

## CP082 Unofficial Recordings of Police Actions

While you and your partner are conducting a foot patrol, a member of the public approaches you and states that he observed a number of youths in a nearby street where one was seen carrying a knife that resembled a fishing knife. You are provided with the identity and the description of the youth. You subsequently locate and speak with the youth that was described as having the knife. You conduct an ordinary search based on the information you received. While conducting the search you notice the youth's friends are filming police actions on their mobile telephones. They are filming some metres away from you, on the sidewalk of a public street.

### Critical Issues

1. Do you, as a NSW police officer have the power to stop the youths filming you?

- No

2. Can you as a police officer delete any images or recordings from the mobile phone?

- No

3. Do NSW Police Officers have the power to confiscate the mobile phones from the youth's friends?

- No
  - The NSW Police Force Media Policy clearly states:

*There is widespread ability amongst members of the public to capture photographs and video images on smart phones and other recording devices.*

*When at the scene of an incident or operation, be aware that people other than official media representatives may record the presence, actions and words of police officers for other than official purposes.*

*Members of the public have the right to take photographs of or film police officers, and incidents involving police officers, which are observable from a public space, or from a privately owned place with the consent of the owner/occupier.*

*Generally speaking, if a person takes photographs or videos police officers, operations or incidents from a public space, police do not have the power to:*

- *prevent the person from taking photographs or filming*

· *confiscate photographic or filming equipment*

· *delete images or recordings, or*

· *request or order a person to delete images or recordings.*

*If police officers try to confiscate equipment or interfere with members of the public to delete images or recordings, the officers may be liable for prosecution for assault or trespass to the person concerned.*

**4. Are there circumstances where police do have the power to take action against a member of the public who is taking images or filming?**

- Yes
  - Police have powers under Commonwealth defence legislation to arrest a person who has photographed certain defence sites.
  - Police have the right to act if a crime is being committed by the person filming, such as filming a person's private parts or filming a person engaged in a private act.
  - In these situations the camera equipment and footage may be used as evidence.

## CP093 - Unofficial Recordings of Police Actions #2

As you are about to conduct a walk through of a local club, you notice a High Risk Offender (HRO) standing a distance away from the entrance of the club. At this stage you just wish to conduct a conversation with the HRO. As you approach you notice a person on the footpath who appears to be in company with the HRO with their arm raised and a mobile phone pointed in your direction. It appears they are filming you. You say, 'Can you stop recording?'

### Critical Issues

#### 1. Can you ask the person in this instance to stop filming and prevent them from filming if they refuse?

- The quick answer is NO.
- Confusion may arise because as a police officer (and like any other member of the public) you have a right to conduct a conversation with anyone in a public place. You also have a right to ask someone in public to stop doing something (politely). However, the issue really is whether you have a legal right (a power) to prevent that person from doing something if they refuse to stop.
- In this instance the person filming is not committing an offence, they are not hindering you in any way, and they are not blocking pedestrian or vehicular traffic. They are filming you, which, in a public place they are legally entitled to do.
- If you politely ask the person to stop recording and they refuse, you have no power to stop them from doing so.
- The NSWPF media policy also states that police do not have the power to stop a person filming from a public place. You can view the media police [here](#).

#### 2. What may happen if I seize the mobile telephone?

- You may be subject to a formal complaint and civil proceedings may be commenced against the NSW Police Force.

#### 3. So what would be the best course of action?

- Speak to the HRO as you normally would, record the matter in your notebook, and if there are no issues (no bail breaches/warrants, offences committed, etc.) continue on to conduct your business inspection and otherwise ignore the film-maker.

## CP094 - Unofficial Recordings of Police Action #3

You are assaulted by a violent offender while trying to arrest him outside a pub. You notice a person using a mobile phone to film the altercation. After arresting the violent offender the person with the mobile phone approaches you.

### Critical Issues

#### 1. Can you ask the person in this instance to delete the recording?

- Given that the person is legally entitled to film in the public place and is otherwise not hindering you or obstructing pedestrians/vehicles they are under no obligation to comply with any such request you may make. In those circumstances it may be inappropriate to ask the person to delete the recording.

#### 2. Can you seize the mobile device and delete the recording yourself?

- NO. The device (and the recordings on the device) are the property of the person and police do not have any power:
  - stop a person filming in the public place, or
  - to delete images or recordings.

You can view the media police [here](#).

#### 3. So what would be the best course of action?

- The best course of action would be to ask them to provide a copy of the recording. This copy could be sent electronically to you (Bluetooth/email etc.) and the person would at all times remain in possession of their device. As the person has witnessed an indictable offence (being assault police in the execution of duty under section 60 (1) of the *Crimes Act 1900*) and you suspect they may be able to assist in the investigation you should ask the person to disclose their identity. Should they fail to do so they may be committing an offence under section 12 of LEPR.

#### 4. If the recording holds evidence pertaining to an offence can't I just seize it and present it at court without asking for permission?

- Police have, in certain circumstances, a common law seizure power pursuant to the principles set out in *Ghani v Jones* (1969). Provided the criteria for seizure set out in that case are met, you may seize the device. If a court ultimately decides that the evidence was improperly or illegally obtained it may still be admitted into evidence under section 138 of the *Evidence Act 1995*.

