**8.15 Police Search and Seizure Powers without a Warrant**

Introduction

1. Police officers’ powers of search and seizure in relation to persons, goods and land are circumscribed in the absence of an authorising warrant.
2. Interferences with one’s person or possessions are presumed to be a grave infringement of elementary common law rights and may engage the doctrine of trespass to person or goods. The mere fact that a person is a police officer does not justify such an interference (*Trobrudge v Hardy* [1955] 94 CLR 147, 152).
3. Similarly, police officers are subject to the law regarding trespass to land and require authority or consent to enter private premises (*Mackay v Abrahams* [1916] VLR 681, 684; *Plenty v Dillon* (1991) 171 CLR 635, [4]).
4. One statutory exception to this principle is found in s 459A of the *Crimes Act 1958*, which authorises entry onto private premises for the purpose of arresting a person in accordance with ss 458 or 459 of the *Crimes Act 1958*, where the police officer believes on reasonable grounds the person has committed a serious indictable offence or has escaped from legal custody. See 8.14 Powers of arrest, for information on these provisions.
5. Police search and seizure powers generally arise in three circumstances:

* Search incidental to an arrest;
* Search and seizure of stolen goods;
* Specific statutory powers.

1. Recent cases have also considered whether there is a broader power to conduct investigative searches in relation to serious offences.
2. Where it arises as an issue, the lawfulness of a search will need to be determined before the possible exclusion of the evidence under *Evidence Act 2008* s 138 is considered. It is only if the court decides that the search was unlawful that s 138 may be engaged (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [116]).

Search and seizure incidental to an arrest

1. Police officers are authorised to search persons and premises when executing an arrest and to seize material for evidentiary purposes (*Field v Sullivan* [1923] VLR 12; *Reeves (a Pseudonym) v The Queen* [2017] VSCA 291).
2. Articles may only be seized for evidentiary purposes (*Reeves (a Pseudonym) v The Queen* [2017] VSCA 291, [30]). The officer must believe that the item constitutes material evidence relevant to the same crime for which the arrest is being carried out (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [110]).
3. If an officer enters premises for the purposes of arresting someone and subsequently arrests a different person, goods may only be seized from those premises that will be used for evidence regarding the crime for which the second person is arrested (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [110]).
4. The arrest and seizure of goods must be sufficiently close in time so as to be regarded as ‘incidental to, and part of, the same operation as the arrest’ (*Field v Sullivan* [1923] VLR 70, 81). This may permit seizures that occur later on the same day as the arrest (*Reeves (a Pseudonym) v The Queen* [2017] VSCA 291, [30]).
5. This temporal relationship does not require that the arrest and seizure occur simultaneously. The law recognises the ‘physical exigencies’ of police operations (*Field v Sullivan* [1923] VLR 70, 81).

What is permitted when searching a person under arrest?

1. A police officer has a common law duty to take reasonable measures to prevent a person in custody from harming themselves or others or destroying or disposing of evidence. This often involves a search of the person’s clothes and body. Such a search is called a ‘safety and evidence search’ (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987); *Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [35]).
2. What amounts to a reasonable method of discharging this duty will turn on the circumstances of the case and should ordinarily involve the person being informed of the reasons for the search (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).
3. In certain circumstances, this common law power may involve requiring the person to remove some or all of their clothes (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).
4. Officers conducting such searches must weigh the affront to a person’s dignity against the desirability of preserving and protecting evidence and persons (*Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [37]).
5. The common law power to conduct a safety and evidence search does not permit forensic procedures. Police officers who wish to take a sample from a person, conduct a procedure on the person or make a physical examination of the person must comply with the requirements imposed by *Crimes Act 1958* ss 464R, 464U and 464Y.

Seizure of stolen goods

1. Police officers are entitled to seize stolen goods from a person provided the seizure occurs without force, violence or otherwise unlawful conduct (*Dalton v McNaughton* (1903) 29 VLR 144, 151).
2. This does not include a power to search a person or premises for stolen goods. The police officers must be able to identify and reach the goods without trespass to land or individuals (*Laurens & Anor v Willers* [2002] WASCA 183, [45]).

