



## HIGH COURT OF AUSTRALIA

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#### Details of Filing

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IN THE HIGH COURT OF AUSTRALIA  
ADELAIDE REGISTRY

BETWEEN:

**POTTER (A PSEUDONYM)**

Appellant

and

**THE KING**

Respondent

**RESPONDENT'S SUBMISSIONS**

**Part I: Certification**

1. This submission is in a form suitable for publication on the internet.

**Part II: Concise statement of the issues**

2. By majority (Doyle and David JJA, Kourakis CJ dissenting), the Court of Appeal ('the CoA') held that the recording was made in breach of s 4(1)(b) of the *Surveillance Devices Act 2016* (SA) ('the Act').
3. Notwithstanding the conclusion that the complainant could not bring herself within the exception in s 4(2)(a)(ii) of the Act, the majority of the CoA,
  - a. considered that the recording could nonetheless be used in evidence under s 9(1)(d) of the Act,<sup>1</sup>
  - b. unless excluded in the exercise of either the general unfairness or public policy discretion.
4. The sole ground of appeal challenges the conclusion at (2)(a). The contention is that the recording was not admissible under s 9(1)(d) of the Act because a necessary precondition of that provision is that the device was used to protect the lawful interests of the person who made the recording.<sup>2</sup>
5. For the reasons set out at [51] to [57], the majority, having found that the use of the device was not reasonably necessary for the protection of the complainant's lawful interests, was wrong to

<sup>1</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at 31 [135]; CAB 87.

<sup>2</sup> Appellant's Written Submissions ('AWS') at [33]-[36].

conclude that the recording could be used in evidence under s 9(1)(d) of the Act. Section 12(1) of the Act operated to prohibit the use of the recording in evidence at the appellant's trial.

6. Accordingly, the respondent concedes that the argument in support of the ground of appeal is correct. However, that argument and s 12(1) are predicate on the rejection of the use of the device having been reasonably necessary for the protection of the complainant's lawful interests.<sup>3</sup> The respondent challenges this assumption by its Notice of Contention.<sup>4</sup>
7. The issue which falls for determination by this Court is:
  - a. was the majority correct to conclude that the making of the recording, at a time when the complainant believed herself to be the victim of repeated serious sexual offending by the appellant, reasonably necessary for the protection of her lawful interests?
8. The respondent abandons contentions 2 and 3 in its Notice of Contention.<sup>5</sup> The respondent maintains that the use of the device was not in contravention of s 4(1) of the Act as it was "in the public interest".<sup>6</sup> However, the use, communication or publication of information or material obtained in the public interest requires a prior judicial order permitting such use (pursuant to s 11 of the Act). That procedural step did not occur, but may be pursued if the matter is remitted for retrial. As a result, the prohibition against the use of the recording, contained in s 10(1) of the Act, applied at the time of the trial.

### **Part III: Section 78B notice**

9. Not applicable.

### **Part IV: Statement of material facts**

10. The respondent accepts the accuracy of the matters set out by the appellant in his written submissions under the heading "Factual Background" save for the following.
11. On the complainant's evidence, following the birth of their second daughter<sup>7</sup> and prior to the complainant's diagnosis in June 2017<sup>8</sup>, there were occasions when she would wake up with genital pain and vaginal bleeding which suggested to her that the appellant had engaged in intercourse with her while she was asleep.<sup>9</sup> On occasion, the appellant made comments to the

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<sup>3</sup> Section 12(1) of the *Surveillance Devices Act 2016* (SA) applies to "information or material derived from the use ... of a surveillance device in contravention of [Part 2]."

<sup>4</sup> CAB 108.

<sup>5</sup> CAB 108.

<sup>6</sup> *Surveillance Devices Act 2016* (SA), s 6(1)(a).

<sup>7</sup> On 18 March 2017: trial transcript at 66-67; Respondents Book of Further Materials ('RBFM') at 15-16.

<sup>8</sup> After count 1, but before count 2; trial transcript at 77; RBFM at 26.

<sup>9</sup> Trial transcript at 77 RBFM at 26.

complainant during the day, including “was it good?”.<sup>10</sup> There was also mention made of the “morning-after pill”.<sup>11</sup> During that period there was a “constant dialogue” between them about the appellant not having sexual intercourse with the complainant whilst she was asleep.<sup>12</sup>

12. Following count 2<sup>13</sup>, the appellant apologised. He moved out of the master bedroom and into the office for several weeks.<sup>14</sup> At that stage, the complainant remained in the relationship for many reasons, including that she was unwell, lacked necessary support structures, held a religious devotion to the sanctity of marriage and because she loved her husband.<sup>15</sup>
13. The day after count 3<sup>16</sup>, the appellant and complainant argued. While apologetic, the appellant was dismissive and minimised the wrongfulness of his conduct.<sup>17</sup> That night, the appellant did not return to the family home.<sup>18</sup> The complainant remained in the relationship as she believed the relationship could work; the appellant was taking steps to change his behaviour and there had been a period of abstinence of offending. She also considered that she did not have the necessary supports to leave, she was still trying to find her “own two feet” and felt tethered to the appellant as a result of their two young children.<sup>19</sup>
14. In respect of the uncharged August 2019 incident (which occurred between counts 3 and count 4)<sup>20</sup>, the complainant described waking up with the same pain she experienced after other occasions of rape, as well as some vaginal bleeding.<sup>21</sup> The complainant confronted the appellant about this incident on Facebook Messenger.<sup>22</sup> In those messages, the appellant described having sexual intercourse with the complainant.<sup>23</sup> The complainant made it clear that she had no recollection of what had occurred and suggested she was asleep at the time.<sup>24</sup>

<sup>10</sup> Trial transcript at 77 and 79; RBFM at 26 and 28.

<sup>11</sup> Trial transcript at 79; RBFM at 26.

<sup>12</sup> Trial transcript at 79; RBFM at 26.

