

THE NIQAB (Face Veil) AND THE COURTS

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1. INTRODUCTION

- 1.1. This guidance note focuses on the issues that may arise for the prosecutor where a woman who wears the niqab (face veil) is to be cited as a witness in a trial. It can be assumed that the same general principles will apply to an accused person who wears the niqab.
- 1.2. The guidance considers some common myths and stereotypes and aims to improve the general understanding of COPFS staff about this particular form of religious and cultural dress. However the principal aim of the guidance is to outline policy and best practice for COPFS, taking account of the cultural and religious issues regarding the wearing of the niqab and the need to serve the interests of justice.

Throughout the guidance we ask staff to be aware of the religious and cultural significance of wearing the niqab and the distress that can be caused by having to remove it in front of adult men other than close family.

However, we also emphasise that not all women who wear the niqab will be offended or humiliated by removing it and in many Islamic traditions it is considered that if wearing a niqab draws undue attention or harassment to the woman, this is worse than removing it.

The best approach is to ask the woman and take account of her views.

- 1.3. The guidance also looks at the approach taken by courts in other jurisdictions to the wearing of the niqab.
- 1.4. COPFS is grateful to all individuals and community organisations who contributed to this guidance. (Annex B)

The overriding concerns should be to consider whether and, if so, to what extent the interests of justice will be adversely affected if the niqab is worn in court and to seek to ensure that women are not required to remove the niqab except where this would prejudice a fair trial.

- 1.5. Women who wear the niqab have their face completely covered, with an opening or sheer material for the eyes. There are also other styles of garment which cover the face to varying degrees. This may raise implications where the woman is a witness or the accused in a criminal trial. The following questions are of particular relevance to COPFS staff:
- If a woman is asked to remove the niqab, does this interfere with her right to practise her religion under the European Convention on Human Rights?
 - If a witness is permitted to wear the niqab, does this interfere with the accused's right to a fair trial under the European Convention on Human Rights?
 - Can the interests of justice be served even though the jury cannot see the face of a witness (or accused person)?
 - Can the identity of the woman be agreed if her face cannot be seen?
 - Are there any implications with regard to the credibility or reliability of the woman's evidence?
- 1.6. This guidance discusses a range of circumstances and offers possible solutions.

1.7. Ultimately it is for the court, in any set of circumstances, to consider what difference, if any, would be made to the interests of justice if the niqab is worn by a witness or accused. It may well be that after due consideration there is no necessity to take any steps at all.

In order to monitor and improve practice, we ask all offices to advise Crown Office Policy Division when they are dealing with any case where a woman who wears the niqab is a witness or an accused person.

Policy Division is here to help if you have any questions or concerns about how best to proceed.

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2. SUMMARY of TERMS and POLICY HIGHLIGHTS

Religious significance

2.1. Terms

- **A Niqab** is a Muslim woman's face veil. This is different to the more common 'headscarf' commonly called a hijab or khimar.
- **A Burqa** is a full length garment covering the whole body including hands, feet and face. The face part features very light material that allows the woman to breathe and see.
- **Purdah** is a word used to describe the practice of covering the face and body (and segregation of men and women).
- **Iddat** describes the strict circumstances of a Muslim woman who is widowed. Observance lasts for 4 months and 10 days after her husband's death.

2.2. The particular observance of wearing the niqab or burqa applies only to women and is only of significance in the presence of adult men other than close family, for example their father, brother, son, husband, uncle or grandfather.

Sensitivities

2.3. For many women who observe this cultural and religious tradition, it may be distressing to be asked to remove their veil in front of any adult man other than close family. The Race Equality Council has reported that asking a Muslim woman to remove the niqab in front of men against her wishes is similar to asking another woman to take off her clothes and appear naked.

2.4. However, not all women who wear the niqab will be offended or humiliated by removing it.

Equality Duties

2.5. COPFS is committed to adopting a sensitive, fair and professional approach to all our services and contact with the public at all times. We work together to maintain the security and confidence of all of Scotland's diverse communities. In order to earn that confidence we have to ensure that we treat people fairly and in accordance with their needs.

- 2.6. COPFS is also subject to statutory equality duties to promote equality and eliminate discrimination. One part of our response to these duties is our commitment to promoting equal access to justice and providing victims and witnesses with equal opportunities to give their evidence.
- 2.7. Misinformation and personal prejudices about the wearing of the niqab must not be allowed to influence our practice.

Case Marking and VIA Referrals

- 2.8. We should expect, in the first instance, that police will give advice in their reports about any victim, witness or accused person who wears the niqab. Lord Advocate's Guidelines to Chief Constables requires that police provide details of any ethnic or religious issues in relation to a witness, bereaved relative or an accused that may be relevant to family liaison or prosecution of a case.
- 2.9. This issue should have no bearing on any marking decisions but Marking Deputes should note any reference to potential witnesses who wear the niqab to ensure their needs are considered prior to the commencement of any court proceedings.
- 2.10. Deputes should consider making further enquiries or early contact with the witness to ascertain her views in order that these can be considered by the Court at intermediate diet (summary cases) or first diet or preliminary hearing (solemn cases). This should include consideration of whether the provisions of the Vulnerable Witnesses Act may apply.

Deputes should alert the defence and court at an early stage to any case where a witness wishes to wear the niqab when giving evidence. Parties should be in a position to inform the court at intermediate diet, first diet or preliminary hearing of their position.

- 2.11. Deputes should consider whether to make a referral to VIA to ensure an increased level of contact and to assist early assessment of 'vulnerability' for the purposes of the Vulnerable Witnesses Act (VWA). VIA have a particular role in helping to gather information to assist the assessment for any provisions under the VWA.

First contact with the witness

- 2.12. Any response to a witness wearing the niqab should be proportionate to its relevance to the case and the simplest and least intrusive solution sought. Wearing the niqab does not affect most situations. We can make no assumptions as to any witness's personal beliefs or circumstances.
- 2.13. Whenever possible, first contact should be made by a female member of staff. This will allow most flexibility in determining the woman's views during any interview and in relation to any future proceedings.
- 2.14. If for any evidential reason, COPFS staff need to see the witness's face during precognition, the witness must be properly informed of the reasons why this is needed. The woman can be asked to remove her veil in private in front of a female member of COPFS staff.
- 2.15. The fundamental issue for prosecutors must be to determine the procedural necessity for exposing the witness's face and to provide a full explanation to the witness in order to secure cooperation and minimise

distress. The best approach is always to ask the woman and take account of her views.

Witnesses who have to give evidence

- 2.16. COPFS staff should never assume, without good reason, that it is inappropriate for a woman to give evidence in court wearing the full veil. If the witness's first preference is to wear her niqab, then this should be properly explored in the first instance.
- 2.17. In all cases, it must be considered in which, if any, circumstances it is essential for the court to see the woman's complete facial expressions. If, after giving proper consideration to this guidance, it is considered essential that the witness's veil is removed during evidence, COPFS staff should explore the use of Vulnerable Witness Act provisions outlined below. The considered best practice is the use of a live TV link which will enable the woman to give her evidence 'unveiled' whilst remaining outwith the presence of everyone in the court.
- 2.18. Where it is considered that the criteria for using the Vulnerable Witnesses Act are not met, we should consider whether it is appropriate to make an application to use screens or live TV link on a Common Law basis with reference to *Hampson*¹

Deputes should always consider Section 5 on Human Rights Issues.

Communication

- 2.19. There is no evidence that a face veil alone inhibits effective communication. COPFS can explore with the court and with the witness if there may be a need for any adjustments to microphones or additional amplification.

