

Police powers to search and seize mobile phones

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1 Introduction

Evidence from mobile electronic devices, particularly smartphones, is increasingly being relied upon in criminal matters. Such evidence is often tendered by the prosecution, having been obtained by police who seize and/or trawl through a person's phone.

Seizure of mobile phones from bystanders, who are recording an incident in which they are not criminally involved, is also an emerging issue. Objection or resistance to seizure can result in charges of assaulting, resisting or hindering police.

In this paper I attempt to grapple with two main questions:

1. Are police empowered by their ordinary personal search powers, without a warrant, to trawl through mobile devices?
2. In what circumstances are police empowered to seize mobile devices, particularly from people who are not suspects?

The answers to these questions are by no means clear. There seems to be a lack of NSW case law on these issues. In this paper I will discuss some relevant provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) and some authorities from other jurisdictions that may provide some guidance.

2 Personal search powers in LEPRA

LEPRA contains a number of different search powers. Extracted below are some provisions relating to personal search powers, which I consider to be relevant for the purposes of this paper.

2.1 General power to stop, search and detain (LEPRA s21)

21 Power to search persons and seize and detain things without warrant

(1) A police officer may, without a warrant, stop, search and detain a person, and anything in the possession of or under the control of the person, if the police officer suspects on reasonable grounds that any of the following circumstances exists:

- (a) the person has in his or her possession or under his or her control anything stolen or otherwise unlawfully obtained,
- (b) the person has in his or her possession or under his or her control anything used or intended to be used in or in connection with the commission of a relevant offence,

(c) the person has in his or her possession or under his or her control in a public place a dangerous article that is being or was used in or in connection with the commission of a relevant offence,

(d) the person has in his or her possession or under his or her control, in contravention of the Drug Misuse and Trafficking Act 1985, a prohibited plant or a prohibited drug.

(2) A police officer may seize and detain:

(a) all or part of a thing that the police officer suspects on reasonable grounds is stolen or otherwise unlawfully obtained, and

(b) all or part of a thing that the police officer suspects on reasonable grounds may provide evidence of the commission of a relevant offence, and

(c) any dangerous article, and

(d) any prohibited plant or prohibited drug in the possession or under the control of a person in contravention of the Drug Misuse and Trafficking Act 1985,

found as a result of a search under this section.

2.2 Search of person following arrest (LEPRA s27, formerly s23)

27 Power to carry out search on arrest

(1) A police officer who arrests a person for an offence or under a warrant, or who is present at the arrest, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything:

(a) that would present a danger to a person, or

(b) that could be used to assist a person to escape from lawful custody, or

(c) that is a thing with respect to which an offence has been committed, or

(d) that is a thing that will provide evidence of the commission of an offence, or

(e) that was used, or is intended to be used, in or in connection with the commission of an offence.

(2) A police officer who arrests a person for the purpose of taking the person into lawful custody, or who is present at the arrest, may search the person at or after the time of arrest, if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying anything:

(a) that would present a danger to a person, or

(b) that could be used to assist a person to escape from lawful custody.

(3) A police officer may seize and detain a thing found in a search if it is a thing of a kind referred to in subsection (1) or (2).

(4) Nothing in this section limits section 28A.

2.3 Search of person in lawful custody (LEPRA s28A, formerly s24)

28A Power to carry out search of person in lawful custody after arrest

(1) A police officer may search a person who is in lawful custody after arrest and seize and detain anything found on that search.

(2) Any such search may be carried out at a police station or other place of detention or immediately before or during transportation of the person to or from a police station or other place of detention.

“Lawful custody” is defined in s3 of LEPR as “lawful custody of the police”.

Although s28A does not state that police must hold any “reasonable suspicion”, the District Court decision of *R v Beekman* [2011] NSWDC 126 suggests that the section (which was then s24) may be subject to a common law requirement of reasonable suspicion.

Ms Beekman had intervened in the arrest of another person and was arrested for assaulting and resisting police (she was ultimately convicted of these charges and the convictions were upheld on appeal).

While at the police station under arrest for the initial charges she was searched, apparently as a matter of routine. Her alleged resistance to this search led to a charge of assaulting police in the execution of duty. She was convicted at first instance but successfully appealed to the District Court.

Toner DCJ found that the search was unlawful for a number of reasons including:

- the search was not carried out in a manner consistent with preserving the defendant’s privacy and dignity and was therefore in breach of LEPR s32;
- it was in breach of LEPR s201, in that the reason given for the search was either not a lawful reason or not the true reason for the search;
- there was excessive force used; and
- it was not justified under LEPR s23 or s24 due to an absence of relevant reasonable suspicion.

His Honour discussed the legislative history of s24 and its predecessor in the *Crimes Act* (s353A). He cited *Clarke v Bailey* [1933] 33 SRNSW 303, in which it was said that to exercise a right of search after arrest, police would have to establish that it was “reasonably necessary”, and said, at para [93]:

“That case was somewhat different to this but, nevertheless, it amplifies a common law proposition in interpreting the predecessor to s24 of the Act that it was circumscribed by an obligation that before such a search could be undertaken there had to be reasonable cause to effect it.

It seems to me that even though the rights of the police are tempered to some extent by s201 and s230 of the Act and by the Commissioner’s Instruction there remains a requirement that the police have to have at least a reasonable suspicion before they are entitled to exercise this power. It is not and cannot be unfettered.”

His Honour noted that both s23 and s24 provide that police *may* search, i.e. that there is a discretion to be exercised. He referred to the police Code of Practice for CRIME which reinforced this view. He went on to discuss some English authorities which also supported the proposition that the power to search after arrest was not completely unfettered. Ultimately he concluded that the search was not justified by either s23 or s24.

2.4 Search by consent (LEPR s34A)

The new s34A of LEPR commenced on 1 September 2016, and provides:

34A Searches carried out with consent

(1) A police officer may search a person with the person’s consent but only if the police officer has sought the person’s consent before carrying out the search.

(2) A police officer must, before carrying out any such consensual search, provide the person with:

(a) evidence that the police officer is a police officer (unless the police officer is in uniform), and

(b) the name of the police officer and his or her place of duty.

It is not clear whether a search by consent is an exercise of a “power”.

On one view, it is not a power; it is simply a request with which a person may choose to comply. If this is the correct interpretation, Part 15 does not apply to searches carried out with consent, and the police are not required to tell the person the reason for the search.

However, it is arguable that it is a “power”, given that s34A sits within Part 4 which is headed “Search and seizure powers without warrant” and that it imposes some preconditions on a police officer’s entitlement to search a person with consent.

Regardless of whether Part 15 applies, an officer’s failure to provide their name and place of duty in this situation cannot be excused by s204A, as the obligation is imposed by s34A(2) and not by Part 15.

3 Power to seize property (including from third parties)

Some of the search powers in LEPR have seizure powers attached. In situations where there is no specific seizure power provided by legislation, it is suggested that a residual common law power applies.

The limits on the police power to seize property, particularly from people who are not suspects, will be discussed below. It is by no means clear how far these seizure powers extend.

3.1 Seizure powers attached to personal search powers under LEPR

The personal search powers in ss21, 27 and 28A all empower police to seize property found as a result of a search.

Subs 21(3) allows seizure of “*anything that may provide evidence of the commission of an offence*” (which is broader than “anything used or intended to be used in or in connection with the commission of a relevant offence” in subs(1)).

Section 27 provides that a police officer may seize and detain things of a kind referred to in the section, i.e. things that are unlawful, that may be dangerous, or that may be of evidentiary value.

Section 28A simply provides that police may seize and detain “*anything found on that search*”. This is extremely broad and I would suggest that it must be read down to mean anything that is unlawfully in the person’s possession, or with evidentiary value, etc. At least it must be read subject to s218, which requires police to return seized items if they are not required for evidentiary purposes and it is lawful for the person to possess them.

Clearly police are empowered to seize items that are unrelated to the original purpose of the search, e.g. if police search a person on reasonable suspicion that the person is in possession of stolen goods, they may seize other items they discover such as weapons, drugs, etc. This also appears to extend to things that may provide evidence of the commission of an offence, even an offence committed by a third party and not by the person being searched.

Section 34A, which relates to consensual searches, does not have a seizure power attached. However, I suggest that there must be a common law seizure power that applies in this situation. This is discussed further below.

3.2 Seizure powers associated with other LEPR search powers

Unlike the personal search powers in Part 4, some of the search and seizure powers elsewhere in LEPR make specific provision for mobile phones or electronic data.

For example, Part 6 of LEPR provides for the issue and execution of search warrants.

As to seizure, s49(1) provides:

- (1) A person executing a search warrant issued under this Division:

(a) may seize and detain a thing (or thing of a kind) mentioned in the warrant, and

(b) may, in addition, seize and detain any other thing that the person finds in the course of executing the warrant and that the person has reasonable grounds to believe is connected with any offence.

However, there are specific provisions (ss75A and 75B, also referred to at 4.3 below) which regulate the operation of electronic devices and the accessing and downloading of data.

The note to s75B(1) is as follows: “Under section 49, data may be seized under a warrant if connected with an offence. Section 46 (3) provides that a thing is connected with an offence if, for example, it will provide evidence of the commission of the offence.” This assumes, in the absence of a specific definition, that “things” may include data.

Another example of a specific provision is in Part 6A, which contains the emergency public disorder powers. These powers may only be exercised when authorised by the Commissioner of Police (or a Deputy or Assistant Commissioner) in situations of large-scale public disorder.

Included in Part 6A is a power to stop and search any person (and anything in the person’s possession or control) in a “target area” or on a “target road”, without any warrant or reasonable suspicion (s87K).

A specific power to seize mobile phones is provided by s87M:

(1) A police officer may, in connection with a search under this Division:

(a) seize and detain, for a period of not more than 7 days, a vehicle, mobile phone or other thing if the seizure and detention of the vehicle, phone or thing will assist in preventing or controlling a public disorder, or

(b) seize and detain all or part of a thing (including a vehicle) that the officer suspects on reasonable grounds may provide evidence of the commission of a serious indictable offence (whether or not related to a public disorder).

(2) The Local Court may, on the application of a police officer, authorise the continued detention of a vehicle, mobile phone or other thing under subsection (1) (a) for an additional period not exceeding 14 days if satisfied that its continued detention will assist in preventing or controlling a public disorder. More than one extension of the detention may be authorised under this subsection, so long as each extension does not exceed 14 days.

(3) A power conferred by this section to seize and detain a thing includes:

(a) a power to remove a thing from the place where it is found, and

(b) a power to guard the thing in or on the place where it is found.

(4) The regulations may make provision for or with respect to the seizure, detention and return of vehicles, mobile phones or other things referred to in subsection (1) (a).

This provision does not specifically empower police to *examine* the mobile phone once seized, and nor does it oblige the phone’s owner to disclose the passcode or otherwise provide access to the phone’s contents.

3.3 Common law power to deal with breach of the peace

Police have a common law power (expressly preserved by s4 of LEPR) to take action to stop or prevent a breach of the peace. A “breach of the peace” generally involves personal violence or damage to property; it is more than loud or offensive or disorderly behaviour. Depending on the circumstances, police may take action including seizure of property, issuing directions, or (as a last resort) arrest.

The relevant case law is summarised in my paper *Arrest without warrant in New South Wales* (February 2017 update) at <http://criminalcpd.net.au/wp-content/uploads/2017/03/Arrest-without-warrant-in-New-South-Wales-Feb-2017-update.pdf>

In *Poidevin v Semaan* (2013) 85 NSWLR 758 police seized the defendant's mobile phone because they believed he was about to use it to call his friends to attend the scene and cause a violent incident. At first instance, Rothman J held that the seizure was unlawful. However, this was overturned by the CCA. Leeming JA said, at [34]:

“The common law power to arrest for imminent breach of the peace carries with it a power to take steps short of arresting a person, including temporarily seizing property. There is no need for the property itself to be used in the threatened breach of the peace”.

3.4 Common law power to seize items that are unlawful or have evidentiary value: *Ghani v Jones*

There is no general power in LEPR to seize items found otherwise than as a result of a search (e.g. items voluntarily produced, items clearly visible in a person's possession without the need to search), or items discovered in a consensual search under s34A.

It appears that there is a common law power to seize property, and that this power has not been ousted by LEPR (s4 provides that LEPR does not limit the powers that police have at common law “unless this Act otherwise provides expressly or by implication”). It could be argued that the specific seizure powers provided by ss21, 27, 28A, 49, 87M, etc provide something of a code and, by implication, displace the common law. However, I do not favour this interpretation. It would make a police officer's job unworkable if there was no residual common law power to seize items.

The common law power to seize property without warrant, and not in connection with an arrest, was discussed in the English case of *Ghani v Jones* [1970] 1 QB 693.

Facts: Police in the UK were investigating a woman's disappearance, and searched (without warrant, but by invitation) the house of her Pakistani father-in-law. At their request, he gave them documents including his passport and that of his wife and daughter. Later, he asked for their return, as the family wished to visit Pakistan. Police refused to return them, so the plaintiffs (the father-in-law, his wife and his daughter) brought an action against the defendant, a senior police officer, for a mandatory order for the delivery up of the passports and documents, an injunction restraining their detention and damages for detinue. Police argued that the documents had evidential value because they believed the woman had been murdered, albeit that no one had been charged or arrested, and that the plaintiffs could help police enquiries and may not return if they left the UK.

Held: Police had not shown reasonable grounds for believing that the documents were material evidence to prove the commission of a murder, nor for believing that the plaintiffs were in any way implicated in or accessory to a crime. Accordingly the police had no power to retain the documents.

Lord Denning MR said (at p1705):

“We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied:

First: The police officers must have reasonable grounds for believing that a serious offence has been committed - so serious that it is of the first importance that the offenders should be caught and brought to justice.

Second: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).

Third: The police officers must have reasonable grounds to believe that the person in possession of it has himself committed the crime, or is implicated in it, or is accessory to it, or at any rate his refusal must be quite unreasonable.

Fourth: The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned.

Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.

Tested by these criteria, I do not think the police officers are entitled to hold on to these passports or letters. They may have reasonable grounds for believing that the woman has been murdered. But they have not shown reasonable grounds for believing that these passports and letters are material evidence to prove the commission of the murder. All they say is that they are of "evidential value," whatever that may mean. Nor have they shown reasonable grounds for believing that the plaintiffs are in any way implicated in a crime, or accessory to it. In any case, they have held them quite long enough. They have no doubt made photographs of them, and that should suffice."

Ghani v Jones has been followed in a number of NSW cases, including *Tye v Commissioner of Police* (1995) 84 A Crim R 147 at 151 per Studdert J, *Greer v New South Wales Police Commissioner* [2002] NSWSC 356; (2002) 128 A Crim R 586 per Bell J and *R v Elomar (No. 11)* [2009] NSWSC 385 per Whealy J. These cases concerned applications for the exclusion of evidence or for the return of items seized. None is especially relevant for the purposes of this paper.

Interestingly, according to Studdert J in *Tye* (at p151), Heerey J in the Federal Court in *Challenge Plastics Pty Ltd v Collector of Customs for the State of Victoria* (1993) 115 ALR 149, (1993) 42 FCR 397, declined to follow *Ghani v Jones*, preferring instead a decision of the Victorian Full Court in *Levine v O'Keefe* [1930] VLR 72. In that case it was held that there is no power to seize property otherwise than under a warrant or in connection with an arrest.

The NSW cases referred to above are all mentioned in paragraph 69 of Garling J's judgment in *DPP v Tamcelik* [2012] NSWSC 1008. *Tamcelik* concerned police powers of entry and search in a domestic violence situation. It is an interesting case because it may provide guidance in interpreting other provisions of LEPRA and how they interact with the common law. After providing a helpful summary of the common law, Garling J held that Part 6 of LEPRA displaces the common law when it comes to the power of entry and search in domestic violence situations.

3.5 Power to seize property from third parties

It has become common practice for police to seize mobile phones from bystanders who are recording incidents in which they are not criminally involved. Phones are seized (and sometimes retained for long periods) for the purpose of preserving and downloading the footage for use as evidence. The personal inconvenience to the phone's owner, not to mention the potential interference with their privacy, can be significant.

In *Ghani v Jones*, discussed above, Lord Denning held that seizure of property from non-suspects may be justified in some circumstances. However, in order to enliven this power, the person's refusal to hand over the property "must be quite unreasonable". He provided (at pp 1704 and 1705) some hypothetical examples of situations in which a third party would be unreasonable in refusing to allow the police to examine their property. For example, some bank robbers "borrow" a private car and then abandon it by the roadside. Police wish to examine the car for fingerprints; the owner of the car would be unreasonable in refusing to allow them to do so.

The seizure of a phone from a bystander was recently considered by Her Honour Magistrate Swain in the NSW Local Court in *Police v Ronald Sines; Police v Andrew Love* (date of decision 7 July 2017; not published on NSW Caselaw).

Mr Love was using his mobile phone to record an altercation between his friend Mr Sines and a police officer. Police asked him to hand over his phone, which he refused to do. Police then tried to seize the phone, and Mr Love threw it on the ground, from where it was retrieved by police.

Applying *Ghani v Jones*, her Honour held (at paras 118-119 of her judgment) that the police officer had the power to seize the phone because:

- police had reasonable grounds to believe that the offence of assaulting police had been committed;
- assaulting police in the execution of their duty is a serious offence;
- “the police had reasonable grounds for believing that the phone contained material which could prove the serious offence alleged”, as Mr Love appeared to have filmed the incident;
- although Mr Love was not criminally involved in the assault police, “the police had reasonable grounds to believe that Mr Love’s refusal was unreasonable”; and
- the phone would not be kept for any longer than reasonably necessary, as the police officer told Mr Love that his phone would be returned after any footage was downloaded.

Her Honour did not elaborate on why Mr Love’s refusal to hand over his phone may have been unreasonable. It is also questionable whether she correctly applied the test set down by Lord Denning. Needless to say, this decision does not establish any precedent and the issue is ripe for further argument.

Ultimately, though, her Honour found that the police officer was not acting in the execution of his duty because he did not comply with LEPRA Part 15. Further, Mr Love’s conduct did not amount to hindering according to the test set out in the relevant authorities (e.g. *Leonard v Morris* (1975) 10 SASR 528, *Plunkett v Kroemer* [1934] SASR 125). The throwing of the phone was a “trivial and ineffective impediment”. By retrieving the phone within seconds of it landing on the ground, the police were not “successfully impeded or obstructed”.

It is worth remembering that, unless the police have real concerns about footage being lost or deleted, there are other more appropriate ways of obtaining such evidence from third parties. A subpoena for production may require a person to “produce a document or thing” (see, e.g. *Criminal Procedure Act* s221), which would encompass a phone and the data within it.

Incidentally, a mobile phone is a “document” under the *Evidence Act* 1995 (NSW) (see Part 1, and also Part 2 cl. 8, of the Dictionary). It, or the data within it, can be the subject of a discovery order, at least in civil proceedings where such a procedure exists (*Palavi v Radio 2UE Sydney Pty Ltd* [2011] NSWCA 264 per Allsop P at [31] and [80]; see also *Palavi v Queensland Newspapers Pty Ltd & Anor* [2012] NSWCA 182).

3.6 Power to seize items from a detainee’s property in police custody

It is the usual practice, when a person is arrested and taken into police custody, for their personal property to be taken from them and held for safe-keeping while in custody. The custody manager is generally responsible for listing these items on a property docket, and for ensuring that the property is returned to the arrestee on release or conveyed with them to court or Corrective Services custody.

Clause 2 of Schedule 2 of the LEPRA Regulations provides as follows:

2 Detained person or protected suspect’s property

The custody manager for a detained person or protected suspect should ascertain what property the person has with him or her when the person comes to the police station or other place of detention concerned, or had taken from him or her on arrest, and should arrange for safekeeping of the property if it remains at the police station or other place of detention.

The taking of property from persons under arrest is also referred to briefly in the Police Code of Practice for CRIME (April 2015 edition, pp 41 and 42).

Once items are “booked into” a person’s property, I would argue that the powers under ss27 and 28A no longer apply, and do not authorise seizure of items from a person’s property. A search under s27 or s28A only authorises a search of the person and the seizure of items found during the search.

A search of the person may include an examination of items *in the person's possession* (see s30). Possession, at common law, generally refers to items that are physically in one's custody or under one's physical control (see, e.g. Lord Diplock in *Director of Public Prosecutions v Brooks* [1974] WLR 899 at 902; [1974] AC 862; cited with approval in cases including *He Kaw Teh v R* (1985) 157 CLR 523). This would not include items that are in the custody of police for safe-keeping.

It is possible that the common law power enunciated in *Ghani v Jones* could justify the seizure of items from a person's property, where the items are reasonably believed to be the fruits of a crime or of evidentiary value. However, in my view this does not authorise a general fishing expedition to see what might be found in a person's property.

4 Searching through (and downloading) data on mobile phones: is it authorised by ordinary search and seizure powers in NSW?

Does the power to conduct a personal search extend to trawling through data on a person's mobile phone? Further, if a phone is lawfully seized or otherwise comes into police custody, does this authorise the police to examine and download its contents?

On one view, the answer to both questions would be yes. What is a search if it is not an examination of items in the person's possession? Isn't a phone similar to a diary or a wallet? And what is the point of seizing an item such as a phone for evidentiary purposes if police are not empowered to examine its contents?

The counter-argument is that trawling through and downloading data from a phone is potentially very intrusive and a significant interference with a person's privacy. Mobile phones now contain the type of personal information that would, traditionally, be kept in a person's home or office, which police would not generally be empowered to search and enter without a warrant. The type of data stored on mobile phones is way beyond the contemplation of the legislature when the LEPR search powers (or at least their predecessors) were enacted. Such an intrusive search should not be performed without a warrant (except, perhaps, in exigent circumstances).

The provisions of LEPR are of limited assistance. At face value, they appear to authorise quite extensive searches of people's personal property. However, there are some overseas and interstate authorities that may have some application in NSW and which provide some limits on powers to trawl through phones.

4.1 Type of search permitted under LEPR

Part 4 Division 4 (ss.29-34A) of LEPR sets out the rules with which police officers must comply when conducting a personal search.

29 Application of Division

(1) This Division applies to any search of a person carried out by a police officer under this Act, except as otherwise provided by this Act or the regulations.

(2) This Division also applies to any search of a person that is carried out by a police officer after obtaining the person's consent to carry out the search. In that case:

(a) the purpose of the search is the purpose for which the police officer obtained consent to search, and

(b) a general consent to the carrying out of a search is not consent to carry out a strip search unless the person consents to the carrying out of a strip search.

Unless the circumstances justify a strip search (as to which see ss 31 and 33), the type of search that may be performed is governed by s30, which provides:

30 Searches generally

In conducting the search of a person, a police officer may:

- (a) quickly run his or her hands over the person's outer clothing, and
- (b) require the person to remove his or her coat or jacket or similar article of clothing and any gloves, shoes, socks and hat (but not, except in the case of a strip search, all of the person's clothes), and
- (c) examine anything in the possession of the person, and
- (d) pass an electronic metal detection device over or in close proximity to the person's outer clothing or anything removed from the person, and
- (e) do any other thing authorised by this Act for the purposes of the search.

Paragraph (c), "*examine anything in the possession of the person*" would appear to allow police to examine the contents of a phone.

However, how far does this extend, particularly if the device is locked with a password? It seems clear that the police cannot compel a person to unlock the phone or provide the passcode, in the absence of an express statutory provision (such as the provisions in ss21A and 28 which empower police to require a person to open their mouth or move/shake their hair in certain circumstances).

The dangers of treating phones like any other physical object, due to the amount of information stored, were highly significant considerations in some of the overseas cases discussed below.

4.2 Consensual searches

When performing a personal search, or after having arrested a person, police will often obtain the person's "consent" to unlock and trawl through their phone.

In my experience, this is often done by asking for the phone's PIN or passcode, and suggesting that failure to provide it will enliven a reasonable suspicion about the ownership of the phone, which in turn will result in the phone being confiscated and the person being charged with goods in custody. This, I would suggest, does not amount to free and fair consent.

Importantly, where a search is carried out by consent, s29(2)(a) provides that "the purpose of the search is the purpose for which the police officer obtained consent to search". It is not "open slather" for the police to search anything and everything in the person's possession.

4.3 Contrast with provisions relating to search warrants

Part 6 of LEPRA provides for the issue and execution of search warrants.

Section 47(1) provides that a search warrant authorises police to enter the subject premises, and to "*search the premises for things connected with a particular searchable offence in relation to the warrant*".

Section 49 provides for the seizure of items found during the search.

However, there are specific provisions in Part 6 dealing with electronic devices and computers. Sections s75A and 75B permit the police to operate electronic equipment at premises subject to a warrant and to access/download data from computers respectively.

The existence of these specific provisions in the context of search warrants, and the absence of similar provisions in the context of personal searches, suggests that ordinary LEPRA search powers do not provide the police with broad powers to access and download data.

4.4 Power to search phones that are booked in as property when a person is arrested

At 3.6 above, I have discussed the power to *seize* items from a person's property which is being held by police for safe-keeping.

As to whether the police are empowered to search through a person's property, I would argue that this is generally not permissible without a warrant. As pointed out above, once an item is booked in

to a person's property, it is no longer in the person's possession and the personal search powers in ss27 and 28A no longer apply.

In the overseas case law discussed below, the only justification offered for warrantless search of phones is where evidence is likely to be deleted (or, per *Riley*, perhaps some other emergency scenario). When a person has been arrested and their phone booked in as property, there is no longer a risk of deleting evidence, so a warrantless examination of the data is unnecessary. With recent innovations like "cloud" storage and remote wiping, it is conceivable that the risk of deleting evidence could arise notwithstanding arrest: perhaps it might be argued that a warrantless search of the phone was justified because, for example, a family member with access to the arrested person's computer and "iTunes" account, could wipe the phone remotely. However, this argument was dismissed in *R v N* (discussed below), the judge pointing out that these concerns could be alleviated by disconnecting the phone from the network or removing its battery.

5 Overseas and interstate case law on search of mobile phones

The first three cases discussed here are from the USA and Canada. Obviously they were decided in a different legal environment: firstly, both countries have some constitutional protections from unreasonable search and seizure and, secondly, they do not appear to have the same statutory search powers as we have in LEPR.

However, the principles may still have some application in Australia. Indeed, as discussed below, the case of *Riley v California* had considerable persuasive value in at least one Queensland case.

5.1 *Riley v California*, U.S. , 134 S. Ct. 2473, 2490-95, 189 L.Ed.2d 430 (2014)

Facts: Riley was stopped for a traffic violation (expired registration tags), and then it was discovered that his licence was suspended. A search of his vehicle led to discovery of gang-related items and two loaded firearms hidden under the hood. After being arrested, Riley was searched without warrant and the police found a mobile phone, they looked at it and saw repeated use of a term associated with the infamous "Bloods" gang. A police expert on gangs later examined the photos and videos on the phone. Photos of Riley in front of a car believed to be involved in a shooting weeks earlier led to him being charged with firing at an occupied vehicle, assault with a semiautomatic firearm and attempted murder, with Riley's ties to the gang constituting an aggravating factor. Riley contended that the searches of his phone violated the Fourth Amendment because they had been performed without a warrant and were not otherwise justified by exigent circumstances.

The *Riley* case was decided together with another case, *United States v Wurie*, which appears within the *Riley* judgment. Brima Wurie was observed making an apparent drug sale from the car, the officer's seized two cell phones from his person after arresting him. A source identified as "my house" continuously called the phone. The police accessed the phone to get this number, traced it to an apartment, and obtained a warrant with which they searched the premises where they found a firearm and a (large) drugs stash.

Held: The search of Mr Riley was illegal and the evidence was inadmissible. Searching of a mobile phone seized incident to a lawful arrest, in the absence of consent or an emergency situation, requires a warrant.

The Court (at p9, and again at pp 16-19) discussed the significance and pervasiveness of cell phones, and opined that it is inappropriate to inflexibly apply doctrines developed before technology like this existed. The Court was of the view that a mobile phone (or at least, a relatively modern smartphone) was not analogous to the cigarette packet in *Robinson* (see below).

The Court held (at pp 25- 28) that a warrant is generally required before a search of a cell phone, although it acknowledged that there may be case-specific exceptions such as emergencies or where information is needed to prevent imminent destruction of evidence or to pursue a fleeing suspect.

In its concluding remarks (at p28), the Court said:

“Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life,” *Boyd, supra*, at 630. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple— get a warrant.”

Note: An important factor in *Riley* was the existence of a rights-based Constitution, and in particular the Fourth Amendment which provides “*the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*”

The US Supreme Court described reasonableness as a key requirement of the Fourth Amendment (see p 5). It is significant that privacy concerns prevailed despite the high degree of seriousness of the alleged criminal conduct (gang-related shooting).

Although some may point to the absence of equivalent constitutional rights in Australia, this is unlikely to support an argument that privacy does not have similar value in Australia. The common law of England and Australia clearly upholds the importance of personal privacy rights. This approach is supported by the endorsement of *Riley* in the Queensland case of *R v N* (discussed below).

5.2 *United States v Robinson, 414 U.S. 217 (1973)*

Facts: Robinson was arrested for driving with a suspended licence. Police searched him and found a packet of cigarettes. They removed it and searched inside, where they found heroin.

Held: The evidence was admissible despite the fact that there was no warrant and no credible chance that the cigarette packet posed a risk to the police officer – the search was just an incident of the arrest. The doctrine is limited to “personal property... immediately associated with the person of the arrestee” (*US v Chadwick*, quoted in *Riley* at p 8).

Note: This case was considered in *Riley* (at pp 7-8) and was held not to extend to searches of mobile phones.

5.3 *R v Fearon [2014] 3 SCR 621*

Facts: Two men (one armed with a pistol) robbed a merchant as she loaded her car with jewellery, and fled in a car. The police later found the car and arrested the men. During a pat-down search conducted incident to the arrest, they found a mobile phone. Police searched the phone at that time and again within less than two hours of the arrest. They found a draft text message which read “*We did it were the jewlery at nigga burrrrrrrrrrr*”, and some photos, including one of a handgun. A day and a half later, when police had a warrant to search the vehicle, they recovered the handgun used in the robbery and depicted in the photo. Months later, police applied for and were granted a warrant to search the contents of the phone.

Held: A 4-3 majority in the Canadian Supreme Court held that warrantless searches are acceptable after an arrest as long as the search is directly related to the circumstances of the arrest. In this case, the evidence was excluded.

The court said (at p 1): “*This power must be exercised in the pursuit of a valid purpose related to the proper administration of justice and the search must be truly incidental to the arrest.*”

The last paragraph of Cromwell J’s judgement shows the emphasis given to privacy concerns:

“The evidence which was unconstitutionally obtained should be excluded. The state conduct was not particularly objectionable, given that the police acted in good faith, and the evidence is reliable; however, the high privacy interest individuals have in their electronic devices tips the balance in favour of exclusion. Unwarranted searches undermine the public’s confidence that personal communications, ideas and beliefs will

be protected on their digital devices. This is particularly important given the increasing use and ubiquity of such technology. It is difficult to conceive of a sphere of privacy more intensely personal — or indeed more pervasive — than that found in an individual's personal digital device or computer. To admit evidence obtained in breach of this particularly strong privacy interest would tend to bring the administration of justice into disrepute.”

5.4 *R v Peirson* [2014] QSC 134

Facts: This was a first instance decision concerning the admissibility of evidence in a trial in the Queensland Supreme Court. The defendant was seen by police getting out of a maxi taxi drinking an opened can of alcohol. Police approached the defendant and told him that this was an offence. The police formed the belief that he was under the influence of drugs, and detained him for a search on the grounds that they reasonably suspected he was in possession of unlawful drugs. No drugs were found. The defendant was then asked whether his mobile phone contained drug-related messages, to which he replied “*Ah, there shouldn't be*”. The officer then began looking through the phone and found text messages which were believed to contain drug references. The defendant was subsequently charged with drug trafficking, after police contacted and interviewed people who had sent messages to his phone.

Held: The search of the accused, including looking at the messages on his phone, was lawful, and the evidence obtained as a result was admissible.

The relevant search powers in this case were ss29 and 30 of the *Police Powers and Responsibilities Act 2000* (Qld). These provisions are not dissimilar to LEPRA s21. Section 30 sets out the prescribed circumstances for searching a person without a warrant, which include that the person has something that may be an “*unlawful dangerous drug*” or “*evidence of the commission of a seven year imprisonment offence that may be concealed on the person or destroyed*”. Section 29 provides that a police officer who reasonably suspects that any prescribed circumstances exist may, without a warrant, stop and detain a person, and “*search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained*”.

The court accepted that police had a reasonable suspicion that the defendant was in possession of drugs, and thus that they had a power to stop and search him.

Defence counsel submitted that, once it had been established that his client was not in possession of drugs, the authorisation for detaining him was exhausted and he should have been released, or at least he should have been cautioned before the police asked him whether there were drug-related messages on his phone. Douglas J was not persuaded by this submission, and held (at para [30]) that the police officer “*was justified to ask about the messages on the phone and to form a reasonable suspicion justifying the continuation of his search of it as well. Even if there had been an unlawful detention of Mr Pierson it could not be characterised as serious or reckless in the circumstances*”.

5.5 *R v Varga* [2015] QDC 82

Facts: This was also a first instance decision, this time in the Queensland District Court, concerning an application for exclusion of evidence of SMS messages obtained from the accused's phone. The accused in this case was charged with drug supply and possession offences.

In this case the police had a valid search warrant which empowered the police to seize property found in residential premises occupied by the accused and others. The accused was not named in the warrant but he lived at the premises and was present when the warrant was executed.

The accused was asked if he had anything he wished to “declare”. He nominated a “billy”; the police then located a bong and some drugs. The police also took possession of the accused's mobile phone which was in the bedroom. One of the officers asked the accused, “*Do you know your mobile phone number off by heart mate?*”, to which the accused replied “*No... you have to get it from my phone... if you go to my contacts it should be right at the top*”.

There was a short exchange between the police and the accused about whether there was a passcode (there wasn't) and how to access the phone. The police found some SMS messages

which provided evidence of drug-related activity and which led to further questions being asked of the accused.

Held: The evidence was lawfully obtained and admissible. The phone had been accessed with the accused's consent and he was fully co-operative.

There was an issue raised in this case about s154 of the *Police Powers and Responsibilities Act 2000* (Qld). This provision allows for a specific inclusion in a search warrant empowering the police to compel persons to provide the means of access to electronically-stored information on devices such as mobile phones. There was no such inclusion in this particular search warrant.

Essentially it was submitted on the accused's behalf that s154 "*provides the only power to search a mobile phone of a person lawfully detained when a search warrant is executed on premises where the person is an occupant.*"

Durward SC DCJ disagreed, saying (at [45]):

"However, in this case the accused was co-operative. He responded to the questions asked about the mobile phone by volunteering the access information. Hence resort to an order pursuant to s154 was not necessary. It seems to me that he made a 'conscious decision' so to do."

Having lawfully accessed the accused's phone, the police were then empowered by the search warrant to search through the data in the phone.

I do not interpret this case as authority for the proposition that the accused's consent to the police looking in his phone for a particular purpose (to find his phone number) extended to them accessing other content on his phone (including all his text messages).

5.6 *R v N* [2015] QSC 91

This is another Queensland Supreme Court decision concerning the admissibility of evidence obtained in a warrantless search. Unlike *Peirson* and *Varga*, this case contains a useful discussion of privacy issues and refers to *Riley v California*.

Facts: Police were called to a hotel room due to a disturbance. They detained N and a group of her friends for an emergent search "in regard to drugs" ostensibly under s160 of the *Police Powers and Responsibilities Act 2000* (Qld).

Firstly N was strip-searched. No drugs were found. Believing (incorrectly) that drugs had been found elsewhere on the premises, police then searched the accused's handbag for any illicit items. They found some cash (suspected to be the proceeds of crime) and an iPhone. They then seized the phone "to search its database for any sign of use in connection with drug dealing and presumably to preserve any evidentiary material", and found some incriminating text messages.

Held: While the first two searches were lawful, the search of the iPhone was not, and the evidence obtained as a consequence was inadmissible.

The provisions in the Qld Act regarding warrantless searches (ss29-30, 160) share some similarity with equivalent provisions in LEPR. Sections 29 and 30 have been referred to in the discussion of *Peirson* above, and are broadly similar to LEPR s21. Section 160 confers powers of entry and search, without a warrant, in situations when the officer reasonably suspects that there is evidence of a "part 2 offence" and that "*the evidence may be concealed or destroyed unless the place is immediately entered and searched*".

Carmody J briefly discussed the common law and policy considerations surrounding privacy and the freedom from unwarranted state intervention (at paras 11-23). He went on to discuss the statutory provisions governing warrantless searches in Queensland (at paras 24-29), and the reasonable suspicion requirement imposed by those provisions (at paras 30-39).

His Honour held that the search of the iPhone was unlawful because the suspicion underpinning it was not reasonably held (at paras 40-49). In particular:

"[44] To my mind [the police officer]'s conclusions can only be explained on the basis of faulty logic, an overly mistrustful disposition or an instinctive notion that the iPhone

tended to incriminate N. N's possession of \$305 or so, even after a night out at a concert, is not, either of itself or in combination with other material circumstances, logically suggestive of N's drug dealing. The lack of a satisfactory explanation for having it could not give rise to, or sustain, a reasonable suspicion, or raise any further legitimate doubts. An unreasonable suspicion is an insufficient legal basis for [the police officer]'s seizure and warrantless search of the iPhone.

His Honour then proceeded to consider whether the fruits of the search should nevertheless be admitted into evidence, and ruled that they should not. It was in this context that His Honour discussed *Riley* (misspelt "Reilly"), and endorsed the position taken by the USA Supreme Court as substantially identical to Queensland law (at [63]).

Carmody CJ said:

[61] In *Reilly v State of California*, for example, an in custody search of a mobile phone revealed evidence of a shooting unrelated to the reason for arrest. The police could have seized and secured the phone to prevent destruction of its contents pending issue of a warrant. The Supreme Court of the United States held that the common law exigent circumstances exception (similar to the PPR Act's emergent search provisions in s160) might excuse a warrantless search of a cell phone in such circumstances, but the wider "incident to arrest" exception did not justify such an interference with privacy rights even where it was reasonable to believe that it would reveal evidence of the crime of arrest and might be destroyed if not preserved. In doing so, the Court accepted that because of their large storage capacity and broader privacy implications, iPhones differ in both a quantitative and qualitative sense from other documentary records.

[62] In point of principle, the general incident to arrest power was considered too broad and invasive to justify searching a mobile phone, whereas the exigent circumstances search had the standard safeguard of reasonable suspicion of imminent destruction of evidence before it could be validly exercised without warrant.

[63] That is really no different to the current Queensland position. A warrantless prearrest search of a mobile phone may be legally justified under the PPR Act despite the invasion of privacy where a post arrest search would not be."

In conclusion, his Honour said:

[65] [The police officer] was arguably authorised or at least justified in taking possession of the iPhone to prevent possible destruction of potential evidence of a crime, but was not entitled to take the extra step of searching it there and then (as she did). She could have minimised or eliminated any risk of deletion long enough to have applied for a warrant to search the iPhone.

[66] There is little or no suggestion that the iPhone was particularly vulnerable to remote wiping. Any risk of pre-search erasure could have been avoided simply by disconnecting the phone from the network or removing its battery.

[67] The seizure of N's iPhone for the purposes of a warrantless search pursuant to either ss 29 or 160 of the PPR Act was unreasonable and, therefore, illegal. It was also contrary to the balance of relevant public policy considerations. The common law power is no wider and is conditional on the same criterion viz reasonable suspicion.

[68] In short, the desirability of admitting the texts does not outweigh the undesirability of the illegal and overly intrusive means of obtaining them.

[69] Thus despite its potent probative value as evidence, the content of the iPhone data should not be led by the prosecution against N because it was obtained by investigative action which was illegal or improper, and public policy warrants its exclusion.

6 Conclusion

Police undoubtedly have broad powers under LEPRA and at common law to search and seize items without warrant. However in this paper I hope I have demonstrated that such powers are not unfettered.

There are compelling arguments that mobile phones ought to be treated differently to other items that may traditionally be the subject of a search, and that personal privacy rights must be given appropriate weight in the interpretation of search powers.

While there is a paucity of NSW case law in this area, guidance might be drawn from other jurisdictions including the USA, Canada and Queensland.

With the caveat of “*be careful what you wish for*”, I look forward to the development of some NSW authority on these issues.

Jane Sanders
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