<sup>13</sup> Count 2 was charged as occurring between the 18<sup>th</sup> day of April 2017 and the 31<sup>st</sup> day of January 2018 at Christies Beach; CAB 5. The complainant’s evidence was that this occurred after she had placed a call to telehealth on 11 July 2017, and had fallen asleep (trial transcript at 81-82; RBFM at 30-31.). *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [21]; CAB 60.

<sup>14</sup> Trial transcript at 86; RBFM at 35.

<sup>15</sup> Trial transcript at 90; RBFM at 39.

<sup>16</sup> Count 3 was charged as occurring between 18 April 2017 and 31 January 2018.

<sup>17</sup> Trial transcript at 93; RBFM at 42.

<sup>18</sup> Trial transcript at 95; RBFM at 44.

<sup>19</sup> Trial transcript at 96; RBFM at 45.

<sup>20</sup> See, AWS at [8] and [10].

<sup>21</sup> Trial transcript at 102; RBFM at 51.

<sup>22</sup> The messages formed Exhibit P1 at the trial.

<sup>23</sup> Exhibit P1; *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [36]; CAB 63.

<sup>24</sup> Exhibit P1; *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [36]; CAB 63.

15. After this incident the appellant and complainant separated, although they continued to reside in the same house with their children.<sup>25</sup>
16. There was a single further occasion of consensual sexual intercourse in December 2019. The complainant indicated clearly to the appellant that it would not happen again.<sup>26</sup>
17. The complainant recorded a conversation with the appellant on 14 December 2019.<sup>27</sup> The complainant recorded the conversation against the background of the appellant having previously been apologetic, but dismissive, when the complainant had confronted him in relation to his sexual offending against her.<sup>28</sup>

#### **Part V: Respondent's response to the ground of appeal**

##### ***The legislative scheme***

18. The purpose of the Act can be gleaned from the application of ordinary processes of statutory construction, having regard to the text, context and the historical background of the provisions.<sup>29</sup>
19. The Act came into operation on 18 December 2017. Its long title makes plain that it was enacted to replace the *Listening and Surveillance Devices Act 1972* (SA) ('**the Old Act**'). The Second Reading Speech for the *Listening Devices Bill 1972* ('**the 1972 Bill**') identifies the "mischief" to which that scheme was directed – namely, unjustified invasions of privacy presented by covert surveillance.<sup>30</sup>
20. The Act pursues its purpose through the criminalisation of the covert use of surveillance devices (Part 2, Division 1) (subject to exceptions) and through criminalising the use, communication or publication of the *product* of surveillance devices except in certain circumstances (Part 2, Division 2). The provisions in Part 2, Division 2 act as a further layer of deterrence against using surveillance devices without justification. The prohibitions remove a key incentive for using the devices (i.e. the obtaining of a recording which can be put to some use, communicated or published). The Act treats privacy as harmed both at the point in time when a device is used covertly, and when the product of covert surveillance is given publicity.<sup>31</sup>

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<sup>25</sup> Trial transcript at 103; RBFM at 52.

<sup>26</sup> Trial transcript at 104-105; RBFM at 53-54.

<sup>27</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [39]; CAB 63-64.

<sup>28</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [34]; CAB 63.

<sup>29</sup> *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [171] (Edelman J).

<sup>30</sup> South Australia, House of Assembly, Parliamentary Debates, Hansard, 21 September 1972 at p 1516.

<sup>31</sup> See, *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 593 [171] (Gordon J) (in the context of ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW)).

*The operation of Part 2, Division 1*

21. Part 2, Division 1 governs, among other things, the covert use of surveillance devices. It creates offences in relation to the covert use of listening devices (s 4), optical surveillance devices (s 5), tracking devices (s 7) and data surveillance devices (s 8).
22. Section 4(1)(b), subject to the exceptions provided by s 4(2), creates a criminal offence prohibiting the knowing installation, use or maintenance of a listening device to record a private conversation to which the user of the device is a party.
23. In s 3, listening device is defined to include “a device capable of being used to listen to or record a private conversation or words spoken to or by any person in private conversation (whether or not the device is also capable of operating as some other kind of surveillance device)”.
24. Private conversation is defined in the same section to mean:
 

a conversation carried on in circumstances that may reasonably be taken to indicate that at least 1 party to the conversation desires it to be heard only by the other parties to the conversation (but does not include a conversation made in circumstances in which all parties to the conversation ought reasonably to expect that it may be heard by a person who is not a party to the conversation)
25. Section 4(2)(a)(ii) creates a defence, excepting from the liability created by s 4(1), the use of a device in circumstances where doing so was “reasonably necessary for the protection of the lawful interests” of the accused person.
26. Similarly, s 6(1)(a) excepts from the liability created by s 4(1), the use of a listening device to overhear, record, monitor or listen to a private conversation “if the use of the device is in the public interest”.
27. Under both sections, the burden lies on the accused to bring themselves within the exception.<sup>32</sup>
28. “Lawful interests” is not defined in the Act. The meaning to be attributed to this term is dealt with in [69]-[74] below.
29. If an accused person, charged with an offence under 4(1), proves on balance that the use of the device was for the protection of their lawful interests in the circumstances contemplated by s 4(2)(a)(ii), they avoid conviction under Division 1. But that does not mean that they are free to use, communicate or publish the information or material derived from the device. The right to

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<sup>32</sup> *Criminal Procedure Act 1921 (SA)*, s 56; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 258 (Dawson, Toohey and Gaudron JJ).

use, communicate or publish the information or material derived from the device is governed by Part 2, Division 2 of the Act.<sup>33</sup>

*The operation of Part 2, Division 2 and its interaction with Part 2, Division 1*

