

**Amnesty International  
Human Rights in Law Group**

**Queensland-Northern NSW Branch**



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Ms Barbara Stone MP  
Chair, Legal Affairs, Police, Corrective Services and Emergency Services Committee  
Parliament House  
Cnr of George Street and Alice Street  
BRISBANE QLD 4000

5 December 2011

Dear Ms Stone,

**Re: Submission concerning the Identification Laws Amendment Bill 2011**

Please find enclosed the submission of the Amnesty International Human Rights in Law Group concerning the Identification Laws Amendment Bill 2011.

The submission aims to draw the attention of the Legal Affairs, Police, Corrective Services and Emergency Services Committee to the current inconsistencies between the approach adopted by the Bill and Australia's obligations pursuant to international human rights instruments regarding the permissible limitation of fundamental human rights. The Group hopes its submission will assist the Committee to recommend the necessary amendments to the Bill.

The Human Rights in Law Group is part of the group structure of Amnesty International members and supporters who are committed to promoting and advocating for human rights throughout the world. The Amnesty International Human Rights in Law Group comprises voluntary members whose objective is to promote the legislative protection of human rights in Queensland. Our group membership base is predominantly drawn from the Queensland legal profession.

We thank you for taking the time to consider our submission.

Yours Sincerely,

**Catherine Drummond**

Convenor

Amnesty International

Queensland-Northern NSW Branch

Human

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Group

## **Submission Concerning the Identification Laws Amendment Bill 2011**

The Identification Laws Amendment Bill 2011 places serious limitations upon the freedom to manifest religion. The Bill contains no acknowledgment of the appropriate test for imposing limitations on fundamental human rights, and in part, disproportionately restricts the freedom to manifest religion.

### Fundamental Human Rights Impacted by the Bill

This Bill, through amending relevant legislation to require the removal of face coverings for identification purposes, impacts on the right to freedom of religion.<sup>1</sup> This is acknowledged in the Explanatory Notes to the Bill.<sup>2</sup> Freedom of religion is protected by Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Australia became a State Party to the ICCPR on the 13 August 1980 and accordingly, has undertaken to respect and to ensure to all individuals within its territory and subject to its jurisdiction, the rights contained in the ICCPR.<sup>3</sup>

### The Appropriate Test for Limiting the Right to Freedom of Religion

As a State Party to the ICCPR, Australia has undertaken to comply with its provisions, including those that govern the permissible limitation of certain fundamental rights. The freedom of religion contains two parts: the freedom to have or adopt a religion and the freedom to manifest that religion.<sup>4</sup> The freedom to have or adopt a religion is absolute. The freedom to manifest religion is not. Article 18(3) permits States Parties to the ICCPR to limit the freedom to manifest religion, but *only* where such limitations are prescribed by law and are “*necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*”<sup>5</sup>

The United Nations Human Rights Committee (HRC), the treaty monitoring body charged with overseeing implementation of the ICCPR, has observed that Article 18(3) is to be ‘strictly interpreted’ and requires that limitations must be:

- (1) Applied only in pursuance of, and be directly related to, one of the legitimate aims outlined in Article 18(3); and

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<sup>1</sup> As contained in ICCPR, Art 18(1). See also Article 7(1) *Anti-Discrimination Act 1991* (Qld) (freedom from discrimination on basis of religion); s 116 Constitution of Australia prohibits the *Commonwealth* from making any laws prohibiting the ‘free exercise of religion’. The freedom to manifest religion includes the wearing of headcoverings; see United Nations Human Rights Committee (HRC), General Comment No 22, [4]; cfR (*Begum*) v *Governors of Denbigh High School* [2005] 2 WLR 3372 and *R (on the application of X by her father and litigation friend) v Headteachers* [2006] EWHC 298 (Admin) in which UK courts held that a school’s decision to refuse to allow Muslim students from wearing a jilbab (a long coat-like garment) and a niqab a veil covering the entire face and head except the eyes) were justifiable and permissible limitations ‘in the interests of public safety or for the protection of the rights and freedoms of others’. The courts held that freedom of religion ‘does not require that one should be allowed to manifest one’s religion at any time and place of one’s own choosing’. See also *Singh Binder v Canada*, HRC, Communication No 208/1986, UN Doc CCPR/C/37/D/208/1986 (1989) in which the HRC ruled that a restriction on the wearing of a turban due to a requirement to wear safety headgear was permissible.

<sup>2</sup> Identification Laws Amendment Bill 2011, *Explanatory Notes*, 1.

<sup>3</sup> ICCPR, Article 2(1).

<sup>4</sup> ICCPR, Article 18(1).

<sup>5</sup> ICCPR, Article 18(3).

(2) Must be ‘necessary’ meaning that all limitations be ‘proportionate to the specific need on which [they are] predicated’.<sup>6</sup>

### Why Any Legislation that Limits Freedom to Manifest Religion Should Apply the Article 18(3) Test

The *Legislative Standards Act 1992* (Qld) requires that bills satisfy ‘Fundamental Legislative Principles’, including the rights and liberties of individuals. The Queensland Government has recognised that the ‘individual rights and liberties of individuals’ includes internationally protected human rights. In its submission to the former Scrutiny of Legislation Committee’s review of the meaning of ‘Fundamental Legislative Principles’ the Government stated that ‘[a]ll rights and liberties, including those sourced from the common law *and international law*, should not be encroached without explanation and justification.’<sup>7</sup>

We welcome the Government’s recognition that an integral part of respecting and upholding fundamental human rights includes limiting such rights only when certain conditions are met. We submit that as the Queensland Government is bound by treaty obligations assumed by Australia and its own commitment to upholding internationally protected human rights, Queensland legislation that seeks to limit such rights must comply with the tests laid down by international instruments for doing so. Specifically, to the extent that this Bill limits the freedom to manifest religion, it must satisfy the Article 18(3) test outlined above.

