdens on police resources and may not be practical in all circumstances.⁸⁴ No change has been made to the legislation in response to the Ombudsman's recommendations.

It is perhaps understandable in the case of a roadside traffic stop, where there are likely to be only two police officers, that it may not be possible to have a police-woman present in every case. In other circumstances it should be much easier to accommodate such a request. If it is not, this highlights a bigger problem than a few women who wear a piece of cloth over their face. As former Prime Minister Gillard's infamous misogyny speech highlighted, sexism and inequality between women and men is still alive and well in Australia.⁸⁵ An argument that it may be difficult to locate a female to accommodate a request by a Muslim woman to have her face viewed by a

⁸⁰ Mahram refers to male relatives a woman cannot marry. However, Bouteldja found that many of her interviewees chose to remove the veil in front of non-mahram relatives to minimise family conflict: see Bouteldja, above n 43, 136.

⁸¹ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 19B; *Criminal Investigation (Identifying People) Act 2002* (WA) s 16; *Road Transport (General) Act 1999* (ACT) s 58B.

⁸² *Road Transport (General) Act 1999* (ACT) s 58B(3)(b).

⁸³ New South Wales Ombudsman, 'Review of Division 4, Part 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002*: Face Coverings and Identification' (Report, New South Wales Ombudsman, August 2013).

⁸⁴ *Ibid* 27.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 2012, 11 581–5 (Julia Gillard).

person of the same gender would only further highlight this problem. The continued inequality faced by all women in Australia is a far more insidious problem than a small group of women who choose, for religious reasons, to wear a veil.

V BUT OTHERS ARE DOING IT

In July 2014, the European Court of Human Rights handed down its decision in *SAS v France*.⁸⁶ In a majority decision, the Court found that France's ban on the wearing of face coverings in public did not violate art 9 of the *European Convention on Human Rights*.⁸⁷ While the Court rejected most of France's arguments, the majority ultimately found that a ban was permissible on the basis of the minimum requirements of 'living together' or *le vivre ensemble*.⁸⁸ The decision has been heavily criticised.⁸⁹ For example Marshall, in her analysis of the decision, commented that

[p]ressurizing women, or any one, in ways that may result in them staying at home and away from public places, or telling them what they can and cannot wear is, however, the opposite [of enabling people to make their own choices]. It shows human rights law potentially being used as a restricting tool, preventing certain choices and ways of life through legal prohibition or bans. This is inconsistent with the overall objective of human rights law.⁹⁰

However, this has not stopped those advocating a ban in Australia from placing reliance on the French laws and the decision by the European Court of Human Rights to uphold them. Nile, in particular, has commented that '[s]ome members in this

⁸⁶ (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014).

⁸⁷ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 9.

⁸⁸ *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 4–5 17, 55, 57.

⁸⁹ Frederick Cowell, 'French Burqa Ban Upheld: A Victory For Democracy and a Setback for Human Rights', *The Conversation* (online), 4 July 2014 <<https://theconversation.com/french-burqa-ban-upheld-a-victory-for-democracy-and-a-setback-for-human-rights-28784>>; Mark L Movsesian, 'European Human Rights Court to France: Do Whatever You Want' on *Centre for Law and Religion Forum* (3 July 2014) <<http://clrforum.org/2014/07/03/european-human-rights-court-to-france-do-whatever-you-want/>>; Stephanie Berry, '*SAS v France*: Does Anything Remain of the Right to Manifest Religion?' on *European Journal of International Law, EJIL: Talk!* (2 July 2014) <<http://www.ejiltalk.org/sas-v-france-does-anything-remain-of-the-right-to-manifest-religion/>>; Frank Cranmer, '*SAS v France* and the Face-Veil Ban: Some Reactions' on *Law & Religion UK Blog* (5 July 2014) <<http://www.lawandreligionuk.com/2014/07/05/sas-v-france-and-the-face-veil-ban-some-initial-reactions/>>.

⁹⁰ Jill Marshall, '*SAS v France*: Burqa Bans and the Control or Empowerment of Identities' (2015) 15 *Human Rights Law Review* 377, 387.