30. Part 2, Division 2 creates a corresponding regime to Division 1 for the regulation of the use, communication or publication of information or material derived from the use of surveillance devices. The correspondence between the two Divisions is not complete. It is confined to the use of material or information obtained in accordance with the lawful interests exceptions<sup>34</sup>, the public interest exceptions<sup>35</sup> and in breach of Part 2.<sup>36</sup>
31. Section 9(1) of the Act prohibits, subject to limited exception, the knowing use, communication or publication of a recording obtained where “the device was used to protect the lawful interests of that person”. The terms of s 9(1) correspond to the lawful interests exceptions<sup>37</sup> to the prohibitions against using listening devices to record private conversations (ss 4(1)(a)-(b)) and optical devices to record private activities (ss 5(1)-(3)).
32. Section 10 corresponds to the public interest exception contained in s 6. It prohibits the knowing use, communication or publication of the product of a recording made “in the public interest” “except in accordance with an order of a judge under this Division”. The power to make such an order is found in s 11 of the Act.
33. Section 12(1), addressed more fulsomely below, prohibits the knowing use, communication or publication of the product of unlawful surveillance, except in the limited circumstances identified in s 12(2). The prohibition extends to both the user of the surveillance device and others.<sup>38</sup>
34. Section 12(3) provides that a person who obtains knowledge of information or material in a manner that does not involve a contravention of Part 2 is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened the Act.

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<sup>33</sup> The same applies in respect of liability under ss 5(1)-(3) of the Act (optical surveillance devices), and the use of a device in the public interest under ss 6(1)-(2) of the Act.

<sup>34</sup> *Surveillance Devices Act 2016* (SA), ss 4(2)(a)(ii), 4(2)(b)(iv)(B), 4(2)(b)(v)(B) and 4(2)(c)(ii) (listening devices); ss 5(4)(a)(iv)(B), 5(4)(a)(v)(B), 5(4)(b) (optical surveillance devices).

<sup>35</sup> *Surveillance Devices Act 2016* (SA), ss 6(1)(a) and (b) (listening devices) and s 6(2)(a) and (b) (optical devices).

<sup>36</sup> *Surveillance Devices Act 2016* (SA), s 12(1).

<sup>37</sup> *Surveillance Devices Act 2016* (SA), ss 4(2)(a)(ii), 4(2)(b)(iv)(B), 4(2)(b)(v)(B) and 4(2)(c)(ii) (listening devices); ss 5(4)(a)(iv)(B), 5(4)(a)(v)(B), 5(4)(b) (optical surveillance devices).

<sup>38</sup> “whether by that person or another person”.

35. Put simply, s 12(3) permits the communication and publication of the *content* of the private conversation the subject of the recording, but not the use of the recording itself. In the context of court proceedings, s 12(3) renders permissible the giving of evidence about a private conversation even if the conversation was recorded unlawfully.

36. The inclusion of this carve-out provides a textual indicator that the prohibitions are targeted at a particular mischief. Its concern is not protecting the sanctity of private conversations *simpliciter* but, rather, the particular “evil” of covertly recording private conversations. It is concerned with the potential “chilling effect” of covert surveillance on “personal communications which it is the place of privacy law to prevent or at least discourage”.<sup>39</sup> It concerns the making of a record of a conversation.

*No express requirement of reasonable necessity in s 9(1) of the Act*

37. Unlike the lawful interest exceptions in Division 1, s 9(1) does not impose an express requirement that the use of the device was reasonably necessary.

38. The respondent contends that the correspondence between the exception provisions (in Division 1) and the use provisions (in Division 2) suggests that s 9(1) is only engaged where a lawful interest exception is made out under Division 1. Put differently, it should be read as adopting the circumstances of the lawful interest exceptions under Division 1.

39. If s 9(1) related to any recording made to protect lawful interests (irrespective of whether the use of the device was reasonably necessary), then the Act would contain two provisions prohibiting the use of such recordings with exceptions and penalties in different terms (being, ss 9(1) and 12(1)).

40. The respondent’s construction of the provision gives ss 9(1) and 12(1) distinct fields of operation. The former applies to non-prohibited recordings made in particular circumstances, while the latter applies to prohibited recordings.

41. Properly construed, the chapeau in s 9(1) confines the circumstances (set out in ss 9(1)(a)-(h)) in which material or information (derived from the use of a device in accordance with a lawful interest exception under Division 1<sup>40</sup>) may be used, communicated or published.

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<sup>39</sup> Australian Law Reform Commission, *Privacy* (Report No 22, 1983), p 50 [1134].

<sup>40</sup> *Surveillance Devices Act 2016* (SA), ss 4(2)(a)(ii), 4(2)(b)(iv)(B), 4(2)(b)(v)(B) and 4(2)(c)(ii) (listening devices); ss 5(4)(a)(iv)(B), 5(4)(a)(v)(B), 5(4)(b) (optical surveillance devices).

### ***The recording and the CoA's decision***

42. It was not disputed in the courts below that the complainant had knowingly recorded a private conversation (to which she was a party), and that the appellant did not consent to the making of the recording. She was, *prima facie*, liable under s 4(1)(b) of the Act.
43. The complainant made the recording after the first three counts (each of which occurred at the couple's home in Christies Beach), but before the final count (which occurred when they lived in Lightsview). The recording captured admissions by the appellant to having had sexual intercourse with the complainant while she was asleep when the couple lived at Christies Beach.
44. The recording captured the appellant telling the complainant, among other things, "I sexually assaulted you", "I moved on top of you when you were asleep", and "I started having sex with you when you were asleep ... and then I stopped".<sup>41</sup>
45. On the prosecution case, statements made by the appellant during the recording were admissions to having engaged in sexual intercourse with the complainant while she was asleep.<sup>42</sup> At a minimum, that evidence was relevant as establishing a specific propensity to engage in sexual intercourse with the complainant while she slept.<sup>43</sup> The relevance and probative value of the recording was not disputed.<sup>44</sup>
46. In an affidavit dated 8 July 2022, the complainant deposed that she made the recording to "convince [herself] never to go back to [the appellant] no matter what happened or how he tried to convince [her] to".<sup>45</sup> She explained that at that point she did not intend to "[take] it further".<sup>46</sup>
47. The trial Judge held that the making of the recording was reasonably necessary for the protection of the complainant's lawful interests, and refused to exclude the evidence in an exercise of the unfairness discretion.<sup>47</sup> At trial, the appellant accepted that he made the statements but stated that he had done so to placate the complainant.<sup>48</sup>

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<sup>41</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [39] and [120]; CAB 63-64 and 82.

<sup>42</sup> Trial transcript at 256; RBFM at 160.

<sup>43</sup> Trial transcript at 264; RBFM at 168.

<sup>44</sup> *HML v The Queen* (2008) 235 CLR 334 at 351 [5] (Gleeson CJ).

<sup>45</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [121]; CAB 82.

<sup>46</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [121]; CAB 82. This was interpreted by both the trial Judge and the Court of Appeal as meaning she did not intend to report the appellant's conduct to the police.

<sup>47</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [123]; CAB 83.

<sup>48</sup> Trial transcript at 236-237; RBFM at 144-145.

48. On appeal, the appellant asserted that the recording was wrongly admitted as the use of the device was not reasonably necessary for the protection of the complainant's lawful interests.

49. In dissent, Kourakis CJ determined that 'lawful interest' was to be construed in accordance with the purpose of the provision, the associated exemptions and interests recognised and protected by other statutes and the common law.<sup>49</sup> His Honour characterised the relevant lawful interest as being the protection of the complainant's bodily autonomy and integrity, which included the right to give or withhold consent.<sup>50</sup> His Honour explained that, for victims of sexual offending, the ability to make informed decisions regarding their human right to bodily autonomy is best achieved when the reasons behind the offending are shared. In the context of the privacy of conversations which relate to that offending, the Chief Justice considered that the exercise of balancing the interest of bodily integrity of a victim of sexual offending against the interest of the suspected offender, must fall in favour of the putative victim.<sup>51</sup>

50. The majority (Doyle and David JJA) characterised the complainant's rationale for making the recording as being "connected with her ending her relationship with the appellant, and in particular as a reminder to herself not to resume the relationship".<sup>52</sup> Their Honours described the relevant interest as being her "right to end their relationship".<sup>53</sup> In so doing, their Honours distinguished the complainant's rationale from those underpinning the covert recordings considered in *R v DRF*<sup>54</sup> and *Davies v The Queen*<sup>55</sup>. In both cases, devices were used with the specific intention of obtaining confessional statements for anticipated prosecutions. Their Honours concluded that the use of the device was not reasonably necessary for the protection of the complainant's lawful interests.<sup>56</sup> The effect of their Honours' finding was that the complainant's use of the device contravened s 4(1)(b) of the Act.

<sup>49</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [4]; CAB 57.

<sup>50</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [6]-[8]; CAB 58 (citing Australian Human Rights Commission, *Ensuring Health and Bodily Integrity: Towards a Human Rights Approach for People Born with Variations in Sex Characteristics* (Chapter, October 2021) 27-28; Natalia Kanem, 'Bodily Autonomy: A Fundamental Right' (Speech, United Nations Population Fund, 16 March 2022)).

<sup>51</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [9]; CAB 58.

<sup>52</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [132]; CAB 86.

<sup>53</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [134]; CAB 87.

<sup>54</sup> *R v DRF* (2015) 263 A Crim R 573; *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [130]; CAB 86.

<sup>55</sup> *Davies v The Queen* (2021) 289 A Crim R 15; *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [130]; CAB 86.

<sup>56</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [134]; CAB 87.

***The majority were wrong to conclude that s 9(1)(d) of the Act permitted the use of the recording at trial in light of their Honours' antecedent finding (the ground of appeal)***

51. The majority averred erroneously to s 9(1)(d) as permitting the use of the unlawful recording at the appellant's trial.<sup>57</sup> As explained above, s 9(1)(d) is only engaged where a lawful interest exception is established under Part 2, Division 1 of the Act.

52. Section 12(1) is engaged where a device has been used "to record a private conversation" in contravention of s 4(1)(b) of the Act.

53. The exceptions to the general prohibition, contained in s 12(2), provide some guidance as to the intended meaning of the words "use", "communicate" and "publish" in s 12(1). Section 12(2)(c) permits the use of information or material derived from the unlawful use of a surveillance device "for the purposes of a relevant investigation, or relevant action or proceeding relating to that contravention of this Part or a contravention of this section ...". The terms of s 12(2)(c) qualify the definitions of "relevant investigation" and "relevant action or proceeding" in s 3, such that a recording unlawfully made can only be used for the purposes of an investigation, action or proceeding relating to a contravention of the Act.

54. From the inclusion of s 12(2)(c) it can be inferred that s 12(1) was intended to proscribe the use, communication and publication of unlawful recordings in court proceedings. If the prohibition did not extend to use in court proceedings, the exception in s 12(2)(c)<sup>58</sup> would have no work to do.<sup>59</sup>

55. It follows from the above that s 12(1) prohibits the use, communication and publication of unlawful *recordings* by a person<sup>60</sup> in court proceedings (other than proceedings relating to a contravention of the Act). The tender of a recording unlawfully made constitutes a criminal offence under that provision. In this way, s 12(1) operates as both an offence and as a rule of evidence. In the latter regard, it operates as an automatic rule of exclusion.

56. The majority's consideration of the public policy discretion, which is exclusionary and confined to evidence that is improperly obtained by police or other law enforcement agencies, was misconceived.<sup>61</sup>

<sup>57</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [135]; CAB 87.

<sup>58</sup> At least to the extent it refers to a "relevant action or proceeding".

<sup>59</sup> See, *Thomas v Nash* (2010) 107 SASR 309 at 317-318 [54]-[55] (Doyle CJ).

<sup>60</sup> "Person" is not defined in the *Surveillance Devices Act 2016* (SA). "Person" defined under s 4 of the *Legislation Interpretation Act 2021* (SA) to include both a body corporate and an individual.

<sup>61</sup> See, *Kadir v The Queen; Grech v The Queen* (2020) 267 CLR 109, 125 [12] (the Court). There is no equivalent provision to s 138 of the *Evidence Act 1995* (NSW) in South Australia.

57. For these reasons, the respondent concedes that the majority erred in finding that s 9(1)(d) permitted the use of the recording at the appellant's trial, subject to discretionary exclusion.

#### **Part VI: The respondent's notice of contention**

##### ***The recording was reasonably necessary for the protection of the complainant's lawful interests***

58. The respondent contends that the majority erred in concluding that the use of the device was not reasonably necessary for the protection of the complainant's lawful interests within the meaning of s 4(2)(a)(ii).

##### *Origins of the exception in s 4(2)(a)(ii) and the defence of qualified privilege*

59. The provenance of the term "reasonably necessary for the protection of lawful interests" can be traced to the defence of qualified privilege in relation to the law of defamation. This context assists in determining the scope of the exception as it is found in s 4(2)(a)(ii) of the Act.

60. The language of s 4(2)(a)(ii) of the Act derives from s 7(1) of the Old Act. Section 7(1) of the Old Act provided exceptions to the blanket prohibition on the use of a listening device to record private conversations (contained in s 4 of the Old Act). Immediately prior to the Old Act being repealed, s 7(1) stated:

Section 4 does not apply to or in relation to the use of a listening device by a person (including a person to whom a warrant is issued under this Act) if that listening device is used—

- (a) to overhear, record, monitor or listen to any private conversation to which that person is a party; and
- (b) in the course of duty of that person, in the public interest or for the protection of the lawful interests of that person.

61. As can be seen, the Old Act did not contain a requirement that the use of the device be "reasonably necessary" for the protection of the lawful interests of the user of the device. The words "reasonably necessary" were introduced into the Act to narrow the exception as it existed under the Old Act. In moving the second reading of the related bill, the following was remarked:<sup>62</sup>

The general ability to use a listening device to record a private conversation if it is in the course of duty of the person, in the public interest or for the protection of the lawful interests of that person in the current section 7(1)(b) of the act is too broad and ill-defined. It is unsuited to the threats to personal privacy posed by the technological realities of the 21<sup>st</sup> century. It has been eliminated and more specific and targeted allowances made for lawful use.

<sup>62</sup> Parliament of South Australia, Legislative Council, Parliamentary Debates, Hansard, 5 June 2014, at p 376.

62. The Second Reading Speech for the 1972 Bill makes only passing reference to the lawful interests exception. It refers to the *Rights of Privacy Bill 1969* ('**the Rights of Privacy Bill**'), the purpose of which was to control the possession and use of aural and visual surveillance devices.<sup>63</sup>

63. The *Rights of Privacy Bill*, which prohibited the use of a device to record a private conversation and the publication of the private conversation, contained an exception where publication "is reasonably necessary for the protection of his lawful interests".<sup>64</sup>

64. The Second Reading Speech for the *Rights of Privacy Bill* makes plain that the content of that bill was based largely on the drafting of the *Listening Devices Act 1969* (Vic) ('**the Old Victorian Act**') and the *Omnibus Crime Control and Safe Streets Act of 1968*.<sup>65</sup>

65. Under s 4(1) of the Old Victorian Act, the communication or publication of the substance or meaning of a private conversation, which had been recorded without the consent of all parties, was prohibited. That prohibition was subject to an exception in s 4(2): "the communication or publication is no more than is reasonably necessary in the public interest or in the course of his duty or for the protection of his lawful interests".

66. The Second Reading Speech for the Old Victorian Act indicates that the phrases incorporated into that expression were adopted from terms used in the defence of qualified privilege in relation to the law of defamation.<sup>66</sup> In the result, the nature of a lawful interest, for the purposes of the defence of qualified privilege, is capable of informing the breadth of the exception in s 4(2)(a)(ii) of the Act.

67. Lawful interests is a protean concept. In the context of the defence of qualified privilege it is a term of wide import. In *Toogood v Spyring*, Parke B referred to an interest for the purposes of qualified privilege as arising in the conduct of an individual's own affairs.<sup>67</sup> In *Austin v Mirror Newspapers*, the Privy Council described an interest in information as arising where such information would assist in the making of an important decision or the determining of a particular course of action.<sup>68</sup> In *Howe & McColough v Lees*, Griffiths CJ referred to an interest as not being "an interest in the particular subject matter as to which the communication is made,

<sup>63</sup> Parliament of South Australia, House of Assembly, Parliamentary Debates, Hansard, 3 October 1972, at p 1774.

<sup>64</sup> Parliament of South Australia, House of Assembly, Parliamentary Debates, Hansard 20 August 1969, at p 1087.

<sup>65</sup> Parliament of South Australia, House of Assembly, Parliamentary Debates, Hansard, 20 August 1969, at p 1086 and 27 August 1969, at p 1253.

<sup>66</sup> Parliament of Victoria, Legislative Council, Parliamentary Debates, Hansard, 26 March 1969, at p. 3426.

<sup>67</sup> *Toogood v Spyring* (1834) 1 CM & R 182 at 193; (1834) 149 ER 1044 at 1049-1050.

<sup>68</sup> *Austin v Mirror Newspapers* (1985) 3 NSWLR 354 at 358 (Lord Griffiths).

but an interest in knowing the fact communicated, in other words, an interest in the subject matter to which the communication is relevant, as for instance the solvency of a probable customer".<sup>69</sup> In the same case, O'Connor J considered that an interest had to be definite, could be direct or indirect, but not vague or unsubstantial<sup>70</sup> and Higgins J considered the term used in the popular sense, as in "a man is 'interested' in knowing a fact – not interested in it as a matter of gossip or curiosity, but as a matter of substance apart from its quality as news".<sup>71</sup>

68. Accepting this, a lawful interest for the purposes of the Act may be understood as arising in the pursuit or furtherance of an individual's affairs in the sense that it has a real bearing upon action or decisions the individual may make.

*Meaning of "protection of lawful interests" in the context of the Act*

69. In the context of surveillance devices legislation, the scope of the expression "lawful interests" has understandably not been comprehensively defined (despite being the subject of extensive consideration by intermediate appellate courts).<sup>72</sup> However, a review of the authorities reveals that "where the conversation relates to a serious crime, or an allegation of a serious crime, or to resisting such an allegation, a court is more likely to find that the recording of a conversation relating to the crime can be made in the protection of the person's 'lawful interests'".<sup>73</sup>

70. "Lawful" is a term capable of several meanings. It may mean; (a) something which is not forbidden by law, (b) something which is recognised by law or (c) it may connote the quality of being specifically legally enforceable.<sup>74</sup> A "lawful interest" can be distinguished from a "legal interest" in the sense of the latter relating to a strict legal right, title, duty or liability.<sup>75</sup>

<sup>69</sup> *Howe & McColough v Lees* (1910) 11 CLR 361 at 369-370.

<sup>70</sup> *Howe & McColough v Lees* (1910) 11 CLR 361 at 377. See also, *Marshall v Megna* [2013] NSWCA 30 at 13-14 [6] (Allsop P); *Stone v Moore* (2016) 125 SASR 81 at 94-95 [86] (Doyle J).

<sup>71</sup> *Howe & McColough v Lees* (1910) 11 CLR 361 at 398.

<sup>72</sup> See, *R v Le* (2004) 60 NSWLR 108 at 125-126 [83] (Adams J) (a synonymous exception under the *Listening Devices Act 1984* (NSW) was made out in circumstances where the user of the device had a lawful interest in protecting her credibility, where there was a risk that she would be accused of lying about the conversation); *Sepulveda v The Queen* (2006) 167 A Crim R 108 at 136 [139]-[140] (Johnson J) (the exception under the *Listening Devices Act 1984* (NSW) was not made out, in circumstances where a recording was made by a person who believed themselves to be a victim of sexual offending of a conversation with the alleged perpetrator); *DW v The Queen* (2014) 239 A Crim R 192 at 199 [37] and 201 [49] (Ward JA) (a comparable exception under s 7(3)(b)(i) of the *Surveillance Devices Act 2007* (NSW) was established where the user of the device was a child and subject to ongoing sexual abuse at the hands of the other party to the conversation); *Davies v The Queen* (2021) 289 A Crim R 156 at 167 [50] (the Court) (the exception in s 4(2)(a)(ii) of the *Surveillance Devices Act 2016* (SA) was established where the complainant had reported historical sexual offending to the police, and with their assistance, engaged in a "pretext call").

<sup>73</sup> *Thomas v Nash* (2010) 107 SASR 309 at 317 [48] (Doyle CJ).

<sup>74</sup> *Taikato v The Queen* (1996) 186 CLR 454 at 460 (Brennan CJ, Toohey, McHugh and Gummow JJ) citing *Crafter v Kelly* (1941) SASR 237 at 243-245 (Napier J).

<sup>75</sup> *Viol & Ors v Berrivale Orchards Limited* (2000) 99 FCR 580 at 586 [28] (Branson J).

71. While the expression “lawful interests” cannot be given content which would undermine the purpose of the Act, it must be borne in mind that there are two additional protections which exist within the scheme to guard privacy.

72. The first protection is that the exception to s 4(2)(a)(ii) will not be available unless the recording was “reasonably necessary” for the protection of the interest. Determining whether the use of a device was “reasonably necessary” will encompass a consideration of the extent to which privacy has been undermined by the use of the device. The meaning to be attributed to the term “reasonably necessary” is addressed below.

73. The second protection is the restriction on the uses to which recordings may be put. Satisfaction of the exception does not have the consequence of the user of the device being able to use, communicate or publish at will information or material derived from the use of the device. The uses to which a recording made pursuant to the exception may be put are circumscribed by ss 9(1) and 11 of the Act.<sup>76</sup>

74. The exceptions to the prohibition on use of a recording (obtained in accordance with s 4(2)(a)(ii)), which are contained in ss 9(1)(a)-(h) of the Act, inform the scope of the expression lawful interest. It follows from ss 9(1)(c)<sup>77</sup> and (d)<sup>78</sup> that a lawful interest can consist of the investigation and prosecution of an offence, where the person using the device genuinely believes that he or she is the victim of offending.

75. “Protection” connotes defending, preserving or safeguarding the lawful interests of the principal party in question.<sup>79</sup>

*Meaning of “reasonably necessary”*

76. There is a long history of judicial and legislative use of the term “reasonably necessary” in Australia.<sup>80</sup> In Australian constitutional law, reasonable necessity has been adopted as a legal criterion of validity of legislation.<sup>81</sup> The word “necessary” connotes “appropriate or adapted”

<sup>76</sup> While s 9(1)(f) permits the communication or publication of information or material “to a media organisation”, to use, communicate or publish the information or material, the media organisation would be required to seek an order pursuant to ss 9(1)(g) and 11 of the Act.

<sup>77</sup> “to an officer of an investigating agency for the purposes of a relevant investigation or relevant action or proceeding”. “Relevant investigation” is defined in s 3 to include “an investigation of an offence”.

<sup>78</sup> “in the course, or for the purposes, of a relevant action or proceedings”. “Relevant action or proceeding” is defined in s 3 to include “a prosecution of an offence”.

<sup>79</sup> *Sepulveda v The Queen* (2006) 167 A Crim R 108 at 132 [120] (Johnson J).

<sup>80</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at 331 [20] (Gleeson CJ).

<sup>81</sup> *Thomas v Mowbray* (2007) 233 CLR 307 at 331 [24] (Gleeson CJ).

rather than “essential or indispensable”.<sup>82</sup> The term “reasonably” imports an objective standard.<sup>83</sup>

77. “Reasonably necessary” is a term requiring evaluative judgment. In application it directs attention to the competing interests recognised by the provision. In the context of s 4(2)(a)(ii), the term requires an assessment of whether the use of the device was reasonably appropriate and adapted for the protection of the relevant lawful interest (bearing in mind the legislative purpose of deterring the use of covert surveillance devices to record private conversations). A form of proportionality analysis is required, where questions of suitability, necessity and proportionality arise.<sup>84</sup>

*The subjective and objective divide*

78. While the term “reasonably necessary” imports an objective standard, in the context of s 4(2)(a)(ii), it relates to the protection of a lawful interest which existed at the time of the use of the device.<sup>85</sup>

79. The application of the lawful interest exception in s 4(2)(a)(ii) is to be assessed by reference to the following questions:

- a. First, what was the actual lawful interest which was capable of being protected by the use of the device? In answering that question, it is necessary to consider what the user of the device anticipated would be the subject matter of the conversation. While the intended use of a recording may inform the nature of the interest (for example, an intended use which reveals the pursuit of an unlawful interest may prevent reliance on the exception in s 4(2)(a)(ii)), it is not wholly determinative of the bounds of the lawful interest.
- b. Secondly, having regard to the identified lawful interest, was the making of the recording reasonably necessary for the protection of the lawful interest (assessed objectively)?

80. The second question (a proportionality analysis) will be informed by the nature of the lawful interest, the circumstances as they existed at the time of the recording<sup>86</sup> and the nature and

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<sup>82</sup> *AW v Rayney* [2010] WASCA 161 at [257], citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 199 [39] (Gleeson CJ).

<sup>83</sup> *Sepulveda v The Queen* (2006) 167 A Crim R 108 at 132 [118] (Johnson J).

<sup>84</sup> *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at 140-142 [459]-[466] (Kiefel J).

<sup>85</sup> *Viol & Ors v Berrivale Orchards Limited* (2000) 99 FCR 580 at 585-586 [17]-[23] (Branson J).

<sup>86</sup> *Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 465 at [17]-[18] (Levine J).

extent of the imposition of the recording on the other party's right to privacy.<sup>87</sup> Such a construction is reinforced by the language of s 4(2)(a)(ii) which requires that the use of the device "is" reasonably necessary.<sup>88</sup>

81. The user's motivation (which may be discerned from both the stated purpose for making the recording, and the content of the recording itself) assists in the identification of the "lawful interest" which existed at the time of the recording. To divorce the inquiry from the user's subjective motivation entirely would be overly permissive. It would permit the making of recordings in pursuit of unlawful ends so long as a lawful interest could be later identified.<sup>89</sup> That said, the user's motivation should not be equated with the lawful interest itself.

*Identification of the lawful interest in this case*

82. The complainant expressed that she made the recording so that she could "use it to convince [herself] never to go back to [the appellant] no matter what happened or how he tried to convince [her] to. It was to be used as a reminder to [herself] not to go back. At the time [she] had no intention of taking it further".<sup>90</sup>

83. At the time of the making of the recording, the complainant believed herself to have been the victim of rape at the hands of the appellant on numerous occasions.<sup>91</sup> Each occasion of sexual offending occurred when they were in a romantic and sexual relationship, while the complainant was asleep in the bed she shared with the appellant. The complainant and appellant had stopped and resumed their romantic relationship at various points in the years preceding the recording. Their lives were interwoven. They shared the responsibility of caring for two young children.

84. While there was a period of two years between the last *charged* incident and the making of the recording, the complainant gave evidence of an uncharged incident in August 2019 (at most, four months before the recording was made) in which she awoke to vaginal bleeding and suspected she had been raped by the appellant in her sleep.<sup>92</sup> After that incident, the pair remained living together with their children. However, the appellant moved into a separate

<sup>87</sup> A right to privacy may generally be understood to relate to "the fundamental value of personal autonomy"; see, *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at 553 [31] (Kiefel CJ and Keane J) citing *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 256 [125] (Gummow and Hayne JJ).

<sup>88</sup> *Viol & Ors v Berrivale Orchards Limited* (2000) 99 FCR 580 at 585-586 [17]-[23] (Branson J).

<sup>89</sup> See, *Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 465 at [20]-[22] (Levine J).

<sup>90</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [121]; CAB 82.

<sup>91</sup> Including one uncharged occasion in August 2019.

<sup>92</sup> Cf. *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [132]; CAB 86.

room. There was a further occasion of consensual sexual intercourse in December 2019. It was unclear from the complainant's evidence whether this occurred before or after the making of the recording on 14 December 2019.

85. It may be inferred, from the complainant's reasons for making the recording, that the complainant's purpose in using the device was to produce something tangible and objective, from which she could gain the resolve to extricate herself from her relationship with the appellant, and withstand his attempts to convince her to stay with him.<sup>93</sup>
86. The majority's characterisation of the complainant's lawful interest ("to protect herself from what she considered a harmful relationship"<sup>94</sup>) failed to grapple with the true harm presented by the relationship and the complainant's ability to protect herself.
87. In the course of the recorded conversation, the complainant repeatedly asked the appellant about what he did to her at Christies Beach, which she described in the recording to be at the "core" of the deterioration of their relationship.<sup>95</sup> It is clear from both the complainant's stated motivation for making the recording and the content of the recording itself that the complainant anticipated that the appellant would admit to having sexually assaulted her at Christies Beach during the private conversation which she decided to record. Contrary to the majority's finding at [132]<sup>96</sup>, there was a plain connection between her desire to leave the relationship for good and the prior instances of rape which occurred in the context of the relationship.
88. In light of the circumstances of the previous offending, it was reasonable for the complainant to anticipate that a resumption of a romantic relationship carried with it a real risk of exposure to further sexual offending and thereby serious affronts to, at least, her bodily autonomy. However, a relationship with the appellant did not merely risk harm to her *bodily* autonomy. The appellant's conduct and manipulation eroded her agency and identity. The fact that the complainant considered it necessary to obtain a tangible record strongly suggests that, at the time of making the recording, she was concerned at having the personal strength and fortitude to reason in her bests interest. It was the complainant's interests in her autonomy in a broader sense (encompassing both *non-interference* with her body by sexual offending and *empowerment* to make decisions about her own life) which stood to be protected by the making of the recording. Escaping a romantic relationship with the appellant was not the

<sup>93</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [121]; CAB 82.

<sup>94</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [133]; CAB 87.

<sup>95</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [39]; CAB 63-64.

<sup>96</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [132]; CAB 86.

lawful interest which she sought to protect; it was the mechanism by which she sought to protect her own autonomy.<sup>97</sup>

89. An interest in one's personal autonomy is both not an unlawful interest and an interest well-recognised by statute, common law and Australia's international law obligations.<sup>98</sup> Irrespective of the precise bounds of the expression "lawful interests", it must encompass an interest in protecting the complainant's autonomy in the broader sense described above. That is consistent with either formulation (a) or (b) explained in [70] above.

*Was the making of the recording reasonably necessary for the protection of the complainant's autonomy?*

90. In the context of this case, the relevant question, and the question when the defence is raised, may be expressed as follows:

- Would a reasonable person in the circumstances of the complainant (being a person who genuinely believed herself to have been a victim of repeated sexual offending during the course of her relationship with the appellant) conclude that the use of the device was "reasonably appropriate and adapted" to protect her autonomy (encompassing both non-interference and empowerment)?

91. If it is accepted that "reasonably necessary" does not mean "essential", then the availability of other methods of protection will not prevent the user of the device from falling within the lawful interests exception in s 4(2)(a)(ii). Applying by analogy the language of the test for proportionality in Australian constitutional law, a use of a device may not be "reasonably necessary" if there is an obvious and compelling alternative which is an equally practicable and available means of protecting the putative interest.<sup>99</sup>

92. In the context of a deeply personal right (as opposed, for example, to a commercial interest for which there is a clear pathway for vindication or protection), there must be some deference to the choice of the protective method. That arises as a corollary of it being necessary to consider the complainant's circumstances as they existed at the time of the recording.

<sup>97</sup> *Potter (A Pseudonym) v The King* [2024] SASCA 108 at [134]; CAB 87.

<sup>98</sup> See, for example, (in the context of bodily autonomy) *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218 at 309-310 (McHugh J): "... the common law accepts that a person had rights of control and self-determination in respect of his or her body which other persons must respect. Those rights can only be altered with the consent of the person concerned. Thus, the legal requirement of consent to bodily interference protects the autonomy and dignity of the individual and limits the powers of others to interfere with that person's body"; *International Convention on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 7 and 8.

<sup>99</sup> *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

93. As explained by Simpson JA in *R v DRF*, a covert recording may be called for in the context of sexual offending because it typically takes place in private, where there is no witness to the events.<sup>100</sup>

94. Without corroborative witnesses, and any physical evidence having ceased to exist, the appellant was the only source of information about what had happened to the complainant. There was no other equally practicable and available means of the complainant obtaining an objective record of what had occurred, from which her resolve to remain outside of the relationship could be strengthened. There was no perfect substitute for recording a conversation with the appellant. A contemporaneous hand-written note of the contents of the conversation, for example, would not carry the weight of a recording in the appellant's own voice. While this is not a complete answer to whether the use of the device was reasonably necessary, it strongly suggests that the making of the recording was a *suitable* and *necessary* measure to protect the complainant's lawful interests.

95. Returning to the question of alternatives, regard must be had to the potential consequences of alternative methods. In cases involving a cycle of sexual violence by an intimate partner, police intervention will not always be a viable option. There may be many reasons for reticence to involve law enforcement, including the consequences for children of the relationship.<sup>101</sup> Shame and embarrassment also act as barriers to disclosure to loved ones who may assist in restoring one's sense of autonomy in the aftermath of serious criminal invasion.

96. In considering the burden on the appellant's privacy, it is relevant that the complainant was concerned to make a personal record for her use only. She did not intend to undermine the appellant's privacy through giving the recording publicity.

97. The complainant's stated motivation for the recording and the content of the conversation demonstrate that the recording was limited in its ambit. It was focussed upon the issue which the complainant considered to be at the core of the deterioration of their relationship: his sexual offending against her. It was not a lengthy recording traversing multiple topics, in which admissions were unexpectedly or serendipitously made. The focussed nature of the recorded conversation suggest that no more was done than was necessary to protect her lawful

<sup>100</sup> *R v DRF* (2015) 263 A Crim R 573 at 594 [90] (Simpson JA).

<sup>101</sup> Australian Bureau of Statistics, *Personal Safety, Australia* (2021-2022 financial year, published 15 March 2023). Ninety-two percent of women who had been sexually assaulted by a male did not report the most recent sexual assault to police. The most commonly cited reason for not doing so was that they "felt they could deal with it themselves", followed by not regarding the incident as serious and feeling ashamed and embarrassed.

interests. The short recording, which focussed on extracting an acknowledgement of serious harm, was appropriate and adapted to protect her lawful interests.

98. The particular use of the device in this case, in all of the circumstances, was a proportionate means of protecting her lawful interest.
99. The majority erred in concluding that the use of the device was not reasonably necessary for the protection of the complainant's lawful interests. The appeal should be dismissed.

#### **Part VII: Time estimate**

100. The respondent estimates that 1 hour will be required for the presentation of its oral argument.

Dated 20 January 2026



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**ANNEXURE TO RESPONDENT'S SUBMISSIONS**

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
1	<i>Surveillance Devices Act 2016 (SA)</i>	Historical (7 October 2021 – 20 September 2023)	ss 3 – 12.	In force at the time of trial.	31 July 2023 to 7 August 2023 (date of trial).
2	<i>Surveillance Devices Act 2016 (SA)</i>	Historical (7 November 2019 – 6 October 2021)	s 4.	In force at the time of the use of the device.	14 December 2019.

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