



UNIFORM LAW CONFERENCE OF CANADA

**WORKING GROUP ON SECTIONS 278.1-278.94 OF THE *CRIMINAL CODE*
(THE “RECORDS REGIME”)**

FINAL REPORT

**Presented by
Melanie Webb & David Parry**

Readers are cautioned that the ideas or conclusions set forth in this paper, including any proposed statutory language and any comments or recommendations, may not have been adopted by the Uniform Law Conference of Canada. They may not necessarily reflect the views of the Conference and its Delegates. Please consult the Resolutions on this topic as adopted by the Conference at the Annual meeting.

**Halifax
Nova Scotia**

August 2025

Presented to the Criminal Section

This document is a publication of
the Uniform Law Conference of Canada.
For more information, please contact
info@ulcc-chlc.ca

1. INTRODUCTION

[1] At the August 2023 Uniform Law Conference of Canada (“ULCC”), the Criminal Section adopted the following resolution:

“It is recommended that a working group be created to study the current *Criminal Code* “records regime” provisions (sections 278.1 to 278.94), with a view to making recommendations for amendments that would serve to simplify procedural issues, streamline the current regime, and provide for a more efficient process.”

[2] The genesis of the Working Group was a desire to simplify the production and admissibility regimes set out ss. 278.1-278.91 and 278.92-278.96 of the *Criminal Code* (the “record screening regime”). As will be expanded upon below, the general view remains that these provisions are complicated, confusing, and a source of delay in the justice system.

[3] The Working Group was constituted in September 2023. It continued its work throughout 2024 and the early part of 2025. A status report was presented at the 2024 meeting. The Working Group now presents this final report for the 2025 annual meeting.

[4] The Working Group considered various amendments around the definition of a record and creating explicit statutory exemptions or “carve outs” for common types of records, simplification of the steps of the production and admissibility regimes, the role of procedural waivers, the role of complainant’s counsel, notice periods and service requirements, mid-trial applications, and whether to add child exploitation offences to the ambit of the regime.

[5] This final report summarizes discussion around each of these issues. The report is explicit when Working Group members reached a consensus on a substantive proposed amendment to the record screening regime. When the Working Group could not reach a consensus on a particular issue, the discussion is summarized with arguments for and against.

2. MEMBERSHIP

[6] The co-chairs strived to maintain regional balance and representation from Crown, Defence and complainant’s counsel throughout the past two years. There have been several changes to the composition of the Working Group, due to members having been appointed to the bench, stepping down due to other commitments, and other reasons. The following is a list of all persons who have participated in the Working Group at some point since its inception:

- Melanie Webb – Co-Chair – Canadian Bar Association (Defence Counsel/Counsel for complainants, Ontario)

- David Parry – Co-Chair – Canadian Bar Association (Crown Counsel, Ontario – *only participated in his capacity as member of the executive of the National Criminal Justice Section of the Canadian Bar Association*)
- Janet Dickie – Crown Counsel, Policy and Justice, B.C. Prosecution Service
- Gloria Ng – Defence Counsel/Counsel for Complainants (British Columbia)
- Nadine Nesbitt – Senior Counsel, Policy, Alberta Crown Prosecution Service
- Kelly Kaip – Senior Crown Prosecutor, Appeals (Saskatchewan)
- Audrey Olson – Senior Director, Legal and Policy, Ministry of Justice and Attorney General (Saskatchewan)
- Rochelle Wempe – Legal Counsel, College of Physicians and Surgeons of Saskatchewan (Counsel for complainants) (Saskatchewan)¹
- Hugo Caissy – Bureau d’aide juridique de Rimouski (Defence Counsel/Counsel for complainants) (Quebec)
- Julie Roy – Coordonnatrice provinciale en matière de lutte contre l’exploitation sexuelle et la marchandisation des services sexuels, Directeur des poursuites criminelles et pénales (DPCP) (Quebec)²
- Anthony Cotnoir – Directeur des poursuites criminelles et pénales (DPCP), (Quebec)
- Emma Evans – Ministry of the Attorney General (Ontario)
- Aidan Seymour-Butler – Defence Counsel (Ontario)
- Cheryl Schurman – Crown Counsel, Nova Scotia Public Prosecution Service³
- Carla Ball – Crown Counsel, Nova Scotia Public Prosecution Service⁴
- Emma Woodburn – Crown Counsel, Nova Scotia Public Prosecution Service
- Patrick Young – Crown Counsel, Nova Scotia Public Prosecution Service
- Mark Knox – Defence Counsel (Nova Scotia)⁵
- Annie Piché – General Counsel, Sexual Violence Team, Public Prosecution Service of Canada, Northwest Territories Regional Office⁶
- Angie Paquin – Crown Counsel, Public Prosecution Service of Canada, Northwest Territories
- Daniel Brown – Defence Counsel, representative of the Criminal Lawyers’ Association (Ontario)⁷
- Zachary Al-Khatib – Defence Counsel (Alberta)⁸
- Morna Boyle – Department of Justice, Criminal Law Policy Section (*attended*)

¹ Ceased membership prior to the submission of this final report, due to judicial appointment in April 2024.

² Ceased membership prior to the submission of this final report, due to judicial appointment in January 2024.

³ Ceased membership prior to the submission of this final report.

⁴ Ceased membership prior to the submission of this final report.

⁵ Ceased membership prior to the submission of this final report.

⁶ Ceased membership prior to the submission of this final report, due to judicial appointment in June 2024.

⁷ Ceased membership prior to the submission of this final report.

⁸ Ceased membership prior to the submission of this final report.

the meetings as an observer from the Department of Justice and did not provide input into the contents of this report)

- Michael Ellison – Department of Justice, Criminal Law Policy Section (*attended the meetings as an observer from the Department of Justice and did not provide input into the contents of this report*)
- Anouk Desaulniers – Juge, Cour du Québec⁹
- Eric Tolppanen – Justice, Alberta Court of Justice, Canadian Association of Provincial Court Judges¹⁰
- Ferhan Javed – Justice, Ontario Court of Justice, Canadian Association of Provincial Court Judges
- Marco LaBrie – Juge en chef adjoint (Chambre criminelle et pénale), Cour du Québec

3. BACKGROUND

3.1 The “records regime”

[7] The “records regime” has two parts:

- i. Production (ss. 278.1-278.91 of the *Criminal Code* (hereinafter “the Code”))
 - a. Records in the possession of a third party
 - b. Records in the possession of the prosecutor (s. 278.2(2) of the *Code*)
- ii. Admissibility of records in the possession of the accused (screening regime – ss. 278.92-278.97 of the *Code*)

[8] The sections set out procedures and legal standards that must be followed if the accused person seeks production of s. 278.1 records, either in the possession of a third party or the Crown, or seeks to adduce into evidence s. 278.1 records in his/her own possession. All of the provisions are set out in Appendix A.

[9] Enacted in 2018, the records regime responds to concerns about private records, notably counselling records, being improperly used in criminal trials based on myths and stereotypes about complainants in sexual assault cases.

[10] The production regime is commonly referred to as the “*Mills* regime” after the Supreme Court of Canada decision in *R. v. Mills*, [1999] 3 S.C.R. 668, which upheld the constitutionality of the production provisions. To obtain private records in the possession of third parties or the Crown, the accused person must bring an application and establish the “likely relevance” of the records at stage one for the judge to review, and then again

⁹ Ceased membership prior to the submission of this final report.

¹⁰ Ceased membership prior to the submission of this final report.

at stage two for ultimate production to the accused person. Various factors that the accused person cannot rely on (on their own) are set out in s. 278.3(4) which target the privacy rights of complainants and the prevalence of myths and stereotypes in the context of sexual assault. Section 278.3(5) requires 60 days' notice of the application. The complainant has standing at stages one and two.

[11] The admissibility regime applies to private records in possession of the accused person. Again, the accused person must bring an application to admit these records which is again heard in two stages with reference to the factors set out in s. 278.92(3). At stage one, the judge must be satisfied that the evidence sought to be adduced is “capable of being admissible” under s. 278.92(2).¹¹ At stage two, the judge must be satisfied that the “evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.”¹² The complainant only has standing at stage two. Only seven days' notice is required.

[12] The admissibility regime only applies to “records which contain personal information about complainants for which they have a reasonable expectation of privacy”¹³ and requires defence to disclose their contents to the Crown and complainant. Therefore, a practice of bringing a motion for directions has emerged pre-admissibility to determine whether non-enumerated records fall into the s. 278.1 definition triggering the admissibility regime.

[13] In *R. v. J.J.*, 2022 SCC 28, the Supreme Court of Canada upheld the constitutionality of the admissibility regime and suggested a procedure to be followed where defence counsel has materials in their possession relating to a complainant, which defence counsel intend to adduce, and for which it is not clear whether the materials amount to a “record” as defined by s. 278.1.

3.2 General discussion of challenges with the record screening regime

[14] The current records regime for offences captured by s. 278.92(1) of the *Code* has resulted in what is widely seen by practitioners and judges as a complicated procedure that prolongs trials, contributes to delay, and increases the burden on scarce judicial resources.

[15] The perception of practitioners and judges who believe the records regime adds to delay has some empirical basis. Data from the Ontario Court of Justice¹⁴ suggests that

¹¹ The Supreme Court of Canada in *R. v. J.J.*, 2022 SCC 28, at para. 25 noted that there is a drafting error in the *Code* and the reference to s. 276(2) should be a reference to s. 278.92(2).

¹² Section 278.92(2) of the *Code*

¹³ *J.J.*, *supra*, at para. 41

¹⁴ <https://www.ontariocourts.ca/ocj/statistics/>

cases of sexual violence take markedly longer from arrest to disposition in Ontario:

OFFENCE TYPE	Cases Received	% of All Cases Received	Cases Disposed	Avg Days to Disposition (for cases without bench warrants)
TOTAL	79,937	32.3%	74,742	237
Homicide	458	0.2%	428	301
Attempted Murder	349	0.1%	246	297
Robbery	5,098	2.1%	3,825	213
Sexual Assault	4,788	1.9%	3,960	369
Other Sexual Offences	1,962	0.8%	1,880	367
Major Assault	23,359	9.4%	19,144	241
Common Assault	24,454	9.9%	28,305	217
Uttering Threats	10,690	4.3%	10,051	218
Criminal Harassment	4,060	1.6%	3,523	242
Other Crimes Against Persons	4,719	1.9%	3,380	240

[16] Working Group members identified several specific issues with the records regime summarized below:

- It is inherently confusing and time consuming, requiring many appearances before the trial judge and coordinating the schedules of at least three lawyers.
- Uncertainty in interpreting the definition of a record in s. 278.1 and how it applies to electronic communications between the complainant and the accused person, which has become a ubiquitous part of many trials.
- There is no process set out for adjudicating what is a record under s. 278.1 and no direction on whether the complainant has standing in that determination.
- With the abolishment of preliminary inquiries for most sexual offences, defence counsel may not have the opportunity to establish relevance in advance of the trial, which may result in mid-trial applications that can derail proceedings.
- Given its complexity, records screening applications are not being brought early enough for complainants to retain counsel and for all steps to be adjudicated before the trial dates.

- Police often obtain waivers from complainants during the investigatory phase; however, it is questionable whether those waivers are valid for production purposes under s. 278.2(2) given the absence of independent legal advice and a fully informed waiver. The Crown is not in the best position either to obtain a fully informed waiver given its conflict with disclosure obligations.
- The seven-day notice period for admissibility applications is wholly insufficient as it does not allow time to set up independent legal representation for the complainant.
- Some materials may contain a mix of private vs. non-private information complicating production and admissibility applications.
- Applications can only be heard by trial judges and not case management judges, which complicates scheduling of matters.¹⁵

3.3 Process followed by the Working Group

[17] The Working Group first engaged in free-form discussion amongst its members regarding the issues they face in their respective practices (content of that discussion as summarized above). From this, the co-chairs engaged in a thematic analysis of this discussion. The themes were divided into substantive and procedural issues, and a schedule was then set, with each further meeting dedicated to a discussion of one or two of these issues. That thematic analysis is set out in Appendix B.