House must have a very poor opinion of the politicians in the French and Belgian Parliaments if they think that this bill is in some way extreme.’⁹¹

While there is some attraction in following other countries, Australia should only do so where the relevant law represents world’s best practice. Further, the law under consideration must be compatible with the fundamental principles that underpin Australia’s legal system, such as freedom of religion.⁹² Bans on the Islamic face veil have not become the norm internationally. Several countries, including the United Kingdom, Canada, New Zealand and the United States, have so far rejected a blanket ban.⁹³

Australia and France have very different societies and laws; laws that are appropriate in France may not be appropriate here. Most notably, the way in which secularism is approached from both a legal and political viewpoint is different. In France, the concept of *laïcité* is enshrined in the Constitution and is seen as an integral part of national identity.⁹⁴ It is interpreted as requiring a complete separation of church and state. This has been taken to include the promotion of religious beliefs by public officials. As a result, all public officials and children attending government run schools are prohibited from wearing religious symbols while at work and school.⁹⁵ By contrast, the *Australian Constitution* does not erect a wall of separation between church and state, although the federal government is prevented from establishing a state church. Consequently, strict secularism is not entrenched in Australia’s *Constitution*.⁹⁶ Instead, Australia operates under a model of pragmatic pluralism.⁹⁷ Australia’s approach has resulted in a high level of religious freedom, not only for the majority Christian population but for the vast array of minority faiths and for those of no faith.⁹⁸ A blanket ban on the wearing of the Islamic face veil in public would be the antithesis of Australia’s multicultural and multi-faith approach to religious issues.

⁹¹ New South Wales, *Parliamentary Debates*, Legislative Council, 11 September 2014, 314 (Fred Nile).

⁹² *Scientology Case* (1983) 154 CLR 120, 130.

⁹³ For a discussion of the debate surrounding the Islamic face veil in the United Kingdom, see Bouteldja, above n 43, 115–21. For a discussion of Quebec’s proposed ban, see Fournier and See, above n 76, 275–83.

⁹⁴ *La Constitution du 4 octobre 1958* [French Constitution of 4 October 1958] art 1; Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 114.

⁹⁵ Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (Routledge, 2012) 2.

⁹⁶ Evans, *Legal Protection of Religious Freedom in Australia*, above n 94.

⁹⁷ Stephen V Monsma and J Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Rowman & Littlefield Publishers, 2nd ed, 2009) 93–130.

⁹⁸ Kevin Boyle and Juliet Sheen (eds), *Freedom of Religion and Belief: A World Report* (Routledge, 1997) 166–75.

The relationship between states and their minority religious populations should not be a race to the bottom. It should not be a contest to see which country can make life most difficult for their Muslim populations. A ban may not breach the European Convention on Human Rights or, if introduced at a state level, Australia's own *Constitution*, but that does not mean Australia should follow France's lead.⁹⁹ Just because something is legally permissible does not mean it is advisable. Instead, Australia should stand as a world leader in finding ways for diverse religious communities to live together, all expressing their diverse religious beliefs and practices as freely as possible. Australia prides itself on its multiculturalism.¹⁰⁰ However, multiculturalism is more than trying a few 'foreign' foods. It includes tolerating and even celebrating practices you find 'confronting'. As I have argued, '[r]ather than feeling uncomfortable when seeing a veiled woman, Australians should feel proud. Our society is tolerant and open-minded enough for a diverse range of religious beliefs and practices, which include wearing the burqa and niqab.'¹⁰¹

VI PLAYING THE UN-AUSTRALIAN TRUMP CARD

Another argument advanced in support of a blanket ban on the Islamic face veil is that it is un-Australian. Bernardi and Lambie have both used this argument.¹⁰² In a speech to Parliament, Lambie argued that 'we must act decisively and unite under the one Australian flag, constitution and culture. The terrorists and extremists will win if we further divide and segregate into ethnic and religious groups who reject the Australian law, constitution and culture.'¹⁰³

Former Australian Prime Minister Abbott never himself called for a ban. He has, however, on several occasions referred to the Islamic face veil as 'confronting'.¹⁰⁴

⁹⁹ Anne Hewitt and Cornelia Koch, 'Can and Should Burqas Be Banned? The Legality and Desirability of Bans of the Full Veil in Europe and Australia' (2011) 36 *Alternative Law Journal* 16.

¹⁰⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 11 143–52.

¹⁰¹ Barker, 'Banning the Burqa Is Not the Answer to Fears About Public Safety', above n 6.

¹⁰² Barker, 'The Full Face Covering Debate: An Australian Perspective', above n 14, 145; Commonwealth, *Parliamentary Debates*, Senate, 30 September 2014, 7392 (Jacqui Lambie).

¹⁰³ Commonwealth, *Parliamentary Debates*, Senate, 30 September 2014, 7391 (Jacqui Lambie).