Identification

- 2.20. A witness or accused must be identified and cannot refuse identification. For the purposes of satisfying the court COPFS may consider the possibility of securing the woman's identification prior to her appearance in the witness box.
- 2.21. Similarly, if it is critical to the case that a witness is able to identify an accused who wishes to wear the niqab in court, COPFS should consider agreeing identification evidence by other means prior to the trial (as is routinely done with child witnesses).

Credibility

- 2.22. COPFS does not assume that witness credibility can be assessed only if the court is able to see complete facial expressions. In each case the court will have to consider the whole circumstances and whether the fact that the witness's face is hidden makes it impossible for the judge (or jury where relevant) to assess credibility.

Vulnerable Witness Act Provisions

- 2.23. If there is any indication that the circumstances of the case and of the woman's evidence may require her to remove her face veil and that doing so may cause her fear and distress, COPFS must consider whether the use of special measures under the VWA provisions would help the witness and accordingly make an application to the court.

¹ *Hampson v HMA* 2003 SCCR 13

- 2.24. As in all cases, we must take full account of the woman's views. For some women, if wearing a niqab draws undue attention to them (for example asking the court for special measures) they may consider this worse than removing it. It is important to ask.
- 2.25. The considered best practice is the use of a live TV link which will enable the woman to give her evidence 'unveiled' whilst remaining outwith the presence of everyone in the court. Everyone in the courtroom, including the accused, would see the witness through a monitor. It has been suggested that this use of camera and monitor is acceptable to women who wear the niqab because it is only the witness's reflection that is on view. If this measure were used, the court should be asked to approve the presence of a female member of the Witness Service or provide a female clerk or court officer in the TV room. Deputes should also consider asking that the court be cleared during the witness's evidence.
- 2.26. The use of screens may help reduce the woman's exposure to men in the courtroom but would not eliminate it.
- 2.27. An early court familiarisation visit may help to assess the witness's vulnerability in terms of the Vulnerable Witnesses Act. As with all Vulnerable Witness Applications, the woman's view on this should be ascertained.

COPFS Monitoring Requirements

- 2.28. Deputes should refer cases to the Area Procurator Fiscal if they have any concerns that the interests of justice will not be served by proceeding with a case, on grounds that the distress likely to be caused to a witness cannot be overcome by any means, and is such that it outweighs the public interest in the prosecution.
- 2.29. In order to monitor and improve practice, we ask all offices to advise Crown Office Policy Division when they are dealing with any case where a woman who wears the niqab is a witness or an accused person.
- 2.30. Policy Division is here to help if you have any questions or concerns about how best to proceed.

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3. THE NIQAB - CULTURAL DRESS STYLES

- 3.1. The Islamic impetus for veiling stems from a passage in the Quran that states: " [and] say to the believing women that they should lower their gaze and guard their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty.' [Quran : 24.31]
- 3.2. The majority view within Islamic understanding is that a woman is required to cover herself with the exception of her face, hands (and some include feet). The minority view is that a woman should cover everything including her face. The more liberal understanding is that the requirement for modesty stipulated in the Qur'an lends itself more to modesty in action and behaviour as opposed to clothing. These different approaches reflect the diversity and plurality in Islam.

- 3.3. Quranic injunctions definitely call for modesty in dressing. Muslim women may therefore believe themselves to be under a religious obligation to keep their bodies covered in order to maintain a high sense of modesty and this may include the wearing of the niqab or burqa. Women who choose to cover their face and body are said to practice [‘purdah.’](#)
- 3.4. There are some cultural variations in how strictly the Islamic dress code should be adhered to. Within Islam, the issue of veiling is a subject for considerable debate as some Muslim women are totally against it and for others it is at the heart of their religious observance. We understand that there is no Islamic law condemning Muslim women who choose not to observe a strict dress code.
- 3.5. Muslim men are also under a religious obligation of modesty and are expected to cover themselves from waist to knee. “Say to the believing men that they should lower their gaze and guard their modesty: that will make for greater purity for them: And Allah is well acquainted with all that they do.” (Qur’an 24:30)

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Visual Aid to Different Styles of Muslim Head-Covering

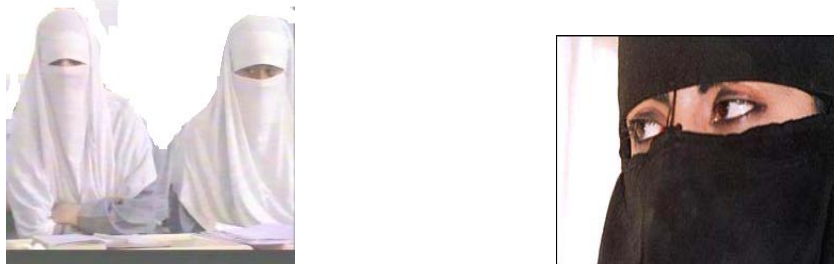
- 3.6. The word ‘hijab’ comes from an Arabic word meaning to conceal or cover, and is used in the Quran to refer to covering, veiling, screening or sheltering, not necessarily to do with clothing. Today the word hijab has become linked with modest dress and is commonly used interchangeably with the English word ‘headscarf’. A woman who wears the hijab or niqab is called Muhajaba.

The Khimar or Hijab:



There are different types of khimar or hijab. They will all cover the head and many will include a long cape-like veil made from a semi circular flair of fabric and sewn up at the straight edge leaving the face uncovered. They can be different lengths from mid chest to the ankle.

The Niqab:



A **Niqab** is a face veil. The **half niqab** has a tie or velcro closure or snaps that go over the hijab (or headscarf) and round the back of the head. It may also have an elastic band that slips under the head covering.

The **full niqab** has a flap that covers the eyes as well.



The eye veils can be raised to expose only the eyes or to expose the whole face. The **Chador or Burqa** covers the whole body including hands, feet and face. The face part features very light material that allows the woman to breathe and see.

The Buknuk or Milfeh:



This style is worn by Gulf women and is usually a two-piece tube style head cover, traditionally only in black. Some times women in the Gulf use Milfeh to cover their faces. Some tribal women wear leather or cloth niqabs decorated with gold coins or shells.

The Chador or Dupatta:



These styles are similar. A Dupatta is worn by many Afghani, Indian, Pakistani and Bangladeshi women and is a longer rectangular scarf wrapped around the head and shoulders over other clothing. A Chador is worn mainly in Iran and is a one piece larger version of the Khimar wrapping the whole body and head, with a built in face veil that fastens by drawing it over the face from one side.

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4. CULTURAL AND RELIGIOUS ISSUES

4.1. Religious and cultural beliefs can have a significant impact on the way people dress. Generally, this does not pose a problem in public places. There are many examples of religious items of clothing – the Jewish skullcap (kippah or yarmulke) and the Sikh turban are simply examples. In most cases religious clothing and different cultural practices present few, if any, issues for the court and other secular institutions. However, issues can sometimes arise in

relation to the wearing of some cultural or religious dress within the criminal justice system and this can apply in relation to the niqab, or full face veil, sometimes worn by Muslim women.