[18] The Working Group then met approximately once per month and specific proposals for amending the records regime were discussed and debated. The co-chairs attempted to obtain consensus on these proposals where possible and recorded the issues with given proposals when this was not possible. The minutes of meetings were compiled into a discussion document for the Working Group before the drafting of this report was split up amongst members.

4. DISCUSSION AND RECOMMENDATIONS

[19] Following the thematic analysis and continued discussion at subsequent meetings, the Working Group summarizes its discussions and, where possible, makes recommendations in eight areas:

1. Amendments to the production of records in the possession of the Crown under s. 278.2(2) of the *Code*

¹⁵ In some jurisdictions, such as Ontario and Alberta, case management judges may hear the application.

2. Simplification of the steps of the record screening regime
3. Motions for directions as to whether the admissibility regime engages for records in possession of the accused
4. Difficulties presented by mid-trial applications
5. Scope, role and timing of complainant's counsel
6. Issues with self-represented litigants
7. Inclusion of additional offences in the records regime
8. Specific and narrow amendments to the *Code* to address drafting issues

4.1 Amendments to production of records in the possession of the Crown under s. 278.2 of the *Code*

[20] Sections 278.1 to 278.9 of the *Code* govern the production of s. 278.1 records to an accused person in the prosecution of sexual violence, human trafficking or a sex trade offence. The production regime is separate from the admissibility or screening regime found in sections 278.92 to 278.97. This section of the report will address proposed amendments to streamline the production regime, by amending section 278.2.

[21] Protecting the privacy and dignity rights of complainants has increased the procedural complexity of sexual violence, human trafficking, and sex trade matters. In many cases, these procedural complexities have contributed to delay in the prosecution. Many Working Group members felt that barriers to disclosure of material that a prosecutor thinks is likely relevant to the case causes delay at the very beginning of the file, which often compounds over the course of the file.

[22] To reduce this delay, the Working Group discussed “carve outs” for certain types of records to streamline and shorten proceedings. Consensus was reached that three types of documents that are commonly in a prosecution brief should be explicitly exempted from the application of s. 278.2(2) on the basis that there is no reasonable expectation of privacy in the documents for the purpose of production to the accused, or the document is otherwise always relevant to the offence.

[23] The three types of documents are: 1) electronic communications to which the accused person is a party, 2) documentation from a sexual assault examination kit (SAEK), and 3) materials constituting the subject matter of the offence or anything that captures the offence itself (e.g. a video recording).

a) Overview of the production regime

[24] The production regime governs anything that falls within the s. 278.1 definition

of “record”. The regime covers both records only in the possession of third parties, as well as records that have come into the possession of the police or Crown.

[25] For records that have come into the possession of the police or Crown, section 278.2 prohibits the production of the s. 278.1 record to an accused person absent a court order or an express waiver by the complainant or witness of the privacy protections afforded to them by the production regime.

[26] This prohibition on the production of s. 278.1 records in the possession of the prosecution is a deviation from the Crown’s disclosure obligations under *Stinchcombe*¹⁶ to disclose all material unless it is clearly irrelevant or privileged.

[27] The production regime in the *Code* was found to be constitutional by the Supreme Court of Canada (SCC) in *Mills*¹⁷ and a valid exception to the Crown’s *Stinchcombe* disclosure obligations in *McNeil*¹⁸ and *Quesnelle*.¹⁹

[28] The enumerated records in s. 278.1 are the types of private records that would normally be obtained from a “third party”, for example doctors and counsellors, and records created by the complainant for their private use, such as journals and diaries.

[29] Section 278.1 also refers to non-enumerated records: “any form of record that contains personal information for which there is a reasonable expectation of privacy ... but does not include records made by persons responsible for the investigation or prosecution of the offence.”

[30] Records made by persons responsible for the investigation or prosecution of the offence, such as a police report, do not fall within the production regime and are disclosed pursuant to common law (*Stinchcombe*) principles.

b) Requirement for an express waiver and its potential to cause delay

[31] Prosecutors often have s. 278.1 records in their brief that were obtained by police with the nominal “consent” of the complainant or witness. However, consent for police to collect evidence is typically not the same as informed consent for the purposes of the production regime. In particular, when consenting to police collection of potential evidence, the complainant or witness does not necessarily know about the protections within the production regime, including their right to appear in court to protect their privacy rights in relation to production to the accused. Further, the material gathered by police may go far beyond what the complainant thought they were consenting to (e.g., medical records beyond the date of the alleged offence, or all communications [or more]

¹⁶ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326

¹⁷ *R. v. Mills*, [1999] 3 S.C.R. 668

¹⁸ *R. v. McNeil*, 2009 SCC 3

¹⁹ *R. v. Quenelle*, 2014 SCC 46

from a complainant's phone, instead of just the communications related to the offence). To protect a complainant's privacy rights as required by the *Code* and the Supreme Court of Canada, an informed and express waiver is required before prosecutors can disclose the records.²⁰

[32] The bar to production in s. 278.2, however, delays the Crown in making full disclosure of its case. It may take time to obtain an express waiver from a complainant, or a waiver may not be able to be obtained. Unless a waiver is provided, the Crown must depend on the accused making an application to the court under section 278.3. While rare and potentially unwise, the accused may choose not to do so,²¹ or may otherwise not do so in a timely fashion. The statutory regime does not contain a disclosure process the Crown can initiate. This means that disclosure of potentially relevant information is dependent on others who may have no interest in proceeding in a timely fashion. The frequent result is delay of the prosecution including trial adjournments.

[33] For a waiver, the length of delay will often depend on what supports are available to complainants to obtain legal advice before signing a waiver. While some provinces have programs that provide legal advice to complainants free of charge to provide a waiver, regardless of whether the accused has initiated an application, other provinces and territories only authorize independent legal advice to complainants or witnesses once the accused files a section 278.3 application. As already mentioned, a defence application may not be timely, or occur at all, so in some provinces, the existence of a waiver process does not ensure production occurs in a timely manner.

[34] Even in provinces where complainants have access to free legal advice for waivers, it may be difficult to contact the complainant or to arrange to have them obtain the advice and potentially sign a waiver. In these cases, an application under s. 278.3 will be required. Complainants in human trafficking cases, for example, may not be willing to cooperate with the prosecution, or may not be readily located before trial.

[35] While there are concerns about the delay caused by requiring an express waiver or court order before disclosing s. 278.1 records, it is recognized that section 278.2 and the requirement for an express waiver or court order ensure that irrelevant private information is not disclosed by the prosecution in the name of expediency. Prosecutors, like others in the criminal justice system, may unconsciously rely on myths and stereotypes when determining the relevancy of documents in their possession. The process set out in ss. 278.1 to 278.9 of the *Code* is an important safeguard to protect the privacy and dignity rights of complainants in sexual violence prosecutions.

[36] However, the potential for harm to the prosecution caused by delay is very serious, even when the delay may be the fault of the accused in failing to make a timely section 278.3 application. Complainants can become frustrated and uncooperative when

²⁰ *Mills, supra*, at para. 114; *R. v. Plaunt*, 2006 CarswellOnt 3329 (Ont. C.J.)

²¹ E.g., *R. v. Lahens*, 2024 ONSC 2245

proceedings are delayed, memories fade, and the public and complainant's interests in timely justice are harmed.²²

c) Proposed amendment to section 278.2(2) of the *Code*

[37] **Recommendation:** In an effort to reduce delay, the Working Group recommends that electronic communications to which the accused is a party, documentation from a SAEK, and materials constituting the subject matter of the offence or anything that captures the offence itself should be explicitly exempted from the application of s. 278.2(2) of the *Code*, on the basis that there is no reasonable expectation of privacy in the documents for the purpose of production to the accused, or that they are always clearly relevant.

i. *Electronic communications with accused person*

[38] The description of the definition of a “record” as “broad and non-exhaustive” in *Quesnelle*,²³ and the discussion about the privacy interests in electronic communications in *J.J.*,²⁴ make it clear that a complainant or witness may have a reasonable expectation of privacy in an electronic communication. However, *J.J.* also makes a distinction between the analysis of a reasonable expectation of privacy for the purpose of production and for the purpose of admissibility.²⁵

[39] Sexual violence, human trafficking, and sex trade offence matters often contain many electronic communications between many people. Communications between people other than the accused person likely attract a reasonable expectation of privacy and therefore fall within the definition of a s. 278.1 record.

[40] However, several prosecution services (although not necessarily all) have taken the position that for the purposes of production, it is unlikely that communications between the accused person and a complainant or witness would attract a reasonable expectation of privacy. This is because the accused was a party to and has already seen the communications. Therefore, the complainant (or witness) would not have a reasonable expectation of privacy, for the purposes of production, in their communications that involve the accused. Whether the accused would be allowed to adduce the communications in court would still be subject to the “record screening regime” in sections 278.92 to 278.94.

[41] While this is the approach taken by several prosecution services, there is uncertainty in the law, which can cause confusion, inconsistency, and potentially

²² *R v Jordan*, 2016 SCC 27, at paras. 19-28

²³ *Quesnelle*, *supra*, at para. 22

²⁴ *R. v. J.J.*, *supra*

²⁵ *Ibid*, at para. 50

unnecessary litigation. It has also created a patchwork of approaches across the country, and even within jurisdictions given the uncertainty in the area. Expressly exempting communications that an accused was party to in s. 278.2(2), for the purpose of production only, would assist with streamlining the disclosure process and reducing delay.

[42] Even though electronic communications between the accused and a complainant or witness would be considered *Stinchcombe* disclosure, prosecutors would still redact private information that is clearly irrelevant, or require controlled disclosure (e.g., disclosure on an undertaking, or controlled viewing) for highly private information or intimate images that may be contained in an electronic communication.

ii. Sexual assault forensic examination kit documents (SAEK)

[43] In the view of the Working Group, forensic medical examinations are medical records within the meaning of 278.1. These examinations are typically conducted by a specially trained nurse or doctor, whose purpose is not only to collect evidence but also to provide health care and treatment to the complainant. These exams typically involve the examiner:

- obtaining a brief description of the alleged offence from the complainant, which helps inform the nature and scope of the examination;
- conducting an examination (with consent) of the complainant's person, including of any orifices that may have been violated;
- taking swabs of any areas of the complainant's person (again with consent) where the accused may have deposited fluids (e.g., semen, saliva);
- obtaining a medical history from the complainant;
- obtaining a sexual history from the complainant, in addition to the alleged offence (e.g., when did you last have sex before the sexual violation);
- treating any injuries;
- providing medication to prevent infection, address any potential sexually transmitted infections, and (in the case of a female within her reproductive years) medication to address unwanted pregnancy, should the complainant choose these options.

[44] Given the medical purposes of the examination, and that it is conducted by a medical professional, SAEKs are "medical records" within the meaning of section 278.1. The issue is whether the SAEKs are exempted from protection because they are "made by persons responsible for the investigation or prosecution of the offence". While appellate courts do not appear to have grappled with this issue, some trial level case law has concluded that when the forensic medical examination occurs in conjunction with a police investigation, the SAEK is prepared for the investigation of the offence and is not

protected.²⁶

[45] However, the analysis is less clear if the complainant obtains a forensic medical examination and then separately reports the alleged offence at a later occasion. Complainants can, and do, seek a forensic medical examination even when they are unsure whether they will ever report the matter to the police.²⁷ Arguably, the SAEK would not be converted into being an investigational document just because the complainant later makes a report to police and consented to the police collecting the documentation and any physical evidence.