¹⁰⁴ Michael Owen, 'Australians Find Burqa Confronting, Tony Abbott Says', *The Australian* (online), 7 May 2010 <<http://www.theaustralian.com.au/news/nation/australians-find-burqa-confronting-tony-abbott-says/story-e6frg6nf-1225863717990>>; Latika Bourke and James Massola, 'Burqa Debate: Tony Abbott Says People Need to Be Identifiable in Secure Buildings', *The Sydney Morning Herald* (online), 1 October 2014 <<http://www.smh.com.au/federal-politics/political-news/burqa-debate-tony-abbott-says-people-need-to-be-identifiable-in-secure-buildings-20141001-10oio5.html>>.

His comments, and similar ones by former Prime Minister Howard,¹⁰⁵ when combined with Abbott's call for all Australians to be on 'Team Australia' are apt to be interpreted as implying that people who wear the Islamic face veil are somehow not playing for the right team.¹⁰⁶ While Abbott perhaps did not intend anything more than a clumsy sports metaphor, such sentiments are unhelpful. It implies that some people are not playing on the same team and are therefore un-Australian. People like Bernardi and Lambie are likely to do just as they have done and link such sentiments to Abbott's comments that he finds the Islamic face veil confronting.

To argue that the veil is in some way un-Australian is to define what it means to be Australian. As argued above, this should mean multiculturalism, tolerance and the embracing of all cultures and peoples who have chosen to call this country their home.¹⁰⁷ During debate in the House of Representatives on 2 October 2014, the same day the parliamentary burqa ban was implemented, a procession of MPs proclaimed their support of multiculturalism and diversity. Some listed the large number of nationalities found in their electorate, others the celebration of multiculturalism at their local schools and others their proud engagement with their local Muslim communities.¹⁰⁸ If such sentiments are to have meaning, then any notion that it is un-Australian to dress differently — including in a burqa or niqab — must be rejected.

VII YOU MIGHT HAVE A BOMB UNDER THERE

While the arguments addressed so far are predominantly social and relate to issues of Australian identity, more practically based arguments are also given in support of a ban on the Islamic face veil. Nile, Bernardi and Lambie have all argued that the Islamic face veil needs to be banned in the interests of security, either because it can be used as a disguise or because it is a symbol of extremism.

¹⁰⁵ Commonwealth, *Parliamentary Debates*, Senate, 30 September 2014, 7391–2 (Jacqui Lambie), quoting David Humphries, 'Live Here and Be Australian, Howard Declares', *The Sydney Morning Herald* (online), 25 February 2006 <<http://www.smh.com.au/news/national/live-here-beaustralian/2006/02/24/1140670269194.html>>.

¹⁰⁶ Tony Abbott and George Brandis, 'New Counter-Terrorism Measures for a Safer Australia' (Media Release, 26 August 2014); Lisa Cox, "'You Don't Migrate to This Country Unless You Want to Join Our Team": Tony Abbott Renews Push on National Security Laws', *The Sydney Morning Herald* (online), 18 August 2014 <<http://www.smh.com.au/federal-politics/political-news/you-dont-migrate-to-this-country-unless-you-want-to-join-our-team-tony-abbott-renews-push-on-national-security-laws-20140818-3dvbx.html>>.

¹⁰⁷ For a discussion of the meaning, history and challenges to multiculturalism in Australia, see Elsa Koeth, 'Multiculturalism: A Review of Australian Policy Statements and Recent Debates in Australia and Overseas' (Research Paper No 6, Parliamentary Library, Parliament of Australia, 2010).

¹⁰⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 2014, 11 143–52.

It must be acknowledged that the covering of the face and body does pose a small security risk in any setting. As with any enveloping garment, some forms of Islamic dress could, in theory, be used to conceal a weapon or bomb. It must also be acknowledged that, as with other forms of facial covering, such as large sunglasses, surgical face masks and balaclavas, a burqa or niqab impedes the accuracy of facial recognition technology and CCTV cameras. However, the risks actually posed by the burqa and niqab are slight.¹⁰⁹ Muslims make up just 2.2 per cent of the Australian population and the proportion of Muslim women who wear the Islamic face veil is a fraction of that. While exact numbers in Australia are not known, it is likely to be less than in France.¹¹⁰ While the number of Muslims in Australia is relatively low, much of the concern over both Muslims and the face veil may be attributed to overestimation. A poll conducted in 2014 by IPSOS Mori revealed that Australians believe the number of Muslims in the country to be nine times higher than the reality.¹¹¹