### The Appropriate Test is Not Met by Particular Provisions of the Bill

There is one clause of the Bill which the Amnesty International Human Rights in Law Group has identified as being of particular issue: clause 12 which inserts, *inter alia*, sections 41A(1)(b) and 41A(2) into the *Police Powers and Responsibilities Act 2000* (Qld). Section 41A(1)(b) permits a police officer to require a person to remove a face covering where the person has been lawfully required to give their name, address or date of birth, and section 41A(2) provides that the police officer may still require the removal of the face covering regardless of whether or not the person has complied with the request to produce photographic identification pursuant to section 41A(1)(a) or give their name, address or date or birth pursuant to section 41A(1)(b).

The primary purpose for these provisions is to permit police officers to require the removal of a face covering for “identification” of the person in question. However, they do not satisfy the appropriate test for permissible limiting of rights under the ICCPR.

#### *(i) Legitimate Aim*

The Amnesty International Human Rights in Law Group acknowledges that, in some circumstances, the identification of persons will be necessary for police officers to ensure public safety and to protect the fundamental rights and freedoms of others; these are both legitimate aims acknowledged by Article

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<sup>6</sup> HRC, General Comment 22, [8].

<sup>7</sup> Legislative Assembly of Queensland Scrutiny of Legislation Committee, *Our Principles: Review of the Meaning of ‘Fundamental Legislative Principles’*, Report No. 47 (June 2011), 4 (emphasis added).

18(3) of the ICCPR. The amendments to the *Police Powers and Responsibilities Act 2000* (Qld) that this Bill introduces therefore serve a legitimate aim.

(ii) *'Necessary': Proportionate to the Specific Need on Which it is Predicated*

Sections 41A(1)(b) and 41A(2) are disproportionate restrictions on the freedom to manifest religion. Section 41A(1)(b) provides police officers with the power to require removal of a face covering if a lawful demand has been made for that person's name, address or date of birth. Unlike section 41A(1)(a), section 41A(1)(b) contains no requirement for the production of photo identification against which to match the physical appearance of the person who is required to remove their face covering. In this respect, and insofar as the legitimate aim of the legislation is "identification", there is limited benefit to be gained from requiring the removal of a facial covering where there is no correlative requirement for the production of photo identification against which to match the person's appearance. To do so is not proportionate to the specific need to identify the person in question. Accordingly, it is a disproportionate restriction on the freedom to manifest religion.

Similarly, section 41A(2), which preserves the requirement to remove the facial covering even if the lawful request for the production of photographic identification pursuant to section 41A(1)(a) or the person's name, address or date of birth pursuant to section 41A(1)(b) is not complied with, also constitutes a disproportionate restriction on the freedom to manifest religion. If the production of photographic identification is refused, requiring the removal of facial covering without something against which to match the person's physical appearance does not properly serve the purpose of "identification." This is also the case where the requirement to give a name, address or date or birth is refused. Therefore section 41A(2) is also a disproportionate restriction on the freedom to manifest religion.

Both proposed provisions contained within clause 12 should be removed from the Identification Laws Amendment Bill 2011.

The Appropriate Test Should be Explicitly Acknowledged in the Bill

The Amnesty International Human Rights in Law Group also recommends that the Bill expressly acknowledge the test that is being applied in the limiting of the freedom to manifest religion. The common law presumption that legislation is not intended to abrogate fundamental rights or freedoms other than by express or unambiguous language<sup>8</sup> contains within it the requirement that legislation clearly acknowledges when rights and freedoms are being subject to limitation and the justifications for such limitation. Given the absence of a statutory human rights instrument in Queensland or Australia, and the abolition of a committee dedicated to the scrutiny of legislation in the recent changes to the parliamentary committee system, it is of heightened importance for transparency and accountability in the legislative process that bills such as the Identification Laws Amendment Bill 2011 clearly acknowledge and justify any limitation to fundamental rights in accordance with the appropriate test to which Australia has committed itself.

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<sup>8</sup>*Coco v The Queen* (1994) 179 CLR 427, 436-437; *Evans v the State of NSW* (2008) 168 FCR 576, 593-594.

### Religious Sensitivities

The Group notes that the procedures for the removal of the facial covering outlined in section 41A(3)(b) do not include provision for the viewing of the person's face by a police officer of the same sex as the person in question. In light of cultural and religious sensitivities related to covering of faces in some societies, the Amnesty International Human Rights in Law Group recommend the inclusion of a subparagraph (iii) in section 41A(3)(b) framed in the following terms:

(b) the viewing of the person's face must be conducted—

(i) in a way that gives the person reasonable privacy if the person requests privacy; and

(ii) as quickly as is reasonably practicable; and

*(iii) insofar as is reasonably practicable, by an officer of the same sex as the person in question.*

### Conclusion and Recommendations

It is the submission of the Amnesty International Human Rights in Law Group that the Identification Laws Amendment Bill 2011 be amended to include express recognition of a limitation of the right to manifest religion and justify that limitation in accordance with the test set out in Article 18(3) of the ICCPR. Further, that Clause 12, proposed sections 41A(1)(b) and 41A(2) of the *Police Powers and Responsibilities Act 2000* (Qld) be removed as they are not permissible limitations on the freedom to manifest religion in accordance with Australia's international human rights obligations. In addition, the Group recommends an amendment making provision for the viewing of the person's face by a police officer of the same sex as the person in question.