- 4.2. The Muslim community in Scotland is the second largest religious group, estimated to be 42,000 people and making up approximately 1% of the population.² Traditionally, many Scottish Muslims have ties to Pakistan, India and Bangladesh, although there are increasing numbers from the Arab world. In many of these countries particular styles of dress have traditionally been worn.
- 4.3. Muslims follow the religion of Islam. The Holy Book of Islam, the Qu'ran (or Koran), is regarded by most Muslims as the infallible Word of God as revealed to Mohammed by the Angel Gabriel over fourteen hundred years ago. Most Christian communities and Jewish communities hold similar beliefs about the New and Old Testaments of the Bible.
- 4.4. Although the Qur'an does call upon women to cover their 'ornaments', the way this is interpreted varies from tradition to tradition. According to an Islamic scholar: "the Burqa/veil, is part of local traditions in different parts of the world. While the Qur'an does not obliterate the need for the niqab, Muslim women have a choice based on their circumstances."³
- 4.5. It is important to remember that the veil has no universal meaning and is represented in several cultural contexts.
- 4.6. However, for some women the niqab is not just a style of dress or piece of clothing; it may be regarded as an act of faith and of solidarity with their culture, traditions and community.
- 4.7. For many woman who observe this cultural and religious tradition, it may be distressing to be asked to remove their veil in front of any adult man other than close family, for example their father, brother, son, husband, uncle or grandfather. It may be considered humiliating and offensive, not only for the woman but also for her family. In some cases, it may even be perceived to be offensive to all observant women within their community. It is suggested that being asked to remove a niqab in front of men may be akin to asking someone to remove their clothing – skirt or trousers.
- 4.8. Not all women who wear the niqab will be offended or humiliated by removing it and in many Islamic traditions it is considered that if wearing a niqab draws undue attention or harassment to the woman, this is worse than removing it.
- 4.9. The best approach is to ask the woman and take account of her views.

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5. HUMAN RIGHTS ISSUES

- 5.1. It is important that COPFS takes proper account of all Human Rights issues when considering each individual case. We need to identify practice which

² [Census Scotland 2001](#)

³ 'Hijab: A must or a choice?' by Haitham, June 2005;
<http://sabbah.biz/mt/archives/2005/06/26/hijab%E2%80%A6-a-must-or-a-choice/>

would be resistant to challenge under ECHR - we cannot simply depend upon defence agreement that a witness does not have to remove her face veil during evidence.

COPFS must have due regard to:

Article 9 - freedom of religion.

The European Court of Human Rights has clarified that wearing religious dress is one part of the manifestation of one's religion or belief and therefore comes within the scope of Article 9(1). According to *Şahin v Turkey*⁴ wearing Islamic dress is viewed as a manifestation of religion or belief, rather than the actual holding of the religion or belief. The right is therefore restricted by the exceptions in paragraph 2 of the Article.

Article 6 – right to a fair trial

Article 6(3)(d) of the European Convention on Human Rights states: 'Everyone charged with a criminal offence has the following minimum rights.... '(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;'

This Article is COPFS paramount consideration and however we proceed in a case involving a witness who wears the niqab, we must ensure that we are not acting in breach of this Article.

There is nothing in Article 6 that requires a witness, in every case, to reveal her face to the accused when giving evidence. The overarching principle is that the accused's right to a fair trial will not be infringed where the proceedings as a whole are fair. The accused's right to a fair trial under this Article will also require consideration of the need for judges and jurors to be able to assess witness credibility. This is explored further in section 6 of this guide.

Other ECHR Articles to consider

Article 3 – prohibition of torture or inhuman or degrading treatment.

This Article is unlikely to be involved, unless the treatment is particularly degrading, but it may be useful to bear it in mind, as the guidance states that being asked to remove the niqab or face covering in certain circumstances can be compared to being asked to remove one's clothes. Article 3 is not subject to any exceptions, as is the case with some of the other Articles, so it is essential that we ensure that women are not treated in a way that could amount to a violation of Article 3. It is essential if a woman is asked to remove her face covering that this is always done in a way that is not degrading, for example, she must not be asked to remove it in front of unrelated men or in a way that could be considered particularly insensitive.

Article 8 – respect for private and family life

This Article is worth considering in that the wearing of religious dress can be considered an important part of the wearer's identity. The observation of Iddat could rightly be considered an important aspect of family life. Article 8 rights are subject to exceptions, but these are not as strong as those which arise in relation to the rights to freedom of expression or religion.

Article 10 – freedom of expression

⁴ (2005) 41 EHRR 8

Wearing Islamic dress can be considered an expression of one's identity or political views⁵. Restrictions are contained within paragraph 2 of the Article.

Article 14 – prohibition of discrimination in the enjoyment of other ECHR rights

This article can only be raised in conjunction with another substantive article. See discussion concerning Article 6.

- 5.2. Turning to the issue of an accused who wears the niqab, it is arguable that to ask her to remove this would interfere with her ability to defend herself. An issue may be raised in conjunction with Article 14 (see below) that she has been discriminated against in her right to enjoy Article 6, in that she is facing an extra barrier which a woman who does not wear the niqab would not have to face. However, it may not be possible to allow the woman to wear the niqab where this would prevent her from being effectively identified in court. It may be possible to allow the accused to appear via video link. This would preserve her Article 9 and 6 rights and ensure the integrity of the process. Screens are not available to accused persons under the VWA.

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6. COPFS POLICY

Introduction

- 6.1. COPFS policy acknowledges from the outset that, for Muslim women who choose to wear the niqab, it is an important element of their religious and cultural identity. There may be a diversity of opinions and debates between Muslims about the nature of dress required; for the criminal justice system the starting point should be respect for the woman's expression of her religious and cultural beliefs.

COPFS strategic aim: to serve the public interest, prosecuting cases independently, fairly and effectively.

Corporate value: to be sensitive to the needs of the public, including victims, nearest relative(s) and witnesses.

- 6.2. COPFS recognises that Scottish society, including the COPFS workforce, is diverse - made up of different people from different backgrounds who all have their own lifestyles, beliefs and experiences.
- 6.3. We also recognise the need to maintain the security and confidence of all of Scotland's diverse communities. In order to earn that confidence we have to ensure that we treat people fairly and in accordance with their needs.
- 6.4. In addition to these corporate commitments, we are also subject to the statutory duties to promote equality and eliminate discrimination. One part of our response to these duties is the commitment to promoting equal access to justice and providing victims and witnesses with equal opportunities to give their evidence.

⁵ Ilicak v Turkey 15394/02

COPFS must ensure at all times that our response is thoughtful, reasonable and appropriate to the individual circumstances of each case

- 6.5. COPFS staff must ensure that a woman wearing the niqab is not treated differently or unfairly, or afforded less support and protection than any other witness. There is room for diversity and respect for different religions and cultures, including the right of Muslim women to practise their religion through religious dress.
- 6.6. However, the ability of the woman to exercise her right to freedom of religion will depend on the circumstances of the case involved and there may be situations where that freedom of expression may have to yield to the rights of others, in the interests of justice.
- 6.7. Each individual situation must be considered on the facts of the case, attempting wherever possible to take account of the Muslim woman's views and to minimise any distress. Not all women who wear the niqab will be offended or humiliated by removing it and the best approach is to ask the woman and take account of her views.

Where the right to manifest one's religion conflicts with the interests of justice, the interests of justice must prevail.

Interests of Justice

- Will the accused's right to a fair trial be violated if s/he cannot see the face of the witness?
- 6.8. Article 6(3)(d) of the European Convention on Human Rights states:
*Everyone charged with a criminal offence has the following minimum rights...
'(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;'*
- 6.9. There is nothing in Article 6 of the European Convention on Human Rights that requires a witness, in every case, to reveal her face to the accused when giving evidence. The overarching principle is that the accused's right to a fair trial will not be infringed where the proceedings as a whole are fair.
- 6.10. The accused's right to a fair trial under this Article will also require consideration of the need for judges and jurors to be able to assess witness credibility which might require unveiling by the witness. This is explored more fully later in this section of the guidance.
- 6.11. Article 9 of the European Convention on Human Rights States:
*(1) 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 worship, teaching, practice and observance.
(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.*
- 6.12. The European Court of Human Rights has clarified that wearing religious dress is one part of the manifestation of one's religion or belief and therefore

comes within the scope of Article 9(1). According to *Şahin v Turkey*⁶ wearing Islamic dress is viewed as a manifestation of religion or belief, rather than the actual holding of the religion or belief. The right is therefore restricted by the exceptions in paragraph 2 of the Article.