[46] However, even though SAEKs are medical records, and regardless of when the forensic examination occurred in relation to the report to police, it would be preferable to explicitly create an exception in s. 278.2(2) for this type of record. As noted, the forensic medical examination often forms part of the investigation and, in any event, is always relevant to an alleged sexual offence. Litigating the production of a record that is patently relevant is not a good use of judicial resources nor an acceptable reason to risk delay in the proceedings. Other private medical or person information, if also captured during the forensic examination, would be redacted when it is irrelevant to the case.

iii. Materials constituting the subject matter of the offence or anything that captures the offence itself

[47] Like SAEKs, any materials constituting the subject matter of the sexual offence or anything that captures the sexual offence itself are always relevant and ought to be disclosed without unnecessary litigation. This would include, for example, recordings of sexual acts that constitute the allegations before the court. Because such recordings would clearly attract a reasonable expectation of privacy on the part of the complainant, they fall under the definition of s. 278.1. However, it is absurd to require an application for production for what would be highly relevant and probative evidence. Such applications only serve to increase delay as it would be a virtual *fait accompli* that they would be granted.

d) Suggested wording of the amendment

[48] Section 278.2(2) of the *Code* would read:

Section 278.1, this section, and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the

²⁶ E.g., *R. v. T.S.*, 2021 ONCJ 299

²⁷ It is now well understood that many complainants of sexual violence will delay reporting the alleged offence or may never report it. In at least some provinces and territories, hospitals will hold the documentation and any physical evidence for up to one year in the event the complainant later decides to report the matter to the police.

prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections, or the record is a communication to which the accused is a party, or, the record constitutes the subject matter of the offence or captures the offence itself, or, the record is documentation from a sexual assault forensic examination regarding the sexual activity in question.

The Working Group is not recommending that this exception be included within s. 278.1 because the definition therein applies to both when the record is in the possession of the Crown as well as when the record is in the possession of third parties. The group intends the amendment to apply to only those records already in the possession of the Crown.

[49] If this recommendation is accepted, it would require clarification in the legislation that records disclosed (produced) to the accused person in any manner (e.g., after a successful production application, with a waiver, or as part of the suggested carve out to s. 278.2(2)), would still require the accused person to bring an application pursuant to s. 278.92 for admissibility purposes.²⁸

4.2 Simplification of the steps of the records regime

[50] In some jurisdictions, the timeframe for the hearings of production & admissibility applications can range from 1 to 12 months, depending on the nature or complexity. While such applications may be rare in smaller jurisdictions, and production applications, at least, may be often resolved on consent, in other areas, such as Ontario, there is often a considerable amount of court time spent litigating these applications. The timing in Ontario may also vary depending on the jurisdiction. Some courts with a full complement of judges may be able to accommodate such applications more quickly than other regions.

[51] Considering this significant time and delay, the Working Group discussed several proposals to simplify the procedural steps in the records screening regime. The Working Group was mindful of the distinction between production and admissibility, and of the further distinction between records in the possession of the Crown and records in the possession of a third party. To avoid confusion, it is specified which of these regimes the discussion below relates to when specificity is necessary.

a) Whether or not admissibility can be “waived”

[52] Initially, the Working Group considered whether admissibility could be “waived” by the parties. The consensus of the group was that admissibility could not be “waived”, as that was a matter to be determined by the judge.

²⁸ See the disagreement in *R v Gallan*, 2024 ONSC 5338, and *R v Martiuk*, 2022 ONSC 5577.

[53] It was further considered whether there could be a waiver of only “threshold admissibility”, which would allow the judge to maintain their gatekeeping function but would somewhat simplify the admissibility hearing. It was noted that one of the ways this is done in practice in some jurisdictions is for the complainant to file a letter indicating that they would not be participating.

[54] Ultimately, the Working Group did not reach an agreement as to whether there was a need to formalize this by way of amendments to the *Code* reflecting “an express waiver”. Rather, some in the Working Group felt that this was something that counsel could work out without a formal process, and that the gate-keeping function of the judge should be preserved.

b) Whether procedural stages can be combined; production of records to counsel for the complainant

[55] The Working Group also considered whether a full “stage one” and “stage two” of either the production or admissibility regime, argued on separate dates, is necessary. In some jurisdictions, parties can schedule and argue both stages on the same day. One common observation among some was that the submissions on stages one and two often seemed to be largely repetitive. Input canvassed from members of the judiciary also reflected a wide consensus to keep both stages separate in the interests of procedural fairness and judicial efficiency.

[56] On a **production** application, the Working Group did not agree that a judge could review the records without first hearing submissions on stage one. The main underlying rationale for this was to ensure that the complainant’s privacy interests were respected. That a judge may review the records could still be considered invasive by the complainant. Indeed, some complainants may not want even their own counsel to review the records, if possible.

[57] In some jurisdictions, it is a common practice for records to be provided to counsel for the complainant prior to stage one of production. However, some complainants’ counsel take the position that they do not want, or may not feel that they are allowed, to receive and review the records in advance of stage one. Members of the Working Group observed that the procedure could generally be streamlined by complainants’ counsel requesting and receiving the records and thereby coming to a position in advance of the hearing. It was suggested that adding language to the *Code* that would encourage this would be helpful.

[58] On **admissibility** applications, one notable difference with the procedural aspects of production applications is that complainant’s counsel does not have standing at stage one. Crown counsel and complainant’s counsel may not be of the same position regarding privacy interests, depending on the arguments being raised. The Working Group also briefly considered whether there were other available mechanisms for the

protection of privacy interests, such as sealing orders or publications orders; however, as this would inevitably involve the open court principle and other protected interests beyond that of the accused, the group did not pursue further discussion on this point.

[59] The “blending” of stages one and two of an admissibility hearing has been discouraged by appellate courts.²⁹ Concerns noted by some members of the Working Group about the blending of stages on an admissibility application, where the application might have been dismissed at stage one, include:

- subjecting the complainant to the unnecessary embarrassment and indignity of a full hearing;
- providing the complainant with an opportunity to tailor their evidence (as the complainant is entitled to receive the full application at stage two, and often receives the full application in advance of stage one³⁰); and
- the requirement to provide the Crown with an affidavit, often from the accused, and an opportunity to cross-examine on that affidavit. This may then be used to cross-examine the accused at trial.

[60] The Working Group did not agree that the stages for both production and admissibility applications should in all cases be combined into one, although practically speaking, in many cases, the parties could make one set of submissions while providing for sufficient time for a judge to review the records, on a production application, if necessary.

[61] The Working Group felt that the two stages should generally be kept distinct; however, in some cases, the hearings may be heard in the same day.

[62] **Recommendation:** The Working Group recommends that language be added to the *Code* to expressly permit records to be provided to counsel for the complainant, where the complainant is represented by counsel, prior to the stage one hearing on production, so that a position on the application by the complainant may be taken early on. Where the complainant does not wish for their own counsel to receive and review the records in advance, counsel may convey that to the parties, and stage one of production would proceed to full argument, as scheduled. For clarity, the proposal is for the language to be permissive that review of the records by complainant’s counsel, in advance of the stage one hearing on production, *may* be done, but that the language does not make it mandatory. This would aid in clarification to complainant’s counsel who are currently of the view that they cannot review the records in advance of the hearing.

²⁹ *R. v. Reimer*, 2024 ONCA 519, at para. 34; *R. v. Graham*, 2019 SKCA 63 at para. 64

³⁰ Some defence counsel file one “blended” application record which covers stages 1 and 2, and in practice, some complainants’ counsel may receive a copy of this record in advance of the hearing on stage one.

c) Format of hearing on production or admissibility: oral vs. written

[63] While the Working Group did not reach a consensus as to whether stages one and two of an application for **production** could or should be combined in all cases, it was suggested that holding all or part of the application in writing should be permitted, where the parties agree and in the judge's discretion.

[64] There were some benefits and drawbacks considered for this proposal. For some counsel, this may create more work and more time in drafting documents. However, as applications for production or admissibility are both required to be brought by the Applicant in writing,³¹ it is difficult to see that providing thorough written submissions would add much more drafting time for the Applicant. In counsel's experience, many counsel for complainants and Crown counsel will typically provide written submissions in response. Some counsel will opt to provide written submissions in every case, regardless of their position; therefore, having the application proceed in writing will not necessarily add more drafting time. On the other hand, proceeding in writing would reduce delay in the sense of eliminating court-time for oral argument and the need to schedule mutually available court-dates for multiple parties, a task which is often very challenging.

[65] Input provided from Crown counsel in one jurisdiction, and passed along through a Working Group member, suggested amending the *Code* to specify that stage one **admissibility** hearings should normally be dealt with entirely in writing. While judges do have the discretion to hold stage one of such applications in writing,³² in practice, this is rarely utilized. Requesting judicial approval to exercise that discretion may add another procedural step to the process. However, this may also be something that could be simply canvassed and agreed upon by the parties at the judicial pre-trial. Presently, the application usually proceeds by either blending stages one and two of the admissibility application into one hearing (discussed above), or scheduling and proceeding with two separate court appearances on stages one and two.

[66] Input provided from provincial court judges on whether there were practical challenges of dealing with either production or admissibility applications in writing was mixed. Some members of the judiciary believed that written submissions were ideal, but that they posed an issue with dealing with judicial clarifications, with ensuring that the records and information were properly sealed and stored with the court, and with judicial capacity and workload, an issue which was more acute in smaller jurisdictions. It was also observed that particularly on stage two of production hearings, the court benefits

³¹ S. 278.3(3) of the *Code*, on an application for production; s. 278.93(2), on an application for admissibility.

³² *R. v. J.J.*, *supra*, at para. 27

from oral argument and the ability to probe the purpose for which the evidence is to be used.

[67] **Recommendation:** The Working Group recommends that language be added to the *Code* to permit for an application (both stages one and two) for production or admissibility of records to be heard in writing, where the parties (including the complainant or complainant's counsel when they have standing) agree, and at the discretion of the judge.

d) Whether parties may attend by video

[68] Counsel within the Working Group were generally of the consensus that appearing by video should be permitted, at least if the hearings were restricted to only argument, as opposed to any potential cross-examination on an affidavit. Where *viva voce* evidence is to be heard (bearing in mind that the complainant is not compellable), some working group members felt that video appearance was generally unsuitable. Other raised concerns over the *in camera* nature of these proceedings. However, some of these concerns may not be relevant when it is only counsel appearing by video as participants can be monitored. Indeed, remote appearances may increase the potential pool of lawyers who can act as complainant's counsel, especially in smaller jurisdictions. It was generally agreed that this did not require a legislative amendment; however, the following observations are presented for consideration.

[69] Remote attendance is not yet available in all regions of Canada. Upgrades in infrastructure to expand the availability of remote attendance to more regions may be advisable, both in the interests of efficiency and as a matter of access to justice. The availability of complainant's counsel in the immediate region is a frequent and continuing challenge in many jurisdictions, particularly in rural or remote areas. The ability of counsel to appear by video would help address this challenge and would facilitate more efficient scheduling of proceedings. Requiring all parties to appear in person may result in delays as counsel for the complainant may need to plan to travel a significant distance to court. Overall, in person appearances would tend to result in an overall increased burden on the system, as compared to appearances by video.