There has only been one recorded incident where an Islamic face veil has been used in Australia as a disguise in the commission of a crime. In May 2010, a person wearing a veil robbed a man in a Sydney car park. Bernardi seized on this incident to call for the banning of the Islamic face veil in Australia.¹¹² There have been no similar incidents since. The only other public incidents involving the Islamic face veil have all been far less serious. In June 2010, a woman in New South Wales was accused of making a false statement to police after she was stopped for a roadside breath test. She later falsely claimed that the police officer had attempted to forcibly remove her veil.¹¹³ This incident led to the passage of the *Identification Legislation Amendment Act 2011* (NSW).¹¹⁴ In July 2010, a witness in a Western Australian court requested to give evidence while wearing a face veil. Judge Deane denied her request, but permitted other arrangements to be put in place to minimise her discomfort while testifying.¹¹⁵ Finally, in June 2013, a Queensland Magistrate questioned whether a defendant could wear an Islamic face veil during sentencing. However, the woman

¹⁰⁹ Evans, *Legal Protection of Religious Freedom in Australia*, above n 94.

¹¹⁰ Samina Yasmeen, 'Australia and the Burqa and Niqab Debate: The Society, the State and Cautious Activism' (2013) 25 *Global Change, Peace & Security* 251, 258; in 2009 it was estimated that as few as 1900 women in France and its overseas dominions wore the Islamic face veil: *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 55.

¹¹¹ Michael Safi, 'Australians Think Muslim Population Is Nine Times Greater Than It Really Is', *The Guardian* (online), 30 October 2014 <<http://www.theguardian.com/australia-news/datablog/2014/oct/30/australians-think-muslim-population-nine-times-greater>>.

¹¹² Barker, 'The Full Face Covering Debate: An Australian Perspective', above n 14, 145.

¹¹³ *Ibid* 150–1.

¹¹⁴ *Ibid* 151–5.

¹¹⁵ *Ibid* 150.

was not required to remove her veil.¹¹⁶ The existence of a few minor incidents, all of which were satisfactorily resolved, does not warrant a blanket ban. As Evans has argued, there is ‘no evidence of a pressing social need created by criminals making use of Muslim dress to evade detection.’¹¹⁷

Bernardi’s link between the burqas found during anti-terrorist raids in Sydney and Brisbane is just as tenuous. While it is perhaps trite to say, it is likely shoes were also found during the raid and no-one is suggesting shoes be banned. In 2001, Richard Reid attempted to detonate an explosive concealed in a shoe while on board American Airlines Flight 63.¹¹⁸ Just as the wearing of shoes in and of itself did not make Reid a terrorist, nor should it be implied that just because someone is wearing an Islamic face veil they are a terrorist.

Even if Islamic face veils have on occasion been used as a disguise during terrorist attacks, a blanket ban is not necessary to address this threat. The European Court of Human Rights rejected France’s argument that its ban was necessary for public safety. The Court has, in the past, found there to be no problem with laws requiring religious veils to be removed for the purpose of security checks.¹¹⁹ The Court was of the opinion that ‘a blanket ban on the wearing in public places of clothing designed to conceal the face can be regarded as proportionate only in a context where there is a general threat to public safety.’¹²⁰

In the context of the French ban, the Court held that

the objective alluded to by the Government could be attained by a mere obligation to show their face and to identify themselves where a risk for the safety of persons and property has been established, or where particular circumstances entail a suspicion of identity fraud.¹²¹

Australia’s existing laws already give police the power to compel people to remove a facial covering for the purpose of identification. They are proportionate responses to any security threat that may be posed by the wearing of face coverings of any description.

¹¹⁶ Transcript of Proceedings, *Police v Alqahtung* (Brisbane Magistrates Court, Magistrate Costello, 12 June 2013). See also Kay Dibben and Robyn Ironside, ‘Queensland Premier Campbell Newman Backs Magistrate’s Right to Decide Whether Islamic Woman Should Wear Full-Face Burqa in Brisbane Court’, *The Courier Mail* (online), 13 July 2013 <<http://www.couriermail.com.au/news/queensland/queensland-premier-campbell-newman-backs-magistrate8217s-rights-to-decide-whether-islamic-woman-should-wear-fullface-burqa-in-brisbane-court/story-fnihsrf2-1226662725183>>.

¹¹⁷ Evans, *Legal Protection of Religious Freedom in Australia*, above n 94.

¹¹⁸ Jeffrey C Price and Jeffrey S Forrest, *Practical Aviation Security: Predicting and Preventing Future Threats* (Elsevier Inc, 2nd ed, 2013) 78–9.

¹¹⁹ *Phull v France* [2005] I Eur Court HR 409.

¹²⁰ *SAS v France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) 54.

¹²¹ *Ibid* 55.