- 6.13. The importance of protecting cultural diversity and respecting cultural and religious beliefs must be properly considered, whilst ensuring that they do not interfere with another person's rights under Article 6 above.

The fundamental question for prosecutors must be: 'What is required to enable a woman wearing a niqab to participate in the legal process, to facilitate her ability to give her best evidence and to ensure that the accused's right to a fair trial is upheld?

You should refer to [Section 5 on Human Rights Issues](#) for full advice.

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Witness Cooperation

- Is the woman being awkward? Could she easily remove her niqab?
- 6.14. The Race Equality Council has reported that asking the witness to remove the niqab in front of adult men against her wishes is similar to asking another witness to take off her clothes and give evidence semi-naked. A woman in a United States law suit chose to have her case dismissed rather than remove her veil, stating, "I wish to respect my religion and so I will not take off my clothes" (*Muhammad v Enterprise Rent-a-Car*, No. 06-41896-GC – Mich. 31st Dist. Ct. Oct. 11, 2006).
- 6.15. A requirement to remove the niqab in front of a courtroom of men may be humiliating for a Muslim woman and considered offensive, not only to the woman, but also to her family. In some cases it may even be perceived to be offensive to all observant women within their community.
- 6.16. However, not all women who wear the niqab will be offended or humiliated by removing it and the best approach is to ask the woman and take account of her views.

The fundamental issue for prosecutors must be to determine the procedural necessity for exposing the witness's face and to provide a full explanation to the witness in order to secure cooperation and minimise distress.

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Effective Communication

- Is the face veil a barrier to effective communication?
- 6.17. Mainstream British culture tends to assume that full 'face to face' communication is the most effective. However we know that it is entirely possible to conduct productive conversations by telephone, and it might be considered absurd if we suggested that someone with a sight impairment couldn't communicate effectively because they couldn't see the other person's face.

⁶ (2005) 41 EHRR 8

- 6.18. Any concern that a witness cannot be heard should be discussed with the witness and it may then be necessary to consider whether any amplification measures should be taken, for example, the use of additional microphones.
- 6.19. Alternatively it may be useful to ask the witness to loosen her veil if this would assist in making her precognition or evidence clearer. This suggestion should be made sensitively so as to avoid any offence to the witness.
- 6.20. Only in circumstances where effective communication cannot be obtained by any other means and the right to a fair trial will be compromised, should a witness, who is generally unwilling to remove her veil, be asked to do so.

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Credibility

- If the judge, jury and accused can't see the person's face, how can they tell whether that person is telling the truth?

'I can't see your face and I can't tell whether you're telling me the truth and I can't see certain things about your demeanour and temperament that I need to see in a court of law' (Muhammad v Enterprise Rent-a-Car, No. 06-41896-GC – Mich. 31st Dist. Ct. Oct. 11, 2006).

- 6.21. Interpretations of the demeanour and presentation of self in Muslim culture and mainstream British culture vary. For example, in British culture a jury may warm to a witness whose face they can see, who speaks out, who they can hear openly and clearly and who looks directly at them. However, in Muslim culture witnesses may tend to cast their eyes lower and speak in a quiet manner giving a very detailed description in evidence. Muslim culture would consider these mannerisms to be more characteristic of an honest and credible witness.
- 6.22. It cannot be assumed, in any particular case, simply because a judge or jury cannot see the whole face of the witness, that they will be unable to assess whether the witness is telling the truth. In assessing the credibility of the witness their overall demeanour should be taken into consideration. Emotion, distress etc may be inferred from the coherence of the evidence, general demeanour and from voice tones.
- 6.23. We suggest that the truth in the witness's evidence can be assessed also by other means, for example:
- Is the woman's account consistent with other witnesses?
 - Is the woman's account consistent with her previous statements?
 - Can the woman's demeanour and temperament be assessed by the tone of her voice?
 - Does the woman sound nervous or appear anxious?
 - Does the woman sound coherent and confident?
 - Do her eyes show any expression? Tears?

<p>It cannot be assumed that a witness is not credible solely because the court or the precognoscer is unable to see their complete facial expressions.</p>
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- 6.24. Each witness has a right of equality with other witnesses in terms of how her evidence is evaluated by the court. Prosecutors may be concerned that if

the court cannot see the witness's facial expressions it will have a negative impact on her evidence and in some cases, it may be appropriate to share these concerns with the witness. Conversely, it must also be noted that any distress or withdrawn demeanour exhibited by a witness who has to remove their veil may adversely impact on the jury's assumptions about her credibility.

- 6.25. We know that each witness expresses their emotions very differently when in the witness box. Some witnesses show a great deal of expression when recounting an incident in the witness box – sometimes real, sometimes exaggerated and sometimes faked. Yet it cannot be assumed that if a rape victim shows no emotion in the witness box that she is not telling the truth. This does not necessarily mean that they are being any more truthful than a witness who 'freezes' and through nerves is unable to express themselves.
- 6.26. As a jury is the finder of fact, it could be argued that they should take the witness as she is and decide whether they find her to be credible.

In all cases, it must be considered in which, if any, circumstances it is essential to see the woman's complete facial expressions.

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7. PRACTICE GUIDANCE

Introduction

- 7.1. COPFS staff should adopt a sensitive, fair and professional approach at all times. Misinformation and personal prejudices about the wearing of the niqab must not be allowed to influence your practice.
- 7.2. This guidance does not offer a single approach to cases where a woman wears the niqab. Each case and each witness must be considered individually. You can make no assumptions as to any witness's personal beliefs or circumstances. Neither should you make assumptions as to the approach any judge may take to the issue in a particular case. It is for the individual judge to decide whether the witness is required to remove her veil when giving evidence. Chapter 2 of the Equal Treatment Bench Book (*awaiting hyperlink to revised version when published*) provides brief guidance on this matter.
- 7.3. This guidance is intended to minimise the concerns of staff and witnesses. It considers some of the practical matters that can arise at the different procedural stages through an investigation, precognition and prosecution of a case and offers some practical solutions to address these practical issues.
- 7.4. The main aim is to ensure that every witness has access to justice and to help minimise any undue distress to individuals.

Not all women who wear the niqab will be offended or humiliated by removing it and in many Islamic traditions it is considered that if wearing a niqab draws undue attention or harassment to the woman, this is worse than removing it.

The best approach is to ask the woman and take account of her views.

In order to monitor and improve practice, we ask all offices to advise Crown Office Policy Division when they are dealing with any case where a woman who wears the niqab is a witness or an accused person. Policy Division is here to help if you have any questions or concerns about how best to proceed.

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Marking Stage: What to expect in the Standard Police Report

- 7.5. In death reports and race crime reports, police are already instructed to provide details of any ethnic or religious issues in relation to a witness, bereaved relative or an accused that may be relevant to family liaison or prosecution of a case. The consolidated [Lord Advocate's guidelines to Chief Constables on the Investigation and Reporting of Racist Crime](#) provide guidance to the police in relation to issues of reporting of racist crime, assessment of language needs and cultural sensitivities and the information which is required by procurators fiscal from the police to ensure that liaison with bereaved relatives takes place in a manner which is sensitive to their religious and cultural needs.
- 7.6. We should therefore expect, in the first instance, that police will give advice in their reports about any victim, witness or accused person who wears the niqab. Marking Deputes should note any reference to potential witnesses who wear the niqab to ensure their needs are considered prior to the commencement of any court proceedings.
- 7.7. Deputes should consider making further enquiries or early contact with the witness to ascertain her views in order that these can be considered by the Court at intermediate diet (summary cases) or first diet or preliminary hearing (solemn cases). This should include consideration of whether the provisions of the Vulnerable Witnesses Act may apply.