[70] There were some concerns expressed by the judiciary about maintaining the integrity of the record, controlling public access to closed courtrooms, and maintaining publication bans and sealing orders in remote appearances. Counsel felt that these concerns should be resolvable with the same Orders that one may impose in a physical courtroom. In terms of controlling public access, this may be addressed by the clerk of the court and by requiring parties always identify themselves with the camera on, and with confirmation that there are no observers in the room from which the accused, or complainant³³, may be appearing. If necessary, the accused could be required to attend

³³ Complainants rarely appear personally on these applications, as counsel typically appears for them.

in the physical presence of their counsel, for example, at counsel's office. While no precautions may be perfect, the danger of surreptitious recording seems similar for both video and in-person appearances.

4.3 Motions for directions

a) Background

[71] In *R. v. J.J.*, the Supreme Court recognized that there will be times when defence counsel must bring a motion for directions to determine whether the evidence in question comes within the definition of a "record" such that the record screening regime is engaged.³⁴

[72] Given that motions for directions are purely a discretionary exercise of the presiding judge's trial management power, the best practice for defence counsel is to bring a motion for directions well in advance of trial. *J.J.* is clear that where there is uncertainty by the trial judge as to whether the evidence is clearly a "record", the defence should proceed with an application.³⁵

b) Discussion

[73] The Working Group recognized that motions for directions have caused significant confusion in two areas: first, when they should be brought and the proper procedure to follow; second, whether counsel for the complainant ought to have standing on a motion for directions. Working Group Members felt that both these issues contributed to significant delay.

[74] Despite confusion over procedural issues, Working Group members reached consensus that it would be cumbersome to add an additional statutory step analogous to a motion for directions. It was also felt that the procedure to follow was best left up to case law and not be codified in the *Code* as adding an additional layer of interpretation would inject needless complexity to what is already a complex regime. It was agreed that the flexibility provided by the common law was better suited than a rigid statutory test.

[75] However, the Working Group did have consensus that there ought to be specific statutory language setting out that the complainant and his/her counsel do not have standing on a motion for directions. To date, the right to standing on a motion for direction is unclear in the common law. However, it was felt that standing would complicate what should be a simple, initial screening step to determine whether the application should be brought. There was also concern that defence counsel would have

³⁴ *J.J.*, *supra*, at para. 103

³⁵ *Ibid*, at para. 104

to unjustifiably “show their hand” to the complainant when the materials may not meet the definition of a record under the regime.

[76] **Recommendation:** The Working Group recommends adding specific, clear statutory language that the complainant does not have standing at any other procedural steps of the records regime other than as currently set out.

c) Best practices

[77] The Working Group did acknowledge some best practices when bringing a motion for directions. The Crown and presiding judge should be served with a notice of motion advising of the need to pre-determine whether the evidence in question is a record. Given that complainants do not have automatic standing at the outset, there is no need to serve the complainant at the outset. The judge retains the discretion to provide notice to complainant and extend them the right to participate.³⁶

[78] The procedure set out in *R. v. A.M.*, 2020 ONSC 1846, provides helpful guidance as to the procedure to be followed:

- i. The accused must bring an application seeking a ruling from the court as to whether or not the material is a “record” as defined by s. 278.1 of the *Code*;
- ii. In the application, the accused must summarize the content of the material in order to provide the Crown with sufficient knowledge upon which to make the argument. Some suggested information that will likely be necessary, may include, but is not limited to the following:
 - a. The nature and type of material – i.e.: text message, email, photograph, social media post;
 - b. Identify all parties privy to the material or expected to be privy to the material, i.e., parties to the communication in text messages;
 - c. The nature of the relationship between the parties at the time of the communication and at the time of the application;
 - d. Identify how and when the material came into the possession of the accused;
 - e. The time of the creation of the material;
 - f. The time period covered by the material;
 - g. The knowledge of the parties sharing the material at the time; in other words, identify whether the parties knew the material was being shared and who it was being shared with;
 - h. The purpose for which the material was provided to the accused;
 - i. Whether the material includes any information that might be typically contained in any of the items listed in s. 278.1;
 - j. Any suggestion in the material that the information will be kept private,

³⁶ *Ibid*, at para. 105

- or alternatively, any suggestion in the material that the information can be shared;
- k. Whether the material includes any information that could constitute other “sexual activity” for the purposes of s. 276 of the *Code*;
 - iii. The accused is not required to disclose the actual material to the Crown or to the complainant until a determination is made as to whether the material is a record;
 - iv. The accused shall provide the material to the court in a sealed envelope and that sealed envelope shall be made an exhibit at the hearing of the application;
 - v. The judge hearing the application will determine whether the court needs to review the material in order to assess whether a reasonable expectation of privacy exists and therefore the material is a “record” as defined by the *Code*;
 - vi. Once the court has reviewed the records, it may supplement the summary if it feels that some further information is required to allow the Crown to make submissions;
 - vii. This hearing should be conducted in camera, and there should be a publication ban.³⁷

[79] For ease of review for the presiding judge, it is recommended that defence counsel, when preparing their summary of the evidence in question, set out the information in table/chart format so that the presiding justice can see – at a glance – the relevant information under the various categories set out in *A.M.* above.

[80] Upon review of the records by the presiding judge only, the summary prepared by defence may be supplemented by the presiding judge if he/she/they believe that more description is required for the Crown (or complainant’s counsel) to respond to the motion.

[81] Defence counsel may also want to consider whether it is possible for the presiding judge to decide the matter at hand solely by way of written submission in a summary fashion³⁸ with the option of the presiding judge to call the parties into court should further clarification on positions be required.

³⁷ *R. v. A.M.*, 2020 ONSC 1846, at paras. 70-71 (but note that what was originally #7 in the recommended procedure has not been included as the decision pre-dated *J.J.* and did not contemplate any complainant participation in motions for directions)

³⁸ *R. v. Flaumenbaum*, 2023 ONCJ 474

[82] Defence counsel may also want to consider whether or not it is possible to resolve the matter between counsel alone. Given the guidance in *J.J.* about what constitutes a record, defence counsel should endeavour to communicate with the Crown about the nature of the information in question. Specifically, the parties should bear in mind that the protection afforded by the records screening regime does not apply to all records of a “personal” nature relating to the complainant, but rather only to those which contain information of such an “intimate and highly personal nature that is integral to the complainant's overall physical, psychological and emotional well-being.”³⁹

[83] Defence counsel should turn their minds to considering early in the process whether a motion for directions is appropriate in the case at hand. Motions for directions have the possibility of eliminating unnecessary s. 278.92 applications if they are brought appropriately. However, if defence counsel believe that it is more likely than not, that a judge will have uncertainty as to whether the evidence in question constitutes a record, the judge will likely err on the side of caution and direct counsel to proceed by way of a s. 278.92 application.

4.4 Mid-Trial Applications

[84] The Supreme Court in *R. v. J.J.* made clear that, as a general rule, private records should be litigated pre-trial, and mid-trial applications should not be “the norm”.⁴⁰ Were mid-trial applications to become routine, this would lead to “frequent adjournments, significant delays, scheduling difficulties – particularly in jury trials – and potential unfairness to the accused”.⁴¹ The Court went on to note that such applications could also harm complainants, and discourage the reporting and prosecution of sexual offences.⁴² However, the Court acknowledged that situations may arise that may require a trial judge to either revisit a prior ruling on admissibility under s. 278.92, or to allow a new application mid-trial.⁴³

[85] Defence counsel report that, largely due to the removal of the option of preliminary inquiries for many sexual offence cases, the defence may lack the opportunity to lay a foundation for such records applications prior to the trial. Consequently, new information may arise under cross-examination at trial, which may prompt defence counsel to bring a mid-trial application on either the production or admissibility of private records.

[86] Post-*J.J.*, mid-trial applications appear to continue to be brought frequently in Ontario as highlighted by Working Group members from that province, but less so in other regions. Ontario experiences significant and long-standing challenges with delay

³⁹ *J.J.*, *supra*, at paras. 45 & 71

⁴⁰ *Ibid.*, at paras. 85, 190

⁴¹ *Ibid.*, at para. 86

⁴² *Ibid.*

⁴³ *Ibid.*

and overburdened dockets, and greater likelihood of charges being stayed for delay. As outlined below, mid-trial applications add to this problem.⁴⁴

a) Delay

[87] Mid-trial records applications have the potential to significantly delay, if not derail, a trial, due to an inevitable adjournment being required to allow for the complainant to retain counsel. Logistical issues include the difficulty in securing and appointing counsel for the complainant available to “step in” on such notice for the hearing of such an application, and prepared to review, respond, and argue the application within a short timeframe. The issue is even more acute with jury trials. Depending on the circumstances of the case, the delay could potentially result in a *Jordan* application and possibly a stay of proceedings.

[88] The delay caused by an adjournment is seemingly unavoidable, unless either complainant’s counsel is essentially “on stand-by”, or the right of the complainant to have counsel and make submissions on a mid-trial application is either made discretionary or removed altogether. The former is impractical; the latter is not ideal. However, an adjournment is not desirable for any party, including the complainant.

[89] Practically speaking, it was observed that in jury trials, counsel typically try and find a way to have the trial continue. Some Working Group members related their experience that some judges tended to lean towards a looser definition of reasonable expectation of privacy when dealing with the admissibility of materials in the accused person’s possession just to avoid the necessity of hearing a mid-trial motion and a potential adjournment.

b) Litigating matters in advance that may not be relevant

[90] Some Working Group members expressed concern that litigating the admissibility of records in advance of the trial may result in counsel litigating matters that do not end up being relevant at the trial. The implication is that this can take up unnecessary court time, as defence counsel may not need to make use of such records after all. However, there are other types of applications argued at the outset of trial where the party bringing the application may not know whether they will make use of the evidence at issue (for example, an application as to the voluntariness of an accused’s statement, for the purposes of cross-examination should the accused testify).

c) Production vs. Admissibility

[91] The Working Group was mindful of the distinction between applications for

⁴⁴ See discussion of *Mills* applications and delay in *R. v. Flamenbaum*, *supra*, at paras. 42-56.

production of records, which may arise mid-trial because of new information uncovered during cross-examination, and applications on the admissibility of records relating to the complainant that are already in the possession of the accused.

[92] For production applications, depending on the type, nature, and volume of records at issue, and who the record-holder is, there may be significant delay for logistical reasons, including time needed to allow for the subpoena of the record-holder, gathering of those records, scheduling of the argument on a date available to all counsel, review of the records by the justice, and vetting, if ordered released.⁴⁵ On the other hand, there may be less of a delay in cases where the record at issue is, for example, a small number of text messages, emails, or other forms of writing which may only be in the hands of the complainant, or an occurrence report that could be quickly obtained by the police.

[93] On admissibility applications, for records relating to the complainant in the possession of the accused, defence counsel may, for tactical or strategic purposes, wish to avoid “tipping their hand” and referring to a record that could engage the complainant’s privacy interests, until and unless the issue arises at trial.

d) “In the interests of justice”

[94] Judges maintain the discretion as to whether to hear a mid-trial application as part of their trial management power.⁴⁶ A trial judge may permit a mid-trial application where it is in the “interests of justice”.⁴⁷

[95] The Supreme Court in *J.J.* suggested that one example of where a mid-trial application may be in the “interests of justice” was where the record was discovered only during the course of the trial.⁴⁸ The Court did not, however, suggest that this was the *only* instance in which such an application might be in the “interests of justice”. Indeed, later in the decision, the majority of the Court allowed that, where a situation arose where “advanced disclosure of the application to a complainant would genuinely negate the efficacy of cross-examination, the accused may choose to bring the application during cross-examination to avoid the risk of “witness tainting”.”⁴⁹ In determining whether or not it would be in the interests of justice to allow the application, the trial judge should be mindful of the risks of trial delay that would arise from the bifurcation of the trial.⁵⁰ Despite this seemingly permissive allowance, the Court cautioned that mid-trial

⁴⁵ For example, a midtrial application for medical records, therapeutic records, or child services records would be anticipated to cause significant delay. S. 278.3(5) of the *Code* requires service of the application “at least 60 days” prior to a hearing under s. 278.4, although the provision also allows for “any shorter interval that the judge may allow in the interests of justice”.