#### **5. When will Ghani v Jones permit the seizure of an article?**

- The seizure of an article will be permitted under Ghani v Jones only if:

1. You have reasonable grounds to believe that a serious offence has been committed (serious offence is not defined and has been interpreted broadly by the courts).
2. You have reasonable grounds to believe that what you are seizing is either the 'fruit of the crime', was used to commit the crime or is material evidence to prove the crime.
3. You have reasonable grounds to believe that the person in possession of the article has committed the offence, is implicated in the offence, is an accessory to the offence or their refusal to provide the article is quite unreasonable.
4. You keep the article for no longer than is necessary to preserve the evidence (given that electronic files are easily transferred from one device to another you should retain the seized device for only such time as is necessary to transfer the file) Note that the lawfulness of your conduct must be judged at the time of seizure and not by what happens afterwards

#### **6. What may happen if I illegally or improperly seize the device?**

- You may be subject to a formal complaint and civil proceedings may be commenced against the NSW Police Force.

## **Frequently Asked Questions - Don't Seize that phone**

### **How do I obtain evidence from a witness mobile phone?**

Ask for permission. Obtain their details in your notebook and arrange for them to come into the police station to provide a statement and a copy of the required images/video. Alternately, ask the witness to email the requested footage to you (remembering that to make the footage admissible in court, you will still need to obtain a statement from the witness about how and when they obtained the footage).

### **Can I use Mobipol or body worn camera to record the images/ video on a witness's phone?**

Yes, if the witness consents to you recording it. Record their details and a brief statement in your notebook which is signed by the witness.

### **Can I seize a phone based on case law, such as Ghani vs Jones?**

Police have a variety of powers available to them which allow them to obtain evidence, including the common law power to seize items (without arrest). Ghani v Jones was a case that talked about the limited circumstances in which police could lawfully seize something (there are five criteria that must be satisfied at the time). For a fuller explanation look at the "Common Law - Powers of search and seizure" chapter of the Police Powers Handbook on the intranet. It's important to understand that the common law power of seizure only applies when you 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.

You must be able to justify any action you have taken and explain why you took that action. If you're in doubt about what action you can take, contact the Operational Legal Advice Unit, Police Prosecutions Command, (OLA). OLA Ph: [REDACTED].

### **I was struggling to arrest an offender when a member of the public standing several metres away, captured the incident on video via their mobile phone. Am I justified in seizing their phone?**

Not under Section 21 of LEPRA because neither the phone nor the footage meets any of the circumstances under subsection 1 that triggers your search power.

## **For Official Use Only**

Under Section 11 of LEPRA you have the power to request the identity of a person who you suspect on reasonable grounds may be able to assist in the investigation of an indictable offence because the person was at or near the place where the indictable offence occurred. It is important to remember that the safeguards under Section 15 of LEPRA apply to this section. You must warn the person that they are required by law to comply with this direction. This means you are required to provide proof that you are a police officer if not in uniform; your name and place of work and the reason for exercising the power. For example, in this scenario you wish to obtain their details and request the use of their footage.

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## Law Notes 42 of 2005

### SEARCHING MOBILE PHONES

#### Under what circumstances can I search the contents of a mobile phone found upon a person I have arrested?

The answer to this question will depend on the circumstances of the arrest. There is no general power to search the contents of a mobile phone that has been found upon a person you have arrested. After the 1 st of December 2005, the majority of police powers will be governed by the *Law Enforcement (Powers and Responsibility) Act 2002 (LEPRA)*. Stop, search and detain powers under LEPRA are substantially the same as previous powers under the *Crimes Act: ss357, 357E* and the *Drug Misuse and Trafficking Act: s37*. The sections are consolidated in LEPRA by *Part 4*, specifically *s21*. *Section 21* relevantly provides:

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

(1) A police officer may, without a warrant, stop, and 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) ....

(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) ....

(d) ....

(2) A police officer may seize and detain:

(a) ....

(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) ....

(d) ....

found as a result of a search under this section.

As you can see, *s21 (2) (b)* only allows you to *seize and detain* property or thing that may provide evidence of the commission of a relevant offence. A relevant offence includes an indictable offence, an offence against *s545E* of the *Crimes Act* and an offence against the *Weapons Prohibition Act*, *Firearms Act* or the *Regulations* made under those Acts: *see s20*.

The seizure and search of property must be linked to the commission of an offence. In other words, if you suspect property may offer evidence that will support your case against an accused for a *relevant offence*, you can seize and search the property. The following scenario illustrates this point. You observe a person using a mobile phone to organise the supply of prohibited drugs. A short time later, you arrest the person after the transaction has taken place. Clearly, the supplier has *used ( subsection (1) (b) )* the mobile phone in connection with an indictable offence, being the supply of a prohibited drug. In this case, the mobile phone may contain evidence (the phone number or name of the buyer) of the offence and therefore, you can seize and search the phone.

In summary, you must have lawful access to the property prior to accessing the information. The access will be lawful if you can show that you had reasonable grounds to suspect the mobile phone would offer evidence of the commission of a *relevant offence*. You should also refresh your memory with Law note 10 of 2005 – Intercepting Stored Communications. Briefly, the Law note concluded that you do not need a telecommunications interception warrant to intercept stored communications. Stored communications include



e-mails, mobile/landline SMS/MMS and voice mail services. However, you will need a warrant if you want to intercept real time or live communications passing over the telecommunications system.

Any queries about this or any other Law Notes article should be directed to the Operational Legal Advice Unit, Legal Services on ph: [REDACTED]

### About the author

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Legal advice about any operational policing issues is available during business hours by calling the Operational Legal Advice Unit, Criminal Law Division, Legal Services on ph: [REDACTED] or after hours through the Duty Operations Inspector (DOI).

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