Deputes should always alert the defence and court at an early stage to any case where a witness wishes to wear the niqab when giving evidence. Parties should be in a position to inform the court at intermediate diet, first diet or preliminary hearing of their position.

- 7.8. Deputes should also consider referring the case to the VIA team either on the grounds of case type, such as a case involving racial or religious aggravation or on the grounds of other vulnerability or need for additional support.
- 7.9. In this way all parties will be aware how the Court process will work and be prepared for adjustments which are considered appropriate.

Deputes should refer cases to the Area Procurator Fiscal if they have any concerns that the interests of justice will not be served by proceeding with a case, on the grounds that the distress likely to be caused to a witness cannot be overcome by any means, and is such that it outweighs the public interest in the prosecution.

These cases should also be referred to the Crown Office Policy Division.

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Deaths

- 7.10. In death reports police are already instructed to provide details of any ethnic or religious issues in relation to a bereaved relative that may be relevant to family liaison. The consolidated [Lord Advocate's guidelines to Chief Constables](#) provide guidance to the police in relation to the assessment of language needs and cultural sensitivities and the information which is required by procurators fiscal from the police to ensure that liaison with bereaved relatives takes place in a manner which is sensitive to their religious and cultural needs.
- 7.11. We should therefore expect, in the first instance, that police will give advice in their reports about any close family member who wears the niqab.
- 7.12. VIA Officers should take this into account when preparing for the Family Liaison Officer (FLO) Handover meeting and seek any further information required from the police. There may be a need at this stage to allocate the handover to a female member of VIA staff in order to ensure that female members of the family are not excluded from the handover. VIA have a particular role in ensuring that the nearest relatives are kept fully informed on all developments during the investigation. Their contact with family members will assist in ensuring the needs of bereaved relatives are known prior to any meeting with the Procurator Fiscal or any court proceedings.

IDDAT

- 7.13. In deaths cases all staff must be particularly aware of the concept of Iddat which is the term used to describe the circumstances of a Muslim woman who is widowed. A Muslim woman who observes Iddat will not go in front of any male person, other than a relative such as her father, brother or uncle, for 4 months and 10 days after her husband's death.

The observation of IDDAT will have consequences for VIA Officers who are involved in a FLO handover; precognition officers who wish to take a statement; and those involved in scheduling court proceedings given the timescales involved.

- 7.14. If court proceedings are expected within the period of Iddat COPFS staff should be particularly sensitive during precognition to ensure that that, wherever possible, the woman is not required to break her religious obligations. This may include the allocation of female only staff and consideration of conducting precognition interviews at an alternative venue to avoid the witness having to travel.
- 7.15. Given the sensitivity of these cases, particular attention should be given to the provisions of the Vulnerable Witnesses Act to allow maximum protection when giving evidence, for example the use of a live TV link in the company of female court staff only.

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Identification

- 7.16. The primary concern for COPFS staff must be the question of identification of any witness both at precognition and in court.
- In the first instance, you must be able to satisfy yourself as to the identity of the person you are interviewing during precognition. (see next section on Precognition)

- The court must also be able to be satisfied as to the identity of any witness and any accused person on each day of evidence.
- It may also be critical to the case that the accused is satisfied as to the identity of the witness giving evidence against him/her.
- It may be critical to the evidence in the case that a witness is able to identify an accused.

It should be remembered that a witness or accused must be identified and cannot refuse identification. The court may consider the absence of identification of a witness as contrary to the interests of justice and contravening the accused's right to a fair trial.

7.17. For the purposes of satisfying the court, you should not assume that it is necessary for the woman to remove her veil in court. If a woman wishes to wear her niqab when giving evidence, it may be possible to secure her identification prior to her appearance in the witness box.

- The witness could be identified in private by a suitable female appointed by the court prior to the commencement of the trial. Although the face of the woman will not be seen in court, it may be possible for a female appointed by the court to check the woman's identity with her passport or another relevant identification document in private prior to the woman giving evidence. The officer appointed by the court could then give evidence on oath that the identity of the witness has been verified.
- If the court does not accept the prior identification of the witness the witness may need to be 'unveiled'. However, the length of time that the witness must be unveiled in order to facilitate identification should be kept to a minimum.

7.18. For the purposes of satisfying the accused and where the witness is a complainer in a case, you should consider if she may have been wearing the niqab when the alleged crime was committed against her. The accused has a right to confront his/her accuser, but he/she may have difficulty in arguing that the interests of justice require that the witness' face be revealed if he/she has never seen the witness' face in the first instance.

7.19. Similarly, if it is critical to the case that a witness is able to identify an accused, who wishes to wear the niqab in court, you should consider agreeing identification evidence by other means prior to the trial (as is routinely done with child witnesses).

7.20. You should always ask if the witness would be willing to remove her niqab voluntarily, but must avoid force or persuasion that may be considered offensive by the witness or her family. However, you must also provide a clear explanation of court procedures and the circumstances under which she might be required to expose her face and the consequences of refusing to do so.

Deputes should refer cases to the Area Procurator Fiscal if they have any concerns that the interests of justice will not be served by proceeding with a case, on the grounds that the distress likely to be caused to a witness cannot be overcome by any means, and is such that it outweighs the public interest in the prosecution.

These cases should also be referred to the Crown Office Policy Division.

7.21. **Important Note:** If the accused was wearing the niqab at the time of the offence, there is unlikely to be a need to ask for her veil to be removed as identification evidence, but she may be required to satisfy the court of her identification at each hearing and on each day of proceedings.

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Precognition interview

7.22. It is essential that COPFS staff do not make assumptions about a woman's beliefs or culture or personal circumstances. There are many different Muslim traditions in relation to cultural dress. In many cases, the fact that a woman wears the niqab will have no bearing on your investigation or on any subsequent proceedings.

Any response to a witness wearing the niqab should be proportionate to its relevance to the case and the simplest and least intrusive solution sought.

Wherever possible, the first contact should be made by a female member of staff.

7.23. Each individual situation must be considered on the facts of the case and circumstances of the Muslim woman in question. The Muslim woman's views on the matter must always be considered and taken into account.

7.24. If for any evidential reason, COPFS staff need to see the witness's face during precognition, the witness must be properly informed of the reasons why this is needed. The woman can be asked to remove her veil in private in front of a female member of COPFS staff. It is OK to ask.

7.25. In most cases, if you are able to show some understanding of the issues involved and are able to provide a clear explanation as to the procedural requirements of the case, it will be possible to gain the woman's cooperation without causing undue embarrassment.

7.26. If the witness indicates that she has no objection to removing the Niqab in front of a male member of staff, this will be acceptable.

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Referral to VIA

7.27. Depending on the witness's views and the requirements of the case, you should consider whether to make a referral to your VIA team to ensure an increased level of contact and to assist early assessment of 'vulnerability' for the purposes of the Vulnerable Witnesses Act.

7.28. Referrals can be made on the grounds of case type, such as sexual crimes, racially or religiously aggravated crimes, or on grounds of the potential vulnerability of the victim or witness.

7.29. VIA have a particular role in helping to gather information to assist the assessment for any provisions under the VWA.

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Vulnerable Witnesses Act

- 7.30. The witness may be considered vulnerable, in terms of the Vulnerable Witnesses Act 2004, if being asked to remove her veil would cause her to suffer fear and distress to the extent that there is a significant risk that the quality of her evidence will be affected. In determining whether a person is a vulnerable witness the court shall take into account the social and cultural background and ethnic origins of the witness and any religious beliefs or political opinions of the witness.
- 7.31. If there is any indication that removing her veil may be required and that doing so may cause her fear and distress, an early court familiarisation visit may help to assess the witness's vulnerability in terms of the Vulnerable Witnesses Act. You should then consider whether the use of special measures would help the witness and accordingly make an application to the court.