⁴⁶ *R. v. J.J.*, *supra*, at para. 86

⁴⁷ *Ibid.*, at paras. 143, 190

⁴⁸ *Ibid.*, *supra*, at para. 86

⁴⁹ *Ibid.*, *supra*, at para. 190

⁵⁰ *Ibid.*

applications “should not be the norm”.⁵¹

[96] The question remains to what extent defence counsel may continue to rely on the above passages to justify bringing mid-trial “records” applications mid-trial, and to what extent trial judges may permit such applications, despite the risks of trial delay.

e) Proposed Statutory Exception

[97] Later in this report, the Working Group proposes increasing the notice period for s. 278.93 applications from 7 days to 60 days. The Working Group also proposes creating a specific statutory exception for mid-trial records applications, mirroring the language in *J.J.*, to provide for such an application to be brought and heard mid-trial when “in the interests of justice”.

[98] Some Working Group members suggested that the trial judge ought to consider specific, enumerated factors beyond “the interests of justice”, including the diligence of the defence. Others felt that the “interests of justice” was broad enough to capture this and other factors while being flexible to the unique situations that often arise during trials.

[99] The Working Group also discussed whether, for practical reasons, and to mitigate the risk of trial delay, an exception to the right of standing for the complainant as normally conferred under s. 278.94(2) (admissibility) could be built in, to make the complainant’s right to make submissions discretionary for mid-trial applications when in the interests of justice. The rationale for such an exception, for mid-trial applications only, is that it is arguably in the interests of justice and the interests of the complainant to proceed without an adjournment and to avoid the disruption of trial scheduling. This could apply potentially to mid-trial applications for **admissibility** of records relating to the complainant in the possession of the accused, and applications where obtaining counsel for the complainant in a timely manner is not practical.

[100] One member of the Working Group suggested that this proposal might be extended to include applications for production as well. However, the group did not reach consensus on this point. Practically speaking, most applications for production would inevitably result in an adjournment of some length in any event.⁵² In some instances, the complainant may consent to providing records in their possession to the Crown and to the defence (such as text messages), but in fairness, the complainant should at least be afforded the opportunity to seek legal advice on whether or not to

⁵¹ *Ibid.*

⁵² In applications involving records not in the hands of the Crown or the complainant, but a third party records-holder, this would require subpoenaing the records-holder, and the records-holder, the complainant or witness, and “any other person to whom the record relates” would be entitled to appear and make submissions on the application: s. 278.4(2) of the *Code*.

provide consent. If the recommendation of a “carve out” for electronic communications, as proposed earlier in this report, is accepted and implemented in future legislation, this would obviate the necessity of bringing an application under the production regime.

[101] The Working Group identified some dangers to making the standing of complainants on mid-trial applications discretionary. For example, it was suggested that this may result in some defence counsel intentionally delaying bringing a “records” application until mid-trial to avoid complainants being able to exercise their right of standing pre-trial. There is also a danger that this may increase the number of mid-trial applications. It was suggested that concerns may be addressed by incorporating language, as suggested above, that would require the judge to consider the diligence of defence counsel weighed against the risk of “witness tainting” negating the efficacy of cross-examination.

[102] Despite fruitful discussion, the Working Group was unable to reach consensus on creating a discretionary power for judges to relieve complainants of standing for either production or admissibility mid-trial applications.

[103] **Recommendation:** The Working Group recommends creating a specific statutory exception for mid-trial records applications, mirroring the language in *J.J.*, to provide for such an application to be brought and heard mid-trial when “in the interests of justice”. Language may be added to include specific factors, such as the diligence of the defence, and where witness tainting would negate the efficacy of cross-examination.

f) Alternative Options

[104] Another potential solution discussed by the Working Group to avoid the disruption and delay of a mid-trial application would be for the defence to send preliminary queries, relating to the potential existence of third-party records for the purposes of production, in writing to the complainant, through the police via the Crown, in advance of trial. This approach has been met with mixed success. On some occasions, the Crown has acquiesced to that request and facilitated the provision of those queries to the complainant. In others, the Crown has refused, on the grounds that it is improper for the Crown to canvass issues that are subject to the complainant’s privacy interests.

[105] Ultimately, consensus on this was not reached as Working Group members felt that defence bears the responsibility to bring a meritorious application that has some basis in the evidence to produce records that are “likely relevant to an issue at trial or to the competence of a witness to testify” (s. 278.3(3)(b) of the *Code*).

[106] While there is a valid concern about guarding against “fishing expeditions”, if the Crown is of the view that the questions have some relevance, and where it may be anticipated that a meritorious mid-trial application may otherwise be brought, Crowns should be encouraged to provide the requested information to the defence, with the consent of the complainant. The complainant, of course, can choose not to respond or

participate in the process, or not to consent to information that may bear upon their privacy interests being provided to the defence. It is the complainant's choice as to whether or to what extent they wish to be involved, and whether they wish to have counsel or seek legal advice.

[107] Another alternative considered by the Working Group was to create a new “pre-enquête”, or alternatively a discovery-like procedure, in which the complainant could be discovered on some of these issues to form the basis of an application for production of records. The Working Group was not in favour of this proposal due to the likelihood of complicating matters. Given that a judge would usually be required to sit in on a discovery of the complainant, this would not necessarily reduce delays or ease the burden on the justice system to a significant degree. This would also seem to be contrary to the complainant not being a compellable witness under s. 278.4(2) (production applications) and 278.94(2) (admissibility applications) of the *Code*.

4.5 Role of complainant's counsel

[108] The Working Group identified and discussed three main issues related to the role of the complainant's counsel:

- i. increasing the notice period under s. 278.93(4) of the *Code* from seven days to sixty days;
- ii. whether a right of standing for the complainant at stage one of the admissibility hearing should be added; and
- iii. how early should the complainant's counsel be involved?

[109] With respect to the notice period for admissibility hearings under s. 278.93(4), the Working Group reached consensus that the notice period of seven days is simply not enough for complainant's counsel and the Crown to arrange a response logistically.

[110] On the right of standing issue, the Working Group did not agree whether complainant's counsel should have standing at stage one of the admissibility hearing.

[111] Regarding how early the complainant's counsel should be involved, the Working Group reached consensus that they should be involved as early as possible to assist with getting waivers to produce records to the defence or to make sure they have availability for when motions are scheduled.

a) Increasing the notice period under s. 278.93(4) of the *Code* from seven days to sixty days

[112] Section 278.93(4) specifies that the accused must provide a copy of the application for admissibility to the court and the Crown at least seven days before the

presiding judge reviews the application unless otherwise ordered.

[113] The notice period was recently subject to comment by the Supreme Court in *R. v. J.J.* The Court found that the section should be interpreted to mean “seven days previously” which refers to seven days before the stage one inquiry. While the statutory language does not state that these applications must be conducted before trial, in the Court’s view, this should be the general practice. The Court also considered that the seven-day period could be truncated when it is in “the interests of justice.”⁵³

[114] After a lengthy discussion by the Working Group, it was determined that the seven-day notice period was insufficient for the complainant’s counsel to be appointed and prepared to provide an adequate response should the matter go to stage two.

[115] The Working Group identified some logistical issues that cause delay under the seven-day notice period and make it difficult for the complainant’s counsel to respond properly or be available.

[116] In some jurisdictions, complainant’s counsel cannot be appointed by Legal Aid until the accused has filed the application for a hearing. As a result, there is a rushed seven-day turnover to try and find available counsel. There is a further service issue, whereby if the complainant does not have counsel, then they must be personally served.

[117] Presently, there is no set procedure for helping the complainant obtain counsel. In most cases, the Crown assists the complainant with accessing resources or getting an order to appoint counsel.

[118] **Recommendation:** The Working Group recommends extending the notice period to sixty days. This should give the Crown and court sufficient time to help arrange the appointment of the complainant’s counsel. Sixty days would also provide complainant’s counsel with adequate time to develop a rapport with the complainant and prepare a response. Increasing the time for notice also helps complainant’s counsel ensure that they can adequately schedule their availability.

[119] The Working Group would also maintain the language of s. 278.93(4), which permits the judge to truncate the sixty-day notice period where it is in the interest of justice.

b) Whether to grant standing to the complainant at stage one on admissibility applications

[120] The Working Group discussed whether the complainant should be granted standing at stage one of the admissibility hearing. The suggestion was that this would rectify some of the issues around short notice periods as complainant’s counsel would

⁵³ *R. v. J.J.*, at paras. 82-86 & 92

be involved earlier on reducing subsequent delay.

[121] This was subject to considerable debate amongst the Working Group members. Because the complainant only has standing at stage two, there is a level of “catch-up” required by complainant’s counsel to make effective submissions at stage two. This is compounded by the similarity between stages one and two.

[122] Additionally, the Supreme Court envisioned that at stage one, the complainant would have a general description of the application so that they could begin taking steps to retain counsel in anticipation of stage two.⁵⁴

[123] The Working Group did not reach an agreement over this proposal. While there may be some benefits, members felt that it had the potential to increase motions for directions (assuming the complainant has no standing on a motion for direction) as defence may not want to “tip their hand” to the complainant so early on.

c) How early should the complainant’s counsel be involved?

[124] Despite disagreement with providing standing at stage one of admissibility application, as indicated earlier in this report, the Working Group generally agreed that having the complainant’s counsel involved earlier in the process – whether for admissibility or production – would be helpful to ensure a more streamlined process. Indeed, some Working Group members indicated that this is already happening in their jurisdictions as soon as the defence says they intend on bringing an application for production or admissibility.

[125] Several benefits to earlier involvement were raised. Complainant’s counsel could help the Crown obtain valid waivers under s. 278.2(1) and (2) of the *Code* so that they can produce all likely relevant materials avoiding the need for a production order under s. 278.7. It would also ensure that when complainants provide materials that could be a record under s. 278.1, they can do so knowing what their privacy rights are.

[126] Additionally, earlier involvement of the complainant’s counsel would make it easier to schedule records admissibility applications with the complainant’s counsel calendar in mind, without the last-minute rush to try and find counsel who might be available. Some members saw benefit to involving complainant’s counsel at the pre-trial stage.

[127] Having complainant’s counsel involved sooner also helps to reduce the Crown’s role as an intermediary in providing the complainant or her counsel the accused’s application for stage two. There may well be instances in which the complainant may be prepared to answer questions, in advance of a trial, that could have bearing upon a

⁵⁴ *Ibid*, at paras. 92-95

potential records application.

[128] However, several Working Group members said that resources are an ongoing challenge in their jurisdiction. There may be a limited number of lawyers willing to take on such matters, particularly in smaller jurisdictions. Increased access to video conference technology was identified as one way to overcome this barrier. Some provinces require an actual application to be filed before any funding is provided for a complainant to retain counsel.

[129] It was proposed by one member of the Working Group that a solution may lie in the form of a legislative amendment incorporating language, similar to that found in s. 486.3 of the *Code*, which would empower a judge to order that counsel for the complainant be appointed, if the complainant wishes to have counsel appointed, at an early stage of the case (not necessarily at the time an application is filed). This application could be brought by the Crown or the complainant. While a formal recommendation from the group as consensus was not reached, it is suggested that this proposal would warrant further consideration from Justice Canada. Any such consideration should include consultation with the provinces and territories as it has the potential to impact the provision of Legal Aid services, which is a provincial/territorial responsibility.