A ban on Islamic face veils may in fact have a negative effect on Australian security. A 2011 Australian Security and Intelligence Office (ASIO) report concluded that '[a]ny move in this direction would likely have negative implications, including increased tensions and distrust between communities, and providing further fuel for extremist propaganda, recruitment, and radicalisation efforts.'¹²² As Evans explains in her book *Legal Protection of Religious Freedom in Australia*:

Tarring people who are merely conservative or traditional as terrorist sympathisers and intervening in the way in which they dress may well have the counterproductive effect of alienating such people from the government and may even radicalise those who come to resent being targeted in this way.¹²³

An additional consideration in relation to security is the symbolic nature of the Islamic face veil. Lambie has argued that the burqa

is also a powerful cultural symbol, a flag for the Islamic extremists who now wage war on us. If Islamic extremists see women wearing burqas in public, it emboldens them. They feel as if they have won and that their culture of fear and intimidation and their sharia law have prevailed.¹²⁴

Symbols can be very powerful. Germany's criminal code (*Strafgesetzbuch*) prohibits the use of symbols in connection with an unconstitutional organisation. This unsurprisingly includes the use of the swastika in connection with Nazi ideology. However, banning symbols can have unintended consequences, especially if a group feels they are being unfairly targeted.¹²⁵ The banning of the Islamic face veil could become a rallying cry for extremists and turn these women into martyrs. Bans and suggestions that bans will be introduced may even increase the symbolic significance of the Islamic face veil and encourage more women to take up the practice. As one woman interviewed by Bouteldja recounted, she began wearing the veil after the debate in France began, saying '[t]he minimum that I can do as a Muslim woman is to wear the niqab, given that they are attacking this little bit of my religion'.¹²⁶

¹²² Peter Hartcher, 'A Burqa Ban Would Have Negative Security Implications, Says ASIO Report', *The Sydney Morning Herald* (online), 28 October 2014 <<http://www.smh.com.au/federal-politics/political-news/a-burqa-ban-would-have-negative-security-implications-says-asio-report-20141028-11d8g5.html>>.

¹²³ Evans, *Legal Protection of Religious Freedom in Australia*, above n 94.

¹²⁴ Commonwealth, *Parliamentary Debates*, Senate, 30 September 2014, 7391 (Jacqui Lambie).

¹²⁵ Adrian Cherney and Kristina Murphy, 'Fairness and Trust Make All the Difference in Countering Terrorism', *The Conversation* (online), 3 October 2014 <<https://theconversation.com/fairness-and-trust-make-all-the-difference-in-countering-terrorism-32319>>; Adrian Cherney, 'Why Australia Shouldn't Ban Islamic Group Hizb ut-Tahrir', *The Conversation* (online), 10 October 2014 <<https://theconversation.com/why-australia-shouldnt-ban-islamic-group-hizb-ut-tahrir-32745>>.

¹²⁶ Bouteldja, above n 43, 151.

VIII YOU CAN SEE MY FACE, I WANT TO SEE YOURS

Those who support a ban on the Islamic face veil often use restrictions on the wearing of motorbike helmets as justification for a ban on the veil. In 2010, Bernardi commented:

As an avid motorcyclist I am required to remove my helmet before entering a bank or petrol station. It's a security measure for the businesses and no reasonable person objects to this requirement. However, if I cover myself in a black cloth from head to toe, with only my eyes barely visible behind a mesh guard, I am effectively unidentifiable and can waltz into any bank unchallenged in the name of religious freedom.¹²⁷

The anti-burqa group Faceless has attempted to make a similar point via protests where men wearing either Islamic face veils or other face covering garments have attempted to enter public buildings. In 2012, members wearing black Islamic face veils walked through the streets of Sydney and entered a number of buildings including the New South Wales Parliament. They claimed that their ability to move around freely while wearing the face veil was evidence of lax security.¹²⁸ Another interpretation is that their protest demonstrated Sydney-siders' respect and tolerance of diverse religious and cultural practices.

In 2014, following the lifting of the federal Parliament's restrictions on face coverings in the public gallery, a group of three men attempted to gain entrance to Parliament while wearing an Islamic face veil, motorbike helmet and Ku Klux Klan outfit.¹²⁹ In response to the incident, the Department of Parliamentary Services released a statement explaining:

The Parliament has a longstanding policy that an assembly or other activity intended to draw attention to a grievance or matter of interest, whether personal, political or otherwise (a protest) is permitted in the Authorised Assembly Area.

'Protest paraphernalia' may be used in the Authorised Assembly Area, but not in other areas of the precinct.

People are not permitted to enter Australian Parliament House with motorbike helmets. Helmets have to be removed and cloaked for security reasons. Once again, this is a long standing arrangement.