The use of screens may help reduce the woman's exposure to men in the courtroom but would not eliminate it.

The use of a live TV link may enable the woman to give her evidence without being directly exposed to anyone in the courtroom.

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Giving evidence

- 7.32. It should never be assumed, without good reason, that it is inappropriate for a woman to give evidence in court wearing the full veil. If the witness's first preference is to wear her niqab, then this should be properly explored in the first instance.
- 7.33. In all cases, it must be considered in which, if any, circumstances it is essential for the court to see the woman's complete facial expressions. If, after giving proper consideration to this guidance, it is considered essential that the witness's veil is removed during evidence, COPFS staff should explore the use of Vulnerable Witnesses Act provisions.
- 7.34. Where it is considered that the criteria for using the Vulnerable Witnesses Act are not met, we should consider whether it is appropriate to make an application to use screens or live TV link on a Common Law basis with reference to *Hampson*⁷.
- 7.35. Remember that removing their face veil is contrary to the woman's religious observance. However, for some women, if wearing a niqab draws undue attention to them (for example asking the court for special measures) they may consider this worse than removing it. It is important to ask.

You must determine the woman's views about wearing the niqab when giving evidence.

⁷ *Hampson v HMA* 2003 SCCR 13

COPFS must respect the witness's choice and pursue all practical and effective alternative measures to assist her give evidence without compromising her religious beliefs and without causing undue distress.

Effective Communication:

7.36. There is no evidence that a face veil alone inhibits effective communication. The court should be advised about any concerns about hearing the witness from the witness box. These matters should be dealt with simply and practically. Microphones are provided in most courts but COPFS should request that additional amplification equipment is provided where necessary.

7.37. In situations where a fair hearing may require the woman to remove her niqab, or where the woman feels she may be able to participate more effectively without her niqab, the following measures can be considered to meet her different needs without compromising the interests of justice.

Clearing the court:

7.38. A request for the court to exclude the public should be considered and could reduce the witness's distress. However, this has limited value as it does not exclude any male members of the press, lawyers, police, dock escorts or jurors.

Use of Screens:

7.39. The use of screens may assist as this would enable the witness to give evidence 'unveiled' out of the direct sight of any male accused, dock escorts, police, press and public. The witness should be advised that they would still be exposed in front of the judge/sheriff, jurors and lawyers.

Use of Live TV link:

7.40. The use of a live TV link is perhaps the most effective way of enabling the witness to give evidence 'unveiled' whilst remaining outwith the presence of everyone in the court. Everyone in the courtroom, including the accused, would see the witness through a monitor. It has been suggested that this use of camera and monitor is acceptable to women who wear the niqab because it is only the witness's reflection that is on view. As with all Vulnerable Witness Applications, the woman's view on this should be ascertained. If this measure were used, the court should be asked to approve the presence of a female member of the Witness Service or provide a female clerk or court officer in the TV room.

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8. GUIDANCE FOR WITNESS

Introduction

- 8.1. The Crown Office and Procurator Fiscal Service aims to treat all people fairly and to adopt a sensitive and professional approach at all times. We want all witnesses to be able to participate in the legal process and to be able to give their best evidence without any undue distress.
- 8.2. If you wear the niqab, you will not be treated differently or unfairly or afforded less support and protection than any other witness. We recognise that for Muslim women who choose to wear the niqab it is an important element of their religious and cultural identity. The starting point for all our staff will be respect for the choice made and to try, wherever possible, to allow for each woman to decide on the extent and nature of the dress she adopts when giving her evidence.
- 8.3. We take seriously the value and importance of your human right to express your religious beliefs. Religious dress and other cultural issues are only our concern when we need to consider their impact on how we conduct our investigation, interviews with a witness or bereaved relative and any impact on court proceedings.
- 8.4. Our primary duty is to ensure fairness to the accused and ensure that what we do meets the interests of justice. It is important to understand that this must be part of the main focus of what we do because the accused's right to a fair trial is an essential part of the Scottish system of justice. We must also take into account the distress and inconvenience to any witnesses that may result from giving evidence.
- 8.5. Our Victim Information and Advice staff (VIA) have a particular role in liaison with bereaved relatives following some sudden deaths and will be particularly sensitive to any witness or relative observing a period of Idit. Our staff will try to ensure that the person is not required to break their religious obligations during this time by considering the use of female staff only and an alternative venue for any meetings to avoid the person having to travel if that is a particular concern.
- 8.6. There are a number of other leaflets that can provide you with information about criminal justice proceedings and court settings.

<p>Please ask if you need more information or if you would like to speak to a female member of staff.</p>
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Precognition – meeting the Procurator Fiscal Staff

- 8.7. There are a mixture of men and women working in our Procurator Fiscal offices. Whenever possible, if you ask, we will try to arrange for you to see a female member of staff. In our larger offices this may be possible, but cannot be guaranteed; in some of our smaller offices that may be more difficult.
- 8.8. Depending on the circumstances of the investigation, the fact that you wear the niqab may have no bearing on our interviews with you. However, in order to ensure fairness, there may be times throughout our investigation when we

will have to ask you to remove the face part of your niqab. Our staff will only do this when necessary and only for the shortest time possible.

- 8.9. If we have to ask you to remove the face part of your niqab we will try to ensure that only female members of staff are present. If this is not possible, we will try to ensure that the time you need to have your face uncovered is kept to a minimum.

COPFS staff may ask you to remove your face veil if we need to identify you at the start of any interview when we are investigating the case and asking you about your evidence (precognition interviews).

- 8.10. If we need to interview you when you are observing a period of Iddat, we may be able to conduct the precognition interview at an alternative venue to avoid you having to travel if that is a particular concern for you.

At court

- 8.11. If you have to give evidence in any criminal court proceedings, we will discuss with you if you have any preference about wearing your niqab.

It is important that you tell us early on in the investigation if you have any concerns about appearing in court so that we can consider how best to help meet your needs whilst also ensuring fairness to others in the court.

- 8.12. We understand that appearing in court may be distressing for any witness and whenever possible we will try to ensure that you are not under any additional pressure to remove your niqab where it is not absolutely necessary.
- 8.13. However, there may be times when the interests of justice require you to uncover your face when giving evidence. If the court considers that it cannot properly ensure fairness for all sides, you may be asked to remove the part of your veil that covers the main part of your face.

Identification

- 8.14. All witnesses must be identified by the court. The absence of identification of a witness or accused is not in the interests of justice and may contravene the accused's right to a fair trial.
- 8.15. You must be able to show the court that you are the person named as the witness and about to give evidence. If your evidence lasts for more than one part of the day, you may be asked to be identified each time the court restarts.
- 8.16. There may be different ways to satisfy the court about your identity, perhaps by asking you to uncover your face to a female member of court staff only, or by clearing the court of everyone except the judge, lawyers and accused for this short time.
- 8.17. We will discuss these options with you and consider what may be possible in your case.

Giving evidence

- 8.18. Giving evidence usually means going into a courtroom in front of a judge, lawyers, the accused person(s), other court staff and possibly a jury made up

of 15 random members of the public. There will inevitably be a mixture of men and women – it is not possible to arrange for an all-woman courtroom.

- 8.19. Most witnesses give their evidence standing in a witness box in the courtroom and it is for the court to decide what difference, if any, would be made to the interests of justice by the niqab being worn by a witness in the courtroom.
- 8.20. It may well be that the court is satisfied that there is no impact on fairness to proceedings and there is no necessity to take any steps at all, other than the need for identification at the start of evidence as described above.
- 8.21. However the court may decide that the circumstances of the case, or the nature of your evidence, means that you will have to remove your face veil whilst giving evidence – either for a short time or for the whole time.
- 8.22. In the first place, the court will consider whether the judge, accused and any jury will have difficulty hearing what you say if you are speaking through your veil. To resolve this it may be possible to ask the court for amplification to be used – such as additional microphones. It may also help if you simply loosen your veil.
- 8.23. The court may decide that you must give part or all of your evidence without wearing your face veil, perhaps because it considers that:
 - your evidence may be disadvantaged if the judge or jury is not able to effectively assess your manner or facial expressions when responding to questions
 - the accused's right to a fair trial may be compromised if he/she cannot see your face
- 8.24. The Procurator Fiscal staff will discuss these matters with you and explain what needs to happen in your case. We will listen to your views and try wherever possible to make arrangements that take account of your wishes and religious and cultural needs.

Special Measures

- 8.25. If you are content to remove the face part of your niqab for the time you are giving your evidence there will be no need to make any special arrangements or to advise the court.
- 8.26. If, however, you feel that having to remove your niqab will cause you such fear or distress that it may affect your ability to give your evidence, it may be possible to apply to the court to ask for special arrangements to be made.
- 8.27. These special arrangements are known as 'special measures' and are available to witnesses who come within the terms of the Vulnerable Witnesses Act 2004.
- 8.28. There are a range of different possible approaches depending on the circumstances of the case.
 - The court can consider clearing the court of all persons not directly involved in the proceedings. This would reduce the number of people who would see you without your face veil. It does not, however, mean that there will be no men present in the court when you give your evidence.
 - A screen can be placed alongside the witness box. This means that an accused person and any members of the public could not directly see

your face – although your face would still be seen by the court officers such as judge, lawyers and, where there is a jury, the members of the jury. The accused and other people in the courtroom would see your face on a television monitor.

- o A live television link can be used from another room. This means that you would sit in front of a television monitor and camera in another room. The people in the courtroom would still see you but only indirectly through their TV monitors.

8.29. Your cooperation and views are very important to us and the court, so please tell us how you feel about these matters. Our Victim Information and Advice Officers (VIA) have a particular role in helping to explain these different special arrangements to you. They will listen to your concerns and help you decide what would work best for you.

8.30. It is important that we try to resolve all these matters early and not wait until the day of the trial.

If you have not had any experience of being in a courtroom and would like to visit one to see what it is like, please tell us. Our VIA staff can arrange a visit through the Witness Service.

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9. THE NIQAB AND THE COURTS: PRACTICE AND CASE LAW IN OTHER JURISDICTIONS

It is acceptable to wear the niqab in courts in Muslim countries.

For guidance to Judges in Scotland please refer to the Judicial Studies Committee Equal Treatment Bench Book (currently under review) (*awaiting hyperlink to revised version*).

For guidance to Judges in England and Wales please refer to the Judicial Studies Board [Equal Treatment Bench Book Chapter 3.3 Religious Dress](#).

England:

A. It was reported on BBC News online on Wednesday 4 July 2007, that a magistrate, Mr Ian Murray, had walked out of Manchester Magistrates Court because Zoobia Hussain, 32 was wearing the Niqab. Ms Hussain's lawyer, Judith Hawkins, said her client was "shocked and distressed" and found Mr Murray's treatment towards her as being "insensitive and unacceptable". **On 8th January 2008, as a result of a Ms. Hussain lodging a complaint regarding his conduct, Magistrate Ian Murray was given a formal reprimand by Justice Minister Jack Straw and the Lord Chief Justice. He was also ordered to attend further training on how to keep to judicial guidance.**

B. On November 6 2006 a veiled Muslim lawyer refused to remove her niqab at the request of Immigration Judge George Glossop, at a hearing in Stoke-on-Trent. The reason given by the Judge was that he could not hear Shabnam Mughal clearly.

However, Mughal insisted that the removal of the veil was against her religious belief and that she had a right to wear the veil during the immigration hearing, and had appeared wearing the niqab at a number of hearings without any

difficulties. The case was briefly adjourned by the Immigration Judge. Later in the day he asked her a second time to remove the veil and she refused to do so. The case was adjourned, pending consultations with the head of the Asylum and Immigration Tribunal.

Days after the Muslim lawyer refused to take off her veil, Sir Henry Hodge, head of the Asylum and Immigration Tribunal ruled that Muslim female lawyers can wear the niqab, as long as this will not prevent them from being heard in the courtroom and that his or her client agrees with this.

New Zealand:

In the 2005 Auckland case of *Police v Abdul Zohoor Razamjoo* (Auckland District Court CRN 30044039397-8) two female Crown witnesses wished to give evidence wearing their burqa. Counsel for the defence raised an objection and the judge accepted that the issue had to be addressed before trial. The right of the witnesses to practise their religious belief by wearing the burqa had to be balanced with the accused's right to a fair trial. However, Judge Moore considered that it was the interests of justice in an overall sense that was the decisive factor. He ruled that screens could be used to ensure that only the judge, counsel and female court staff were able to observe the witnesses' faces during cross examination:

"This Court accepts the evidence of Mrs Salim's faith and beliefs. It accepts that to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold."

However, Judge Moore felt that it is ". . .hard to envisage evidence given from within a burqa having as much impact as evidence from a person (even one physically elsewhere) whose face can be observed." He added, ". . . it seems inevitable that evidence given from beneath a burqa would, consciously or unconsciously, be accorded less weight than the same evidence given by that witness when her face was visible. The [prosecution] submits that downgrading is acceptable. The Court is doubtful. Such an approach creates a lesser class of witness. It undermines the central concept of the equality of all before the law. It harkens of legal systems very different to our system in which a person's sex, race or social position determines how much weight can be given to their evidence."

Overall the Court determined that:

"It is fundamental to the values of a free and democratic society that criminal justice be administered publicly and openly. In general that means that the public should be able to see and hear the participants. Some limitations on that can and are permitted but it is essential for public confidence in the justice system that those limitations are well justified on a case by cases basis. The witness totally masked or hidden so that in practical terms they cannot be seen (directly or indirectly) even by judge, jury and counsel, represents, in conceptual terms, a challenge to the basic values of the New Zealand type of society."

The following conclusions have been drawn from this case:

- The defendant and the public have a legitimate expectation of trial by the normal processes except to the extent that departure from those processes is merited in the interests of justice;
- Mrs Salim had the right to manifest her religious belief by wearing her burqa in public but she recognised that there can be situations in which that manifestation yields to other needs. In addition, Mrs Salim had the right, as a witness, of equality with others in terms of how her evidence is evaluated;
- The public had rights and legitimate expectations concerning the public nature of the criminal process;
- The Court had an obligation to the community to recognise and uphold the values of a free and democratic society;
- Judge Moore concluded that it would be contrary to the interests of justice to require that whilst giving evidence Mrs Salim and others of like beliefs have their faces exposed to the view of the public or the defendant;
- He also concluded that to authorise the giving of evidence from beneath what is effectively a hood or mask would be such a major departure from accepted process and the values of a free and democratic society as to seriously risk bringing the Court into disrepute; and
- Accordingly he ruled that screens may be used to ensure that only the Judge, counsel and female Court staff are able to observe the witness's face. Provided the witness' face is fully exposed to view, the Court has no objection to the witness expressing their religious sensibilities by wearing a hat or scarf which covers their hair.