4.6 Self-represented litigants

[130] Self-represented litigants – whether representing themselves by choice or due to lack of means to hire counsel – experience special challenges in navigating the records regime due to the complex procedure. Several members of the Working Group – particularly its judicial members – stressed the challenges of ensuring fairness for self-represented litigants while ensuring that matters are kept on track.

[131] Trial efficiency is not to be underestimated here. The danger of trials being derailed due to mid-trial applications becoming necessary is even more acute with self-represented litigants, for obvious reasons. Further, complainants can become frustrated with adjournments.

[132] It was generally agreed by the Working Group that it is better for accused persons to have representation, especially in the case of those unable to retain counsel due to financial constraints. The Working Group thus reviewed various routes to having counsel appointed to represent self-represented litigants.

a) Appointing counsel under s. 486.3(2) of the *Code*

[133] Section 486.3(2) of the *Code* provides that counsel may be appointed to conduct the cross-examination of a complainant, in respect of an offence under any of sections 264, 271, 272 and 273. Some judges may expand such an Order to include evidentiary applications, including motions, akin to how an Order may be expanded for the role of amicus. In Ontario, funding by Legal Aid Ontario for such applications by s. 486.3

counsel is typically not an issue, depending on the scope of the Order as worded by the justice.

[134] However, the strict wording of s. 486.3(2) of the *Code* technically only applies for the purposes of cross-examination. More specifically, s. 486.3 counsel may be appointed in the following circumstances:

- i. For the purposes of cross-examination where the witness is under the age of 18 years⁵⁵;
- ii. In any proceedings against the accused in respect of an offence under sections 264, 271, 272 and 273, for the purposes of cross-examination of the complainant⁵⁶;
- iii. In any proceedings against an accused, for the purposes of cross-examination of a witness, where the judge or justice is of the opinion that the order would allow the giving of a full and candid account from the witness of the acts complained of, or would otherwise be in the interest of the proper administration of justice.⁵⁷

[135] The legislation as presently drafted does not appear to allow for appointment of counsel for self-represented litigants for the purposes of applications under the records regime. In practice, some justices appear to expand the scope of a s. 486.3 Order when necessary, reasoning that the outcome of such applications may impact upon the cross-examination of these witnesses.⁵⁸

[136] Working Group members highlighted that s. 486.3 is designed to fill a need for a different purpose than ensuring representation of the accused person and thus is not best placed to serve this need. The difficulty is that the provisions are designed to benefit the complainant, protecting them from being cross-examined by the person who allegedly committed the offence against them. It is not typically viewed as a means with which to benefit the accused person.

b) *Amicus* appointments

[137] While some courts may appoint *amicus* for the purpose of assisting on these types of applications, this approach can still present difficulties, as *amicus* acts as a “friend of the court”, solicitor-client privilege does not apply, and the scope of participation of

⁵⁵ S. 486.3(1) of the *Code*

⁵⁶ S. 486.3(2) of the *Code*

⁵⁷ S. 486.3(3) of the *Code*

⁵⁸ *R. v. Furster*, [2016] O.J. No. 1443 (Ont. S.C.J.), at para. 6; *R. v. J.S.*, 2020 ONSC 8112; *R. v. Vanhalteren*, 2023 ONSC 954, at para. 21

amicus is assumed to be narrower. In many situations, counsel, acting as *amicus*, need to ask questions of the accused, and engage in discussions, that could involve the theory of the defence and trial strategy. While the mandate of *amicus* may include a confidentiality order⁵⁹, problematic issues may persist.⁶⁰

c) *Rowbotham* applications

[138] Another available alternative would be appointment of counsel by way of a *Rowbotham* application. This would be apt for cases in which the accused wished to have counsel, but was unable to retain counsel, either for financial reasons on a private retainer, or because their provincial or territorial legal aid system had denied funding. However, not all accused wish to have counsel. Some self-represented litigants opt to represent themselves for their own reasons. Moreover, for accused who would be interested in bringing a *Rowbotham* application, many accused do not know how to bring such an application and may have difficulty in finding counsel to assist them.⁶¹ Finally, not all cases necessarily meet the *Rowbotham* test for state-funded counsel to be appointed for the entirety of the trial.

d) Discussion

[139] The other enumerated offences captured within s. 278.2(1) and s. 278.92(1) are not specifically listed under s. 486.3(2).⁶² Practically speaking, where a litigant is self-represented, counsel is likely to be appointed for most if not all these offences, under s. 486.3(1) or s. 486.3(3), or alternatively *amicus*.

[140] Proceedings involving self-represented litigants can be significantly more prolonged and less efficient than proceedings where the accused is represented by counsel. Given the frequency of “records” applications in cases involving sexual offences, and the benefit to all for counsel to be appointed on such applications, some Working Group members discussed a legislative amendment specifically permitting a judge to appoint counsel for the purposes of representing the accused on records applications in cases involving the offences enumerated in s. 278.2(1) and s. 278.92(1). This would eliminate any confusion about the authority to appoint counsel for records applications, mandate that appointed counsel bring such applications while still being assured of funding by Legal Aid, and would ultimately reduce delay and streamline

⁵⁹ *R. v. Kahsai*, 2023 SCC 20, at para. 66; *R. v. Imona-Russell*, 2019 ONCA 252, at paras. 64 and 68

⁶⁰ See *Ontario v. Criminal Lawyers' Association of Ontario*, [2013] 3 S.C.R. 3, paras. 49-56, in which the Supreme Court discusses the practice of appointing *amici* to effectively fulfill the role of defence counsel.

⁶¹ In counsel's experience, most defence counsel will not assist on *Rowbotham* applications due to the unknown likelihood of success on the application, which determines whether or not their time spent in preparing and arguing the application will be compensated.

⁶² The complete list of enumerated offences under both subsections is: sections 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3. For many of these offences, the accused is highly likely to be represented by counsel, or alternatively, *amicus* is likely to be appointed in circumstances where the accused is self-represented.

proceedings.

[141] Some members of the Working Group raised the issue that while provincial and territorial Legal Aid programs may have agreed to provide funding for complainant's counsel, one must be careful about enacting a further procedure in the *Code* which would then require additional funding. A counterargument to this would be the potential cost savings insofar as how the proceedings would be streamlined from the involvement of counsel for the purpose of records applications. Alternatively, it is arguable whether this is unlikely to result in increased costs overall, as compared to the costs of either the appointment of *amicus* or funding for counsel being granted following a successful *Rowbotham* application. Another argument is that given that provinces and territories have chosen to provide the complainant with legal aid funding for counsel⁶³ on applications for production and admissibility, and the Crown's interests will always be represented, in the interests of fairness, it would seem to make sense that the accused should also have equitable access to funding for counsel for the purpose of these applications, where they would prefer to be represented by counsel.⁶⁴

[142] This issue was subject to considerable discussion amongst Working Group members. Again, there was general agreement that having a statutory mechanism to appoint counsel for the accused person is beneficial. Caution is needed, however, to ensure that accused persons who chose to be self-represented (vs. those who simply cannot afford representation) are permitted to do so, as is their right. Having regard to the interest in improving justice efficiencies, it is likely an issue which warrants further consideration by Justice Canada. Any such consideration should include consultation with the provinces and territories as it has the potential to impact the provision of Legal Aid services, which is a provincial/territorial responsibility.

4.7 Inclusion of additional offences in the record screening regime

[143] At the 2023 ULCC meeting, Ontario submitted a resolution that proposed that the records regimes in s. 278.2(1) (third party records) and s. 278.92(1) (records in the control of the accused) be amended to apply to three additional child exploitation offences: s. 163.1 (prohibiting the production, distribution and possession of child pornography); s. 171.1 (making sexually explicit materials available to a child); and s. 172.1 (luring a child).

[144] The resolution was withdrawn after discussion with an understanding that the

⁶³ It bears note that complainants do not need to meet a financial eligibility test for legal aid funding for counsel on such applications, whereas self-represented accused frequently do not meet the financial eligibility test and are thus left unrepresented, not necessarily by their own choice.

⁶⁴ This also respects the autonomy and wishes of any self-represented litigant who may prefer to decline any assistance of counsel – though in reality, such situations are likely rare. In counsel's experience, it is far more common that self-represented litigants are left unrepresented because they cannot afford counsel and do not meet the financial eligibility test for legal aid.

“records regime” Working Group would study this issue.

[145] At the 2024 ULCC meeting, Saskatchewan submitted a resolution that recommended that the “records regime” Working Group consider whether other offences, including s. 162.1 (distribution of intimate images without consent), should be enumerated in ss. 278.2 and 278.92. This resolution was carried as amended (27-1-0).

a) Rationale for including the additional offences

[146] The records regime applies to sexual and human trafficking offences enumerated in s. 278.2(1)(a) and s. 278.92(1)(a).⁶⁵

[147] The overarching purpose of the legislative scheme in sections 278.2 (production of record to accused) and 278.92 (admissibility of records in possession of accused) is to protect complainants’ privacy interests with respect to private records in the possession of a third party, in the possession of the prosecutor, or already in the possession of the accused, while preserving trial fairness for the accused person.⁶⁶ Some members of the Working Group felt that the child exploitation offences in ss. 163.1, 171.1 and 172.1⁶⁷ and distribution of intimate images without consent and voyeurism engage some of the same privacy concerns and can have a similar impact on the sexual and psychological integrity of complainants as do the currently enumerated sexual offences.

[148] While the child exploitation offences may sometimes be prosecuted in the absence of known complainants – for example, an accused person may be prosecuted for possessing a collection of child sexual abuse material where the complainants have not been identified – or where a police officer posed as an underaged child, other cases may have identified complainants who may have to testify. Unless the accused has also been charged with an enumerated offence under ss. 278.2 and 278.92, some Working Group members felt that these child exploitation complainants are vulnerable to potential

⁶⁵ Sections 151 (sexual interference), 152 (invitation to sexual touching), 153 (sexual exploitation), 153.1 (sexual exploitation of a person with a disability), 155 (incest), 160 (bestiality), 170 (parent or guardian procuring sexual activity), 171 (householder permitting prohibited sexual activity), 172 (corrupting children), 173 (indecent acts), 213 (stopping or impeding traffic), 271 (sexual assault), 272 (sexual assault with a weapon or causing bodily harm), 273 (aggravated sexual assault), 279.01 (trafficking in persons), 279.011 (trafficking in persons under 18), 279.02 (material benefit from trafficking) 279.03 (withholding or destroying documents), 286.1 (communication to obtain sexual services for consideration), 286.2 (material benefit from sexual services provided), 286.3 (procuring).

⁶⁶ See: *Charter Statement- Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* which established the s. 278.92 records regime. The purpose of the Bill is described as enhancing the *Charter* consistency of federal laws by clarifying “the sexual assault provisions of the *Criminal Code* to reinforce protections for sexual assault complainants throughout the trial process, while preserving trial fairness for the accused”. See also *J.J., supra*, at para. 3

⁶⁷ There was some debate about whether s. 172.2 (make arrangement to commit a sexual offence against a child) should also be included. Private records relating to a complainant or witness will rarely be an issue for this offence, but there could be a situation where privacy rights relating to records arises.

invasion of their privacy rights, the very harms that ss. 278.2 and 278.92 protect against for complainants of other sexual offences. Similarly, voyeurism complainants and complainants who have had their intimate images distributed without consent are subject to the same harms.

[149] In a luring case, for example, the accused may seek a child complainant's psychiatric or child welfare records. Or in a distribution of intimate images without consent case, the accused may seek the complainant's diary. If the records are in the possession of a third party, the common law *O'Connor* regime will govern production of the records to the accused. The complainant will not have the protection of the more stringent s. 278.2 regime. However, it is arguable that the rationale for why private records in sexual offence cases require a higher level of protection than in other cases, as set out by the Supreme Court of Canada in *R. v. Mills*⁶⁸, applies equally to these offences: "As is evident from the language of the preamble to Bill C-46, Parliament also sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of production of personal information on the efficacy of treatment, and to reconcile fairness to complaints with the rights of the accused".

[150] Unlike the s. 278.2 regime, the *O'Connor* regime only applies to records in the hands of third parties. If the psychiatric/child welfare records or the diary have been seized by the police or provided to the prosecutor, the police duty to disclose all material pertaining to its investigation of the accused and the Crown's corresponding duty to disclose all relevant, non-privileged information in its possession or control is engaged.⁶⁹

[151] There is no corresponding common law protection for complainants akin to s. 278.92. In a luring case, for example, a portion of text messages exchanged between an accused and complainant could be inculpatory and evidence of the offence itself, but there could also be exchanges not connected to the luring offence where the complainant bore his or her soul to the accused about deeply personal matters. Or in a distribute intimate images without consent case, the accused may be in possession of the complainant's diary. Because s. 278.92 does not apply, the only recourse to prevent those records from being put to the complainant would be the usual rules governing the admissibility of evidence (relevance and probative value versus prejudicial effect).

[152] At least two Working Group members did not agree with expanding the records regime to these additional offences. They argued that these offences do not engage the same sorts of issues at trial as the currently enumerated offences, especially around issues of consent and the potential for myth-based/stereotypical thinking. It was felt that

⁶⁸ *Mills*, *supra*, at para. 59.

⁶⁹ *R. v. Gubbins*, 2018 SCC 44.

expanding the offences would further complicate the prosecution of these offences. Further, that the *O'Connor* regime was sufficient to protect the privacy rights of complainants, just as it is for complainants (including those under 18) for other types of offences such as assault.

b) Potential implications of expanding the scope of the s. 278.2 production regime

[153] While some Working Members felt that expanding the list of enumerated offences in ss. 278.2(1)(a) and 278.92(1)(a) would increase protections for complainants of child sexual exploitation and distribution of intimate images without consent offences, there are potential implications associated with enumerating these offences for the purpose of the s. 278.2 production regime. Similar implications exist for the offence of voyeurism where the offence is committed by way of the making of a visual recording.

i. The subject-matter of the offence may be captured by the definition of a record in s. 278.1

[154] Unlike for many of the currently enumerated offences, for voyeurism, distribution of intimate images without consent and the child exploitation offences, much of the relevant evidence of the offence will be comprised of electronic communications or other forms of records which contain personal information for which there is a reasonable expectation of privacy. The evidence may be captured by the definition of record in s. 278.1⁷⁰. If captured, this would have implications for the Crown's ability to produce these records to the accused. Unlike, for example, a video recorded police interview of a complainant or photos of a scene taken by a police officer, these records are not made by persons responsible for the investigation or prosecution of the offences, but rather by the parties to the offence.

a. Child pornography offences

[155] For child pornography offences, the child sexual abuse material (images, videos or other visual representations) forms the subject-matter of the offence. This material would likely be captured by the definition of record in s. 278.1 as a complainant would almost certainly have a reasonable expectation of privacy with respect to a visual representation capturing their abuse.⁷¹ These records are not made by the police or

⁷⁰ Section 278.1 of the *Code* states: "For the purposes of sections 278.2 to 278.92, "record" means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes...[enumerated records]...,but does not include records made by persons responsible for the investigation or prosecution of the offence.

⁷¹ In *J.J., supra*, the court concludes at paragraphs 42 and 54 that "...a non-enumerated record will only be captured by s. 278.1, in the context of the record screening regime, if the record contains information of an intimate or highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being." Explicit communications that relate to the subject-matter of the charge, as well as sexual videos or photographs that relate to the subject-matter of the charge will often attract a reasonable

prosecution so would not be excluded from the operation of s. 278.1 as currently drafted. In many cases, the subjects of the photographs/videos/visual representations are unidentified, thus making it impossible to obtain a waiver pursuant to s. 278.2(2). Further, in some cases, the number of images/videos/visual representations seized can number in the thousands or even millions. Obtaining express waivers would be a practical impossibility even if the identity of all the complainants were known. Similarly, requiring the Crown to bring a common law application to produce these records⁷² would add more complexity and potential delay to an already complex system.

b. Distribution of intimate images without consent and voyeurism

[156] A similar difficulty exists for the offence of distribution of intimate images without consent. By its very definition, an “intimate image” is one where the person depicted retains a reasonable expectation of privacy at the time that the offence is committed.⁷³ The intimate image is the subject-matter of the offence but would likely also be captured by the production regime in s. 278.2. Voyeurism is committed where an accused surreptitiously observes or makes a visual recording of an individual in circumstances that give rise to a reasonable expectation of privacy.⁷⁴ Like an intimate image in s. 162.1, the visual recording in s. 162 is the subject-matter of the offence and would likely also be captured by the production regime in s. 278.2.

c. Luring and making sexually explicit materials available to a child

[157] The offences of luring and making sexually explicit materials available to a child involve electronic communications between an accused and a person they believe to be a child. Where the complainant is a real child, as opposed to an undercover officer, the communication may be “of an intimate or highly personal nature that is integral to the complainant’s overall physical, psychological or emotional well-being”⁷⁵ and thus subject to a reasonable expectation of privacy. For example, there may be exchanges that may or may not be integral to making out the offence of luring or making sexually explicit materials available to a child, where the complainant bore their soul to the

expectation of privacy. J.J., *supra* at paras. 65-67. See also *R. v. C.I.*, 2023 ONCA 576 where videos and photographs of the alleged sexual assault were found to be records within the meaning of s. 278.1.

⁷² The Ontario Superior Court of Justice held in the recent case of *R. v. Lahens*, 2024 ONSC 2245 that none of the statutory private records production regime, the first party disclosure regime, or the common law *O'Connor* production regime apply to an application for production of a complainant’s private records brought by the Crown where the Crown is unable to obtain an express waiver but wishes to adduce private records into evidence at trial. Presser J. determined that the development of a common law Crown private record regime, mirroring the statutory regime, was required where the Crown wishes to produce private records without a valid waiver.

⁷³ Section 162.1(2)(c) of the *Code*

⁷⁴ Section 162(1) of the *Code*

⁷⁵ J.J., *supra*, at paras. 42 & 54-55

accused about private matters. In some cases, it may be possible to obtain an express waiver from the complainant to produce the records to the accused, but in other cases, obtaining a waiver may not be possible such as where the identity of the complainant is unknown.

ii. *Production of the records*

[158] If the list of enumerated offences is expanded as described above, Working Group members expressed concern that this could complicate the disclosure process. For instance, child luring offences typically involve electronic communications. However, these communications meet the s. 278.2 definition.

[159] Thus, members of the Working Group agree that if the child exploitation offences and s. 162 and s. 162.1 are added as enumerated offences to the records regime, this should be done as part of a package deal with the proposed amendment to s. 278.2(2) regarding production of records in Crown possession to explicitly exempt communications to which the accused is a party and the subject matter of the offence/material that captures the offence (see section 4.1 above). Nevertheless, the accused would be required to bring a production application for records such as counselling or child welfare records. The complainant would also gain the protection of the s. 278.92 admissibility regime.

[160] A concern was raised by some Working Group members that in some circumstances it may be challenging to delineate the parameters of the “subject-matter of the offence”. For example, if the subject-matter of the offence is text messages or some other form of written communication as is the case in luring offences, it may not be clear which messages form part of the subject-matter of the offence and which are extraneous. This may leave to increased production applications if the Crown does not disclose all of the communications. However, in many cases, it will likely not be contentious which records form the “subject-matter of the offence”. For example, in a possession of child pornography case, the entire collection of child sexual abuse material will likely form the subject-matter of the offence. In a distribute intimate image without consent case, the images that were distributed will form the subject-matter of the offence. Even in luring cases, the body of messages between the complainant and accused seized by the police or provided by the complainant will often provide relevant context and will be relied on by the Crown as the “subject-matter of the offence”.

iii. *Increasing complexity of the records regime*

[161] Some members of the Working Group were concerned that adding additional offences to the records regime may increase the complexity of already complex proceedings. There is the potential that this added complexity could lead to delay in the prosecution of these offences and in the justice system in general if court resources must be devoted to applications under the records regime for these additional offences. However, it is worth noting that records applications may still be brought under the common law *O'Connor* regime and there is some precedent from British Columbia that

the reasoning in *R. v. Barton*⁷⁶ (the application of s. 276 to non-enumerated offences) also extends to the s. 278.2 production regime. Some members of the working-group also questioned the necessity of adding these offences to the regime as they felt that records applications for these offences will likely be rare or non-existent. Adding additional offences may lead to unintended consequences and should therefore only be done if truly necessary.

c) Conclusion

[162] In conclusion, the Working Group was not able to reach a consensus on whether there should be an expansion of the enumerated offences under s. 278.2(1)(a) and s. 278.92(1)(a). However, if there was to be an expansion of the enumerated offences, the working group was in general agreement that there should be an explicit carve out in s. 278.2(2) for the subject matter of the offence in conjunction with a carve out for communications involving the accused. It was noted that the records regime presents significant challenges for self-represented litigants attempting to navigate this process. Additional complexity will only serve to make this even more challenging.

4.8 Amendment to the French version of s. 278.4

[163] The Working Group recommends amending the French version of subsection 2.1 of s. 278.4 to harmonize it with subsection s. 278.94(3) and with the English version of the text.

[164] The English version ought to remain unchanged. The new French version proposed is:

Audience à huis clos

278.4 (1) Le juge tient une audience à huis clos pour décider si le dossier devrait être communiqué au tribunal pour que lui-même puisse l'examiner.

Droit de présenter des observations et incontestabilité

(2) La personne qui a le dossier en sa possession ou sous son contrôle, le plaignant ou le témoin, selon le cas, et toute autre personne à laquelle le dossier se rapporte peuvent comparaître et présenter leurs arguments à l'audience mais ne peuvent être contraints à témoigner.

Droit à un avocat

⁷⁶ 2019 SCC 33

(2.1) Le juge est tenu d'aviser dans les meilleurs délais toute personne visée au paragraphe (2) qui participe à l'audience de son droit d'être représentée par un avocat.

Dépens

(3) Aucune ordonnance de dépens ne peut être rendue contre une personne visée au paragraphe (2) en raison de sa participation à l'audience.

5. SUMMARY OF CONSENSUS RECOMMENDATIONS

[165] Below is a list of recommendations for which the Working Group was able to reach consensus. However, even where the Working Group was unable to reach consensus, it is hoped that the discussion lays out the various problems with the current records regime and unpacks those issues with some suggestions for consideration by policy makers.

[166] **Recommendation 1:** The Working Group recommends that electronic communications to which the accused person is a party, documentation from a SAEK, and materials constituting the subject matter of the offence or anything that captures the offence itself should be explicitly exempted from the application of s. 278.2(2) of the *Code*, on the basis that there is no reasonable expectation of privacy in the documents for the purpose of production to the accused, or that they are always clearly relevant. Section 278.2(2) would read:

Section 278.1, this section, and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections, or the record is a communication to which the accused is a party, or, the record constitutes the subject matter of the offence or captures the offence itself, or, the record is documentation from a sexual assault forensic examination regarding the sexual activity in question.

[167] **Recommendation 2:** The Working Group recommends that language be added to the *Code* to expressly permit records to be provided to counsel for the complainant, where the complainant is represented by counsel, prior to the stage 1 hearing on production, so that a position on the application by the complainant may be taken early on. Where the complainant does not wish for their own counsel to receive and review the records in advance, counsel may convey that to the parties, and stage 1 of production would proceed to full argument, as scheduled.

