



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 14 Apr 2026 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: A24/2025
File Title: Potter (A Pseudonym) v. The King
Registry: Adelaide
Document filed: Form 27F - Respondent's Outline of oral argument
Filing party: Respondent
Date filed: 14 Apr 2026

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

POTTER (A PSEUDONYM)

Appellant

and

THE KING

Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

The respondent certifies that this outline is in a form suitable for publication on the internet.

Part II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**The ground of appeal**

- 1) Having concluded that “the lawful interest exception” in s 4(2)(a)(ii) of the *Surveillance Devices Act 2016* (SA) (**‘the Act’**) was not established, the majority erred in finding that s 9(1)(d) of the Act permitted the use of the recording at the appellant’s trial (RWS [50]-[57]; CAB 87, [135]).
 - a) The majority found that the use of the surveillance device was not reasonably necessary for the protection of the complainant’s lawful interests, but held that, pursuant to s 9(1)(d), the use of the recording at the appellant’s trial was not unlawful (CAB 87).
 - b) Section 9(1)(d) is only enlivened where a lawful interest exception is established under Part 2, Division 1 (RWS [37]-[41]).
 - c) Section 12(1) prohibits the use, communication or publication of information or material derived from the use of a surveillance device in contravention of Part 2 of the Act.
 - i) The exceptions in 12(2) do not apply in this case (RWS [53]).
 - ii) Section 12(1) is both an offence provision and a rule of evidence (RWS [54]-[55]).
 - iii) The respondent concedes that the appellant’s argument in support of the ground of appeal is correct. However, that argument, relies upon a rejection of the respondent’s contention that the use of the device was reasonably necessary for the protection of the complainant’s lawful interests.

Notice of Contention – that the use of the device was reasonably necessary for the protection of the complainant’s lawful interests

- 2) There is no dispute that the complainant knowingly used a listening device to record a private conversation and that the appellant, a principal party, did not consent to the device being so used.
- 3) Section 4(2)(a)(ii) creates an exception to liability. The burden is on the user of the device to bring themselves within the exception (RWS [27]).
- 4) Section 4(1)(b) was not contravened as the recording was reasonably necessary for the protection of a lawful interest pursuant to s 4(2)(a)(ii). The dissenting judgment of Kourakis CJ was correct (CAB 57-59).
 - a) Factually, the complainant’s interest in making the recording can be gleaned from the whole of her evidence, including her stated purpose, the content of the recording and

available inferences. Her interest was described by Kourakis CJ as being her interest in protecting her bodily autonomy and integrity incorporating her agency and dignity as a victim of abuse within a domestic relationship (CAB 57-58; RWS [82]-[89]; Restricted Respondent's Book of Further Materials (trial transcript); *DW v The Queen* [2014] NSWCCA 28 at [47], [48]; additional material).

- b) The term "lawful interest" is not defined in the Act (nor interstate counterparts), though its meaning has been considered by intermediate appellate courts in both civil and criminal proceedings. The historical background, including reference to the general law of defamation and the defence of qualified privilege, informs but does not control the proper construction of the provision (RWS [59]-[70]; second reading speeches and debates for *Listening and Surveillance Devices Bill 1972* (SA) and *Rights of Privacy Bill 1969* (SA); additional material and JBA vol 8, p 1983; second reading speech for *Listening Devices Act 1969* (Vic); JBA vol 8, p 1779; *Howe & McColough v Lees* (1911) 11 CLR 361 at 362-370, 377 and 398; JBA vol 3, pp 478-479, 486, 498; *Austin v Mirror Newspapers* (1985) 3 NSWLR 354 at 358; JBA vol 6, p 1241).
 - c) "Reasonably necessary" is a term requiring evaluative judgment. It imports an objective standard, and invokes a form of proportionality analysis (RWS [77] and [80]). It is informed by the nature of the lawful interest, the circumstances as they existed at the time of the recording and impost on other parties' privacy (*Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 465 at [17]-[18]; JBA vol 6, p 1335; *Violi & Ors v Berrivale Orchards Limited* (2000) FCR 580 at 585-586; JBA vol 7, pp 1684-1685).
 - d) "Protect" connotes defending, preserving or safeguarding the lawful interest of the principal party (*Sepulveda v The Queen* (2006) 167 A Crim R 108 at 132; JBA vol 7, p 1627).
- 5) **The use of the device was reasonably necessary for the protection of a lawful interest (RWS [90]-[99]), having regard to the following:**
- a) The complainant's stated motivation for making the recording was to use it to convince herself never to resume her relationship with the appellant no matter what happened or how he tried to convince her to (CAB 82-83).
 - b) The decision to record a private conversation with the appellant was made in the context of her belief (and at times suspicion) that she had been the victim of rape by the appellant whilst she was asleep on numerous occasions during their marriage, most recently in August 2019.
 - c) Their relationship had ceased and resumed on a number of occasions. The appellant and complainant remained living together at the time the recording was made, and shared responsibility for their children.
 - d) During their separation the appellant had not respected established boundaries.

3-

- e) Resumption of the relationship had the risk of exposing the complainant to further sexual assaults, and thereby risks to her bodily autonomy, physical and mental integrity, agency and dignity (CAB 58).
- f) The content of the recording was directed to the appellant admitting to raping the complainant, which was a core issue in the breakdown of their relationship. There was a direct connection between the rapes and the complainant's desire to permanently cease the relationship.
- g) The recording was made as the complainant was concerned about her personal resolve to permanently leave the relationship absent a tangible record, in the appellant's voice, as to what he did to her.
- h) Given the nature of the sexual assaults the complainant understood she had suffered, the appellant was the only source of information as to what had occurred to the complainant.
- i) Autonomy in decision making is a deeply personal right, which is relevant when considering the reasonableness of alternative options that may have been open to the complainant (such as going to the police in the context of repeated abuse within a domestic relationship).
- j) Relevant to the level of intrusion into the appellant's privacy was the complainant's intention at the time of recording to use the recording only for her own purposes.
- k) The recorded conversation was focused in its content, indicating that complainant did no more than was necessary to protect her lawful interest.
- l) This was not a case where the opportunity to offend was clearly in the past and there was no ongoing risk to the complainant (cf. *Sepulveda v The Queen* (2006) 167 A Crim R 108; JBA vol 7, p 1603). There was objectively an ongoing risk to the complainant's safety both physical and mental while the complainant and appellant remained living together with the possibility of ongoing sexual encounters (*DW v The Queen* (2014) 239 A Crim R 192 at 202; additional material).

Dated: 14 April 2026



M E Chalmers SC

Deputy Director of Public Prosecutions (SA)