Statutory powers independent of an arrest

1. Police officers are empowered under s 82 of the *Drugs, Poisons and Controlled Substances Act 1981* to search a person or vehicle in a public space provided the police officer has reasonable grounds for suspecting that the person possesses a drug of dependence or psychoactive substance or that any such substance are in the vehicle.
2. The test for establishing that the suspicion is based on reasonable grounds has two elements. First, the suspicion must have actually been held. The second element is objective – The circumstances must have been of a kind that would raise a suspicion in the mind of a reasonable person. A suspicion is a ‘positive or actual apprehension or mistrust’ that requires more than a ‘mere idle wondering’ (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62] citing *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, [4]).
3. Section 82 should be construed as balancing the need for an effective criminal justice system against the desirability of protecting individuals from arbitrary interferences with their person and property (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62]).
4. Section 82 is not restricted to circumstances in which a warrant cannot be acquired under s 81. Section 81(7) expressly provides that the section has no bearing on the powers conferred by s 82.
5. There is authority, though obiter, to suggest that s 82 powers could possibly extend to confiscating a person’s vehicle for the purposes of a later search to be conducted at a police station. Whether this obiter will be confirmed is a question for future determination (*GA, MM and PJ v The Queen* [2012] VSCA 44, [13]).
6. Police officers have a broad power to enter premises if they believe on reasonable grounds that a person has assaulted or threatened to assault a family member or is in contravention of a family violence intervention order, family violence safety notice or a personal safety intervention order (*Family Violence Protection Act 2008* s 157; *Personal Safety Intervention Orders Act 2010* s 114).
7. There is also a limited power for a police officer, authorised by another officer of inspector rank or higher, to enter private premises and search for stolen goods. This power can only be exercised if the person occupying the premises has been convicted in the last five years of handling stolen goods or has been sentenced to imprisonment for another dishonesty offence, or if a person has been convicted in the last five years of handling stolen goods has been in occupation of the premises within the past 12 months (*Crimes Act 1958* s 92(2)).
8. Other statutory powers include:

* A power to search where there are reasonable grounds to suspect the person has weapons in their possession (*Control of Weapons Act 1990* s 10);
* A power to search for firearms where there are reasonable grounds to suspect the person is committing or about to commit a Firearms Act offence and that he or she has a firearm or ammunition in their possession (*Firearms Act 1996* s 149);
* A power to search any person on court premises (*Court Security Act 1980* s 3).[[1]](#footnote-2)

The chance discovery principle

1. Search warrants authorise police officers to enter and search private premises in order to seize goods listed in the warrant.
2. The common law extends these powers to the seizure of goods unlisted in the warrant that serve as evidence of serious offences (*Siddique v Martin* (2016) 51 VR 564 577, [32]; *McElroy & Wallace v The Queen* [2018] 55 VR 450, [114]).
3. This is known as the ‘chance discovery’ rule (*Siddique v Martin* (2016) 51 VR 564 577, [24]).
4. Goods seized under the chance discovery rule must be ‘adventitiously found’ in the execution of a search warrant. The rule does not confer independent rights of entry or search (*R v Applebee* (1995) 79 A Crim R 554, 8; *Siddique v Martin* (2016) 51 VR 564 577, [24]).
5. Goods may only be seized in this manner if a police officer holds a reasonable belief that the goods constitute evidence of a serious offence (*Siddique v Martin* (2016) 51 VR 564 577, [22])
6. Once all items listed in a warrant have been seized, the powers conferred by that warrant expire and no further goods may be seized, even if officers believe they are evidence of a serious offence (*Siddique v Martin* (2016) 51 VR 564 577, [24]).
7. Goods seized in this manner are said to have been seized under the warrant that authorised the relevant entry and search (*Siddique v Martin* (2016) 51 VR 564 577, [34]).
8. The scope of this common law power is situational and is to be characterised and delimited with reference to the relevant warrant (*Siddique v Martin* (2016) 51 VR 564 577, [32]).

General common law powers of search and seizure

1. Historically, Victorian cases stated that there were no common law powers of search and seizure beyond those conferred incidental to an arrest, a search warrant or in instances of seizing stolen goods (*Levine v O’Keefe* [1930] VLR 70, 72).
2. Investigating breaches of the peace or threats to breach the peace did not suffice to justify police interference with persons, goods or land in the absence of statutory authority (*Kuru v New South Wales* (2008) 236 CLR 1, [47]).
3. Similarly, there was no power for seizure solely on the basis of a reasonable belief that goods could form material evidence of a crime (*Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387, 395).
4. However, recent Victorian judgments have entertained discussions that suggest that the law may be straying from this approach.
5. Osborn J in obiter in *Goldberg v Brown* suggested that the UK decision of *Ghani v Jones* [1970] 1 QB 693 was applicable in Victoria (*Goldberg v Brown* [2003] VSC 104, [4]).
6. In *Ghani v Jones*, Lord Denning MR found that an assessment of the lawfulness of a seizure disconnected from an arrest requires the weighing up of the freedom and privacy of an individual against the public interest in repressing crime. His Honour identified five requirements that govern a lawful seizure of goods in these circumstances:
7. Officers must believe on reasonable grounds that an offence has occurred that is of such gravity that it is of first importance that the offenders be brought to justice.
8. Officers must believe on reasonable grounds that the articles to be seized constitute material evidence to prove the commission of the serious offence.
9. The person in possession of the article being seized must be someone whom the officers believe on reasonable grounds is implicated in the crime.
10. The police are not permitted to retain the seized articles for longer than is reasonably necessary to complete their investigations or to create a copy of it.
11. These requirements must be assessed at the time of the seizure and are unaffected by any subsequent events (Ghani v Jones [1970] 1 QB 693, 708–709).
12. These principles represent the outer limits of police powers of seizure considered in the United Kingdom and do not permit police offers to interfere with one’s person or property simply to see if they have committed a crime (*Ghani v Jones* [1970] 1 QB 693, 707).
13. In *Siddique v Martin* (2016) 51 VR 564, the Crown argued that *Ghani v Jones* [1970] 1 QB 693 was good law in Victoria. While the Supreme Court noted that it was ‘prepared to assume’ in favour of the Crown, it was not necessary to decide the point as the case concerned the operation of the chance discovery rule when exercising a search warrant (at 574).
14. The most recent consideration of the principles can be found *McElroy & Wallace v The Queen* [2018] 55 VR 450. The Court acknowledged that the factual matrix before it mirrored the circumstances in which the *Ghani v Jones* principles might apply. However, as the Crown did not offer evidence for the proposition that the Court should follow *Ghani v Jones* [1970] 1 QB 693, the Court declined to rule on the matter (at [111]). Instead, the seizure was presumed to be unlawful given the lack of warrant or arrest connected to the evidentiary purpose of the seized goods (at [117]).

*Ghani v Jones outside of Victoria*

1. Outside Victoria there have been conflicting decisions on whether courts should adopt the *Ghani v Jones* approach (*Laurens v Willers* [2002] WASCA 183; *Challenge Plastics Pty Ltd v Collector of Customs* (1993) 42 FCR 397 (at [44]); c.f. *GH Photography Pty Ltd v McGarrigle* [1974] 2 NSWLR 635; *Rowell v Larter* (1986) 6 NSWLR 21; *Tye v Commissioner of Police* (1995) 84 A Crim R 147; *Island Way Pty Ltd v Redmond* [1990] 1 Qd R 431).

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1. For other statutory search powers, see Gambling Regulation Act 2003 s 2.5.38; Graffiti Prevention Act 2007 s 13; Radiation Act 2005 s 74. [↑](#footnote-ref-2)