[168] **Recommendation 3:** The Working Group recommends that language be added to the *Code* to permit for an application for production or admissibility of records to be

heard in writing, where the parties (including the complainant or complainant's counsel when they have standing) agree, and at the discretion of the judge.

[169] **Recommendation 4:** The Working Group recommends adding specific, clear statutory language that the complainant does not have standing at any other procedural steps of the records regime other than as currently set out.

[170] **Recommendation 5:** The Working Group recommends creating a specific statutory exception for mid-trial records applications, mirroring the language in *J.J.*, to provide for such an application to be brought and heard mid-trial when “in the interests of justice”. Language may be added to include specific factors, such as the diligence of the defence, and where witness tainting would negate the efficacy of cross-examination.

[171] **Recommendation 6:** The Working Group recommends extending the notice period under s. 278.93(4) of the *Code* to sixty days. This should give the Crown and court sufficient time to help arrange the appointment of the complainant's counsel. Sixty days would also provide complainant's counsel with adequate time to develop a rapport with the complainant and prepare a response. Increasing the time for notice also helps complainant's counsel ensure that they can adequately schedule their availability.

[172] **Recommendation 7:** The Working Group recommends amending the French version of s. 278.4(2.1) to harmonize it with subsection s. 278.94(3) and with the English version of the text.

[173] The co-chairs wish to sincerely thank all the members of the Working Group for their time and dedication to this report. The discussion and insight over the past two years has been extremely productive.

APPENDIX A

Statutory Provisions

Definition of *record*

278.1 For the purposes of sections 278.2 to 278.92, ***record*** means any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.

1997, c. 30, s. 1; 2018, c. 29, s. 23

Production of record to accused

278.2 (1) Except in accordance with sections 278.3 to 278.91, no record relating to a complainant or a witness shall be produced to an accused in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

- (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or
- (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Application of provisions

(2) Section 278.1, this section and sections 278.3 to 278.91 apply where a record is in the possession or control of any person, including the prosecutor in the proceedings, unless, in the case of a record in the possession or control of the prosecutor, the complainant or witness to whom the record relates has expressly waived the application of those sections.

Duty of prosecutor to give notice

(3) In the case of a record in respect of which this section applies that is in the possession or control of the prosecutor, the prosecutor shall notify the accused that the record is in the prosecutor's possession but, in doing so, the prosecutor shall not disclose the record's contents.

1997, c. 30, s. 1; 1998, c. 9, s. 3; 2014, c. 25, ss. 17, 48; 2015, c. 13, s. 5; 2019, c. 25, s. 102

Application for production

278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.

No application in other proceedings

(2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.

Form and content of application

(3) An application must be made in writing and set out

- (a)** particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and
- (b)** the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

Insufficient grounds

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

- (a)** that the record exists;
- (b)** that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;
- (c)** that the record relates to the incident that is the subject-matter of the proceedings;
- (d)** that the record may disclose a prior inconsistent statement of the complainant or witness;
- (e)** that the record may relate to the credibility of the complainant or witness;
- (f)** that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;
- (g)** that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;
- (h)** that the record relates to the sexual activity of the complainant with any person, including the accused;
- (i)** that the record relates to the presence or absence of a recent complaint;
- (j)** that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

Service of application and subpoena

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

Service on other persons

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

1997, c. 30, s. 1; 2015, c. 13, s. 6; 2018, c. 29, s. 24

Hearing *in camera*

278.4 (1) The judge shall hold a hearing *in camera* to determine whether to order the person who has possession or control of the record to produce it to the court for review by the judge.

Persons who may appear at hearing

(2) The person who has possession or control of the record, the complainant or witness, as the case may be, and any other person to whom the record relates may appear and make submissions at the hearing, but they are not compellable as witnesses at the hearing.

Right to counsel

(2.1) The judge shall, as soon as feasible, inform any person referred to in subsection (2) who participates in the hearing of their right to be represented by counsel.

Costs

(3) No order for costs may be made against a person referred to in subsection (2) in respect of their participation in the hearing.

1997, c. 30, s. 1; 2015, c. 13, s. 7

Judge may order production of record for review

278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that

(a) the application was made in accordance with subsections 278.3(2) to (6);

(b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and

(c) the production of the record is necessary in the interests of justice.

Factors to be considered

(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:

(a) the extent to which the record is necessary for the accused to make a full answer and defence;

(b) the probative value of the record;

(c) the nature and extent of the reasonable expectation of privacy with respect to the record;

(d) whether production of the record is based on a discriminatory belief or bias;

(e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;

(f) society's interest in encouraging the reporting of sexual offences;

(g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and

(h) the effect of the determination on the integrity of the trial process.

1997, c. 30, s. 1; 2015, c. 13, s. 8

Review of record by judge

278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.

Hearing *in camera*

(2) The judge may hold a hearing *in camera* if the judge considers that it will assist in making the determination.

Provisions re hearing

(3) Subsections 278.4(2) to (3) apply in the case of a hearing under subsection (2).

1997, c. 30, s. 1; 2015, c. 13, s. 9

Judge may order production of record to accused

278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).

Factors to be considered

(2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.

Conditions on production

(3) If the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy, personal security and equality interests of the complainant or witness, as the case may be, and of any other person to whom the record relates, including, for example, the following conditions:

- (a)** that the record be edited as directed by the judge;
- (b)** that a copy of the record, rather than the original, be produced;
- (c)** that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
- (d)** that the record be viewed only at the offices of the court;
- (e)** that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and
- (f)** that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

Copy to prosecutor

(4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

Record not to be used in other proceedings

(5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

Retention of record by court

(6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.

1997, c. 30, s. 1; 2015, c. 13, s. 10

Reasons for decision

278.8 (1) The judge shall provide reasons for ordering or refusing to order the production of the record or part of the record pursuant to subsection 278.5(1) or 278.7(1).

Record of reasons

(2) The reasons referred to in subsection (1) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing.

1997, c. 30, s. 1

Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

- (a)** the contents of an application made under section 278.3;
- (b)** any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or
- (c)** the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

Offence

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction.

1997, c. 30, s. 1; 2005, c. 32, s. 14

Appeal

278.91 For the purposes of sections 675 and 676, a determination to make or refuse to make an order pursuant to subsection 278.5(1) or 278.7(1) is deemed to be a question of law.

1997, c. 30, s. 1

Admissibility — accused in possession of records relating to complainant

278.92 (1) Except in accordance with this section, no record relating to a complainant that is in the possession or control of the accused — and which the accused intends to adduce — shall be admitted in evidence in any proceedings in respect of any of the following offences or in any proceedings in respect of two or more offences at least one of which is any of the following offences:

- (a) an offence under section 151, 152, 153, 153.1, 155, 160, 170, 171, 172, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3; or
- (b) any offence under this Act, as it read from time to time before the day on which this paragraph comes into force, if the conduct alleged would be an offence referred to in paragraph (a) if it occurred on or after that day.

Marginal note: Requirements for admissibility

(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,

- (a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or
- (b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge shall consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
- (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (e) the need to remove from the fact-finding process any discriminatory belief or bias;

- (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (g) the potential prejudice to the complainant's personal dignity and right of privacy;
- (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (i) any other factor that the judge, provincial court judge or justice considers relevant.

2018, c. 29, s. 25; 2019, c. 25, s. 403

Application for hearing — sections 276 and 278.92

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Form and content of application

(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded

(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing

(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

2018, c. 29, s. 25

Hearing — jury and public excluded

278.94 (1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Complainant not compellable

(2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Right to counsel

(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

Judge's determination and reasons

(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

APPENDIX B

ULCC 278 Records Regime Working Group – Thematic Analysis

v. 3 - Dec 3, 2023

This is a living document which attempts to capture the working group's discussions.

Substantive Issues

1. What is a record?
 - a. Is this set out in the Code, practice direction, or case law?
 - i. This group may consider categories or definitions of categories.
 - b. How is the question of whether something is a record to be determined?
 - i. Do we need a process for adjudicating what constitutes a record, essentially a process for determining when the process engages when it is not facially clear?
 - ii. How do we incorporate the complainant into the “what is a record” process? Is the complainant entitled to counsel, or should they be entitled at this point?
 - E.g. in a motion for directions or pre-trial application respecting the question of whether something “is a record”?
 - c. Distinction between “production” and “admissibility” regime
 - i. What considerations apply at the production stage vs. the admissibility stage?
 - ii. Consider challenges for the Crown in production of records in its possession (which the Crown can review and assess) vs. records that are in possession of a third party.
 - Potential conflict between Stinchcombe duties and the private records regime.
 - iii. Records that contain both private and “non-private” information
 - E.g. intimate and non-intimate photos intermixed when both are relevant for context of why those photos being taken?
2. Clarify role of complainant's counsel
 - a. Should counsel for the complainant be appointed much earlier in the process rather than at the point the actual application is filed, and if so, when?
 - i. Waiver can be determined up front saving significant time.
 - b. What are or what should be the parameters of the role of complainant's counsel?
 - i. For example, whether or not the complainant has standing to make objections during cross-examination, or submissions

- ii. Uncertainty regarding who complainant's counsel can advise and when
- 3. Crown use of records
 - a. Can the Crown use the information obtained at an admissibility hearing as part of the Crown case?
 - b. What constitutes a valid waiver by the complainant and who can take it, especially concern records that the complainant provides to the police?
 - c. What happens if the complainant tells the Crown they do not want a particular, highly-relevant record used at trial?
- 4. Adding child exploitation offences to private records regime
 - a. (From ULCC Resolution ON2023-05): The offences in s. 163.1 (prohibiting the production, distribution and possession of child pornography), s. 171.1 (making sexually explicit materials available to child), and s. 172.1 (luring a child) should be made subject to the protections for private records of victims in s. 278.2(1)(a) (third party records) and s. 278.92(1)(a) (records in the control of the accused) by adding them to the list of offences therein.
 - b. Does this, and if so how, change the role of complainant's counsel?

Procedural Issues

- 1. Simplification of the steps involved in the regime
 - a. Are both stages of a record production application necessary (especially considering same issues are litigated) or what other ways can the regime be simplified?
 - b. If there is a waiver for production, can there or should there be a waiver for admissibility?
 - c. How can we avoid litigating issues in advance that ultimately end up not being relevant at trial?
 - i. What can realistically be decided at a judicial pre-trial or case management conference?
 - d. Can different formats of the hearing (e.g. oral vs. written) be used to simplify the procedure and reduce the delay?
 - e. Should the Criminal Code maintain the requirement that the trial judge hear a records application for production or admissibility?
 - i. Sometimes it may be preferable to have a case management judge, which avoids the necessity of the judge having to disabuse themselves of information learned during the hearing.
 - ii. NOTE: In Ontario SCJ it is not uncommon to have a case management judge hear the application, as opposed to the trial judge.
- 2. Procedure for mid-trial records issues

- a. What should happen when certain records only become relevant mid-trial through examination of the witnesses?
 - b. Should the same procedure apply to a mid-trial application vs. pre-trial or should there be a simplified, streamlined procedure?
 - c. Should the regime avoid strategic attempts to make records relevant during the trial to circumvent the pre-trial regime?
- 3. Notice and service requirements
 - a. Are the notice provisions in the Criminal Code adequate or should they be increased given the steps involved in an application (retaining complainant's counsel, setting dates and subpoenaing records, step 1 and 2, etc.)?
 - b. In particular, is the seven day notice period for production appropriate?
 - c. How can we ensure applications are brought early enough to avoid losing previously-set trial dates?
 - d. Who serves notice on the complainant and ensures they understand their rights to counsel and appearance at the hearing?
- 4. Difference between French and English versions of the Criminal Code throughout the regime
 - a. Difference in use of "avocat" vs. "conