



HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

POTTER (A PSEUDONYM)

Appellant

and

THE KING

Respondent

APPELLANT’S OUTLINE OF ORAL SUBMISSIONS

Part I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

2. The respondent concedes that if the conclusion of the majority – that the complainant’s use of a recording device was not reasonably necessary for the protection of her lawful interest – is not shown by the respondent to be incorrect, an inadmissible recording of an admission was admitted in the appellant’s trial (AS[33]-[38]; Rep [2]; RS[8]). The respondent does not identify an error of principle in the approach of the majority but rather complains about the exercise of an evaluative judgment {AS[20]}.

Proper construction of s 4 of the *Surveillance Devices Act 2016* (SA)

3. The legislative purpose of s 4(2)(a)(ii) is the protection of private conversations. This purpose is achieved by prohibiting the recording of such conversations through the imposition of criminal sanctions {AS[19]-[20]; *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 at [5], [52], [159], [171] [JBA 3.10]; *Sepulveda v The Queen* (2006) 167 A Crim R 108 [JBA 7.31]}.

4. The content of ‘lawful interests’ for the purposes of s 4(2)(a)(ii) is informed by ss 9 and 12. Each provision complements the prohibition in s 4(2)(a)(ii) {AS[21]-[22]; *Farm Transparency* at [45], [68]}.
5. The textual origins of the formulation in s 4(2)(a)(ii) in the defence of qualified privilege does not expand the scope of ‘lawful interests’, such that it is to be understood to “aris[e] 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” {Rep [7] *cf.* RS[66]-[68]}. A formulation of this breadth undermines the purpose of the prohibition in s 4(2)(a)(ii) {*Sepulveda* at [141]}. The organising principles of the defence of qualified privilege are the freedom of communication; the need to protect that freedom for the welfare of society; and the reciprocity of duty {Rep [7]; *Roberts v Bass* (2022) 212 CLR 1 at [62] [**JBA 4.17**]; *Marshall v Megna* [2013] NSWCA 30 at [3]-[4], [6] [**JBA 7.26**]}.
6. ‘Reasonably necessary’ connotes ‘appropriate or adapted’ {AS[20]}. Whilst the phrase is commonly encountered in constitutional law {RS[76]-[77]}, its content is informed by the legislative context in which it is used {AS[20]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1 at [374] [**JBA 5.18**]; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at [38]-[40]}. It should not be understood as requiring that an alternative be ‘obvious and compelling’ {*cf.* RS[91]}.

The complainant’s stated purpose

7. The respondent’s identification of the complainant’s lawful interest is not reflective of her stated purpose and amounts to a retrospective justification {Rep [3]-[5], [8]-[10] *cf.* RS[85]-[88]}:
 - 7.1. The complainant’s stated purpose was to have something tangible to refer to in the future and in the event that her resolve weakened {CAB82-83; CA[121]-[122]}. So understood, the complainant sought to have a reliable record in case it turned out to be advantageous in the future. The complainant did not seek to use the recording for the purpose of the prosecution of the appellant or to vindicate the alleged sexual abuse.
 - 7.2. The conversation was concerned with particularised alleged sexual offending that had taken place two years beforehand rather than with alleged sexual offending more broadly.

- 7.3. In the period between the particularised sexual offending and the making of the recording, the complainant had attempted to make the relationship ‘work’ and had engaged in consensual sexual intercourse with the appellant (including potentially immediately before the recording was made). The complainant did not assert she needed protection from the appellant. The lawful interest was not in need of protection {Rep [10]; *Sepulveda* at [120]}.
- 7.4. It was not reasonably necessary to use the device in the above circumstances, and where there were other alternative means available that would have served the complainant’s purpose and which did not involve an invasion of privacy {Rep [12]-[15]}.

The Court of Appeal

8. Doyle and David JJA were correct to hold that the exemption in s 4(2)(a)(ii) was not engaged in circumstances where the recording was to be used as a reminder; where the relationship had already ended; and where the offending the subject of the private conversation had taken place two years before {CAB86-87; CA[132]-[134]; AS[29]-[31]}.
9. Kourakis CJ was incorrect to hold that the use of the recording device was reasonably necessary for the protection of the complainant’s lawful interest. His Honour:
- 9.1. imputed a lawful interest to the complainant which did not reflect her stated purpose {CAB58; CA[5], [9]; AS[30]}, which he expressed in absolute terms and without engaging with the question of whether the use of a recording device was reasonably necessary {AS[26]-[27]}; and
- 9.2. misunderstood the purpose of ss 4, 9 and 12, by posing the dispositive question as a comparison of the complainant and the appellant’s competing interests with the latter being appropriately protected by s 9 {CAB58; CA[9]}.

Dated: 14 April 2026



Marie Shaw KC

Frank Moran Chambers



William Mickan

Frank Moran Chambers