United States:

In the case of *Muhammad v Enterprise Rent-a-Car*, No. 06-41896-GC – Mich. 31st Dist. Ct. Oct. 11, 2006 a Muslim woman sought \$2,750 in damages against Enterprise Rent-A-Car for damage caused by thieves. Muhammad arrived in court wearing the niqab and was given the 'option' of removing the niqab or having her case dismissed. Presiding Judge Paul Paruk stated:

'I can't see your face and I can't tell whether you're telling me the truth and I can't see certain things about your demeanour and temperament that I need to see in a court of law.'

Muhammad's suggestion that her case be heard in front of a female judge, before whom she would feel comfortable removing her veil, was refused. Judge Paruk claimed that this was impossible. The inevitable consequence for Muhammad was a choice between manifesting her religious beliefs and pursuing justice through the courts. As a result Muhammad was forced to opt out of the justice system.

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10. USEFUL LINKS TO ARTICLES AND ORGANISATIONS:

[Muslims in Britain - A Guide for Non-Muslims](#)

Sectarianism, Don't Give It Don't Take It: Islam and Islamophobia in a Scottish Context: (Learning and Teaching Scotland website)

<http://www.ltscotland.org.uk/antisectionarian/whatIsSectarianism/aboutsectarianism/Islam/index.asp>

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CASE LAW ON THE NIQAB IN OTHER CONTEXTS

England:

In *R (ex parte X) v Head Teachers and Governors of Y School*, 2007 WL 675365, the issue raised was whether a school was entitled as a matter of public law to refuse to allow a Muslim girl to wear the niqab at school. It was held that:

- Although X's Article 9 rights had been engaged, they had not been infringed by the school's decision. X could choose whether or not to attend the school in question or to attend a school that did not have a policy against the wearing of the niqab. Hence there is no infringement of the right to manifest one's religion 'where other public institutions offering similar services' are available.
- In any case, even if it could be proven that the school had interfered with X's Article 9 rights, this interference would be justified where the school's policy to prohibit the wearing of the niqab had been 'in the interests of public safety or for the protection of the rights and freedoms of others' and was not disproportionate, pursuant to Article 9(2) of the Convention.
- The claimant was not entitled as of right to the same treatment her sisters had received at the school. X had started at the school many years after her sisters had left. During this period many changes had taken effect at the school, including the appointment of a new head teacher. It was felt that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing', quoting Lord Hoffman in *Begum*.
- The school was permitted to adopt changes to their policies. The court confirmed that the change to school policy did not breach the legitimate expectation of the parties. Different schools were entitled to adopt their own rational policies and there had not been a practice, let alone a regular practice, amounting to a representation that Y would permit X to wear a niqab at school. If there had been such a representation, taking into consideration the legitimate aims pursued by the school in the public interest, Y had departed from its practice for good reasons that were a proportionate response.
- It was felt that as regards the right to manifest one's religion, the European Court of Human Rights has required 'a high threshold before interference can be established.' (para. 38)

R (on the application of Begum) v Denbigh High School Governors [2006] UKHL 15 concerned the appeal of a school against a decision that the respondent had been unlawfully excluded from school for failing to comply with her school's dress code, and that her rights to education and to manifest her religion under the Human Rights Act 1998 had been violated. Begum had worn a shalwar kameeze⁸ for two years without objection. However, she now wished to wear a

⁸⁸ [Wikipedia](#) gives the following description of the Shalwar Kameez: 'Salwars are pleated at the waist and held up by a drawstring or an elastic belt. The [pants](#) can be wide and baggy, or they can be quite narrow and made of fabric cut on the bias. In the latter case, they are known as [churidars](#). The kameez

Jilbab to school. A Jilbab is a garment that covers the body except for the hands, feet, face and head. The head is usually covered with a scarf. Begum maintained that the Jilbab was the only garment that complied with her religious requirements as it concealed the contours of the female body. Three other schools in Begum's catchment area permitted the wearing of the Jilbab, however Begum's application to one of these schools was rejected and she maintained that the other two were too distant. Begum spent two years without education in a school environment before she was accepted to another school.

The House of Lords concluded, by majority, that Begum's right to manifest her religion was not infringed as Begum and her family had chosen that school. The court held:

- There were other schools in her catchment area that permitted the wearing of the Jilbab. Begum had failed to show an unduly onerous difficulty in attending another school.
- It was felt that the school had gone to great lengths to devise a uniform policy that respected Muslim beliefs in a sensitive, unthreatening and uncompetitive way.
- The uniform policy had contributed to a period of success and harmony within the school and the rules were acceptable to the opinion of mainstream Muslims.
- It was felt that Begum had not been denied access to education. The two year interruption was the result of her unwillingness to comply with a rule that the school were entitled to uphold.
- It was Begum's responsibility to quickly secure admission at a school where her desire to comply with religious dress could be adhered to without breaching school regulations.

European Court of Human Rights:

In *Dahlab v Switzerland (Unreported, App. No. 42393/98)* it was held that a policy prohibiting a teacher of young children from wearing her headscarf at school was justified as it had the legitimate aim of protecting the rights and freedoms of others, public order and public safety. As there was a 'powerful external symbol' exhibited by the teacher wearing the headscarf, there was a pressing social need given the potential for a proselytising effect on the children.

In *Sahin v Turkey (2005 41 EHRR 8)* the court affirmed the lawfulness of a university regulation prohibiting a student from wearing a headscarf at enrolment, lectures and examinations. The Court accepted that this was justified on the basis that this regulation has the legitimate aim of protecting the rights and freedoms of others, protecting public order and being necessary in a democratic society. It was felt that upholding the principle of secularism is necessary in the interests of a democratic society.

is usually cut straight and flat; older kameez use traditional cuts, as shown in the illustration; modern kameez are more likely to have European-inspired set-in sleeves. The tailor's taste and skill are usually displayed not in the overall cut, but in the shape of the neckline and the decoration of the kameez.'

The court also determined that there has been no breach of the right to education, the right to respect for private and family life, the right to freedom of expression; and the right to be free from discrimination.

In *El Morsli v France* (2008 Application No 15585/06) the court found no breach of Articles 8, 9 and 14 where a visa was refused to lady who refused to lift her veil for the purposes of her visa application.

United States:

Sultaana Freeman, a United States citizen, who had been converted to Islam for 6 years, had her driver's license revoked after refusing to remove her niqab for her photograph. She filed a lawsuit claiming that forcing her to remove the niqab violated her constitutional right to religious freedom. However, it was found that 'momentary raising of her veil for the purpose of the ID photo does not constitute a substantial burden on her right to exercise her religion.'

Judge Thorpe felt that it was necessary to identify drivers from their photographic licence in order to protect the public from 'criminal activities and security threats.' She stated, 'The state's need to be able to immediately identify subjects of investigative traffic stops and criminal intelligence investigations outweighs anyone's need to pose for a driver's licence photo wearing any garb that cloaks all facial feature except the eyes.'

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ANNEX B

Organisations consulted on this guidance

[AMINA](#) – Muslim Women's Resource Centre, Network House, 311 Calder Street, Glasgow, G42 7NQ

[Anastasia Vakulenko](#), Researcher in Human Rights, School of Law, University of Dundee

[Association of Chief Police Officers in Scotland](#), Religion and Faith Reference Sub-Group

[Association of Muslim Lawyers](#), PO Box 148, High Wycombe, Bucks, HP13 5WJ

[Believing Women](#), Glasgow

[Crown Prosecution Service](#)

[Equality Advisory Group](#)

[Faculty of Advocates](#)

[Judicial Studies Committee](#)

[Muslim Council for Scotland](#), Glasgow Central Mosque, Mosque Avenue, Glasgow,
G5 9XA

[Pakeeza](#), 38 Allan Breck Gardens, Edinburgh, EH4 7HX

[Scottish Court Service](#)

[Scottish Prison Service](#)

[The Law Society of Scotland](#)