¹²⁷ Cory Bernardi, 'Burka Bandits Justify a Burka Ban', *The Drum* (online), 29 September 2010 <<http://www.abc.net.au/news/2010-05-06/33978>>.

¹²⁸ See Australian Protectionist Party, 'Faceless in the City [Burqas in the Street]' on *Australian Protectionist Party* (5 April 2012) <<http://www.protectionist.net/2012/04/05/faceless-in-the-city/>>.

¹²⁹ Simon Cullen, 'Men Wearing Ku Klux Klan Outfit, Motorbike Helmet and Niqab Try to Enter Parliament House in Canberra', *ABC News* (online), 27 October 2014 <<http://www.abc.net.au/news/2014-10-27/men-wearing-kkk-outfit-niqab-try-to-enter-parliament-house/5843762>>.

The policy requiring the temporary removals of facial coverings that came into effect on 20 October 2014 enables security staff to identify a person who may be a security risk. In this instance, the Parliamentary Security Service followed procedures for screening visitors entering Parliament. *The visitors were requested to remove the items obscuring their faces as the items were deemed to be protest paraphernalia.*¹³⁰

The men protested that had they been Muslim women they would have been permitted to re-cover their faces after the initial security screening. However, the reason they were refused entry was not because they wished to wear a face covering, Islamic or otherwise, but because they wanted to carry out a protest.

Those who argue for a blanket ban on Islamic face veils on this basis usually rely on security concerns to justify their position. They argue that if it is necessary to remove a motorbike helmet for security reasons, then it must also be necessary to remove a face veil. However, the existing laws already cater for the need to identify a person wearing a face covering. New South Wales, the Australian Capital Territory and Western Australia have all introduced laws that explicitly give police, and some other public officials, the power to require a person to remove their face covering for the purpose of checking their identity. While other states and territories have not introduced similar laws, police in those states have stated that existing laws are already adequate.¹³¹ It is also important to note that helmets protect the wearers' head in a way that Islamic face veils do not. As a result, they are not a good comparison; the security implications of allowing a person to wear a helmet are different to other non-protective face coverings.

The real motivation behind the motorbike helmet arguments seems to be an attempt to cast those who oppose the Islamic face veil as victims of discrimination. However, there is no fundamental human right to wear a motorbike helmet, ride a motorbike or to cover your face. Conversely, freedom of religion, including the right to exercise that religion, is recognised as a fundamental human right in multiple international and domestic human rights instruments. It is not the covering or uncovering of the face that is important for considerations of discrimination and breaches of human rights. It is the religious motivation of the wearer that transforms a requirement to remove a face covering into a case of discrimination and a breach of human rights.

Bernardi and those carrying out the protests in Sydney and at the federal Parliament appear to have forgotten that face coverings can take several forms, from large

¹³⁰ Rosie Lewis, 'Men in KKK and Niqab Challenge Government Scrapping of Burka Ban', *The Australian* (online), 27 October 2014 <<http://www.theaustralian.com.au/news/men-in-kkk-and-niqab-challenge-government-scrapping-of-burka-ban/story-e6frg6n6-1227103546475>> (emphasis added).

¹³¹ Legal Affairs and Community Safety Committee, Parliament of Queensland, *Identification Laws Amendment Bill 2013* (2014); Kay Dibben, 'Expert Claims Court Had Right to Demand Woman Remove Her Burqa', *The Courier Mail* (online), 14 June 2013 <<http://www.couriermail.com.au/news/queensland/expert-claims-court-had-right-to-demand-woman-remove-her-burqa/story-fnihsrf2-1226663403817>>.

sunglasses to Halloween masks, from dressing up at the cricket to Santa costumes at Christmas.¹³² Far from being banned, some of these forms of covering are actively encouraged as part of Australian culture. As a result, a blanket ban on face coverings is likely to have a far wider impact than envisaged by Bernardi and the protestors. During the debate on the New South Wales laws, Liberal MP Bryan Doyle highlighted the range of face coverings worn in Australia when speaking in support of granting police power to require face coverings to be removed for the purpose of checking a person's identity:

In my former role as a public order policeman I attended many major football games. Sometimes people turn up to those games wearing gorilla masks. I often found that people who turned up at sporting events with their faces concealed felt much freer and more open to engage in antisocial behaviour but once the masks were removed and the person's identity was revealed it was much easier to apply the process of the law. Madam Acting-Speaker would also be familiar with those hoodlum elements that sometimes slink around shopping centres with their faces concealed.¹³³

While Doyle's words could also be used to support a blanket ban, as such a ban may solve some of the problems he highlights, it would also have unintended consequences. For example, many brides still choose to wear a veil at their wedding. If a blanket ban were to be introduced in the form suggested by Nile in 2010 and 2014, it would apply equally to the Islamic face veil and to the wedding veil. Both garments cover the wearer's face. While it could be argued that 'common sense' would prevent such an application, common sense is not as common as it should be. It would be a tragedy if an overzealous police officer arrested a bride on her wedding day as she made her way from the car to the church. It would be of little help to her on the day that this was not the intended use of the law. Similarly it would be a tragedy if a Muslim woman wearing the Islamic face veil were arrested as she sought medical attention or the protection of the police. There is great danger that in criminalising the wearing of the veil, these women may be put beyond the protection of the law and other support services, which is 'cruelly ironic in light of the usual objection to the niqab as oppressing those very same people.'¹³⁴

IX NOT IN THE SEAT OF DEMOCRACY

While none of the arguments examined above withstand close scrutiny when used in support of a blanket ban on the wearing of Islamic face veils, those relating to security and identity arguably support situational restrictions. Australia already has

¹³² New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 September 2011, 5459 (Kevin Conolly).

¹³³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 September 2011, 5510 (Bryan Doyle).

¹³⁴ Gareth Morley, 'Veils of Ignorance: How the Supreme Court of Canada Came to Render Muslim Women Outlaws (Sometimes) — and What It Should Have Done Instead' (2013) 33 *Inroads* 119, 129.

laws that restrict the wearing of face coverings in certain circumstances. However, just because a restriction on the wearing of face coverings is confined to certain places or situations does not necessarily mean it is appropriate or necessary.

In the wake of the hysteria over the Islamic face veil and an increased security threat level, the federal Department of Parliamentary Services announced increased security measures at Parliament House. Two of these related to the Islamic face veil. First, 'that anyone entering the building covering themselves in such a way they cannot be clearly identified will be asked to be identified and to produce identification that matches their identity' and second, that 'people [who] do not wish to be readily identified in the galleries of each chamber ... may use the galleries that are fully enclosed in glass.'¹³⁵

On their face, these seemed to be proportionate responses. People wearing Islamic face veils would still be permitted within Parliament House and when it came to identifying people, '[i]f people [had] a cultural or religious sensitivity in relation to this, they [would] be given the privacy and sensitivity that is required in relation to that identification.'¹³⁶ This aspect of the new security arrangements is proportionate as it is minimally invasive and sensitive to an individual's religious and cultural needs. However, it was the second aspect that garnered public attention and was the most problematic.

While it is not entirely clear from the statement by the President of the Senate as to the effect of the security changes, the practical outcome was that people wearing an Islamic face veil who wished to continue to wear it while viewing sessions of parliament were required to do so from behind a screen. These glassed areas are usually used by school children, who presumably cannot be trusted to contain their excitement at being in the nation's capital and remain silent. The explanation given for relegating these women to sit with the school children was that

if there is an incident or if someone interjects from the gallery, ... they need to be identified quickly and easily so that they can be removed from that interjection. Or if they are asked to be removed from the gallery, we need to know who that person is so they cannot return to the gallery, disguised or otherwise.¹³⁷

The difficulty here is the proportionality of the measure. It must be acknowledged there is some risk that a person wearing a face covering may interject and need to be removed. If there are several veiled people, identifying who interjected may be more difficult than it would otherwise be. However, the aim sought to be achieved is far outweighed by the harm this decision has caused.

Parliament is the seat of Australia's democracy. It is where the nation's laws are made and public policy debated. In the wake of the terrorist raids in Brisbane and

¹³⁵ Commonwealth, *Parliamentary Debates*, Senate, 2 October 2014, 7660 (Stephen Parry).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

Sydney, the public debate around the Islamic face veil and the proposed changes to anti-terrorism legislation, Muslims were already feeling unfairly targeted and alienated.¹³⁸ To add insult to injury and bar some Muslim women from full, adult participation in our democratic process is a step too far. As argued above, symbols are important. Symbolically, this decision says more than ‘we need to identify interjectors’. It says to Muslim women ‘you are not welcome here, you cannot be trusted, like school children you must be kept behind glass’. If those like Nile are right and the burqa is oppressive, this decision to segregate women wearing the face veil only further oppresses them.

A further difficulty with the restrictions imposed is that they were a knee jerk reaction to a rumour. The President of the Senate, Senator Stephen Parry, later revealed that the measures had been put in place in response to advice that

a group of people, some being male, were going to disrupt question time in the House of Representatives. The advice further indicated that this group would be wearing garments that would prevent recognition of their facial features and possibly their gender.¹³⁹

It also became apparent that the advice was based on the presence of a film crew who had arrived in anticipation of the rumoured protest:

I was informed that there was a film crew at the front of Parliament House on the forecourt and that they were there in anticipation of a group of people wearing burqas attempting to enter Parliament House or something to that effect.¹⁴⁰

The protest did not eventuate. Given the timing, the suggestion that some of the protesters were likely to be men and the later protest by the three men wearing the Islamic face veil, motorbike helmet and Ku Klux Klan outfit, it is likely the rumoured protest was going to be against the wearing of the Islamic face veil in Australia. In order to prevent a protest against Muslim women’s freedom of religion, the Speaker of the House and President of the Senate curtailed the freedom of these women to participate in our democracy — in effect doing the protestors’ work for them.

¹³⁸ ‘Muslim Community Denounces ‘Anti-Terror’ Law Proposals’ on *Islam in Australia* (20 August 2014) <<https://islaminaustralia.com/2014/08/20/muslim-community-denounces-anti-terror-law-proposals/>>. See also ‘Australian Muslims Denounce Proposed ‘Anti-Terror’ Laws’ on *ABC Religion and Ethics* (21 August 2014) <<http://www.abc.net.au/religion/articles/2014/08/21/4071617.htm>>.

¹³⁹ Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 20 October 2014, 8 (Stephen Parry).

¹⁴⁰ *Ibid* 15.

X CONCLUSION

While the parliamentary restrictions on the Islamic face veil were short-lived,¹⁴¹ they highlighted both the hysteria surrounding the veil and the dangers of responding to that hysteria. Fear, horror and even revulsion are understandable reactions to the actions of IS in Iraq and Syria. However, we must not allow women on the other side of the world to be scapegoats for the actions of IS. Where there are real security concerns posed by facial coverings of any type, these should be addressed. However, a blanket ban is not the way to achieve this. Laws such as those in place in Western Australia, New South Wales and the Australian Capital Territory are adequate to address the miniscule security risk posed by the wearing of face coverings in Australia.

None of the arguments put forward to support a blanket ban on the Islamic face veil stand up to close scrutiny. Even if it is accepted that a ban is necessary to alleviate the oppression of Muslim women and to enhance Australia's security, a ban will be counterproductive. If these women are oppressed, a ban will only deepen that oppression. Further, rather than enhancing security, a ban is more likely to be detrimental as it becomes a rallying cry for extremists.

Suggesting that a ban is appropriate because the face veil is un-Australian or not a true part of Islam only undermines Australia's efforts to be an inclusive, multi-cultural and multi-faith society. Claiming that the veil is not part of Islam only highlights ignorance of the rich diversity within Islam. Further, a law based on this premise requires the state to involve itself in questions of religious orthodoxy; something a secular state is not qualified to do. To claim that the veil is un-Australian is equally problematic. It casts veil wearers as playing for the wrong team setting up a false image of what it means to be Australian. As highlighted by so many MPs in the procession of speeches in Parliament on 2 October 2014, Australia has a vibrant, rich mix of cultures and religions expressed in a variety of ways. This is what it means to be Australian.

Instead of a blanket ban, Australia should carefully examine when and where it might be necessary to see a person's face and then put in place the appropriate laws and procedures. These must be proportionate to the aims they seek to achieve and sensitive to the needs of Muslim women. While the restrictions in Parliament House may have appeared to be appropriate, in reality, they were neither proportionate nor sensitive. Instead, they were an example of where lawmakers can get it wrong by taking action before carefully considering what it is they are seeking to achieve and how that can be achieved in the least invasive way. Instead of enhancing security, the temporary ban on those wearing the Islamic face veil while sitting in the open public gallery excluded an already marginalised group from full adult participation

¹⁴¹ The parliamentary ban on the wearing of face coverings in the public gallery was lifted on 20 October 2014: see Latika Bourke and James Massola, 'Controversial Parliament House Burqa Ban Dumped', *The Sydney Morning Herald* (online), 20 October 2014 <<http://www.smh.com.au/federal-politics/political-news/controversial-parliament-house-burqa-ban-dumped-20141019-118j5h.html>>.

in the democratic process. Furthermore, it highlighted the contradictions inherent in the arguments in support of burqa bans. On the one hand, veiled women are cast as oppressed victims who must be rescued, while at the same time they are treated like naughty school children, outspoken and unable to be trusted to observe normal, polite behaviour when visiting Parliament. This contradictory image highlights the lack of cogency in the ban the burqa rhetoric. Far from having a logical, coherent argument, those who support a ban on the Islamic face veil are self-contradictory and promote an outcome that would be counterproductive to the ends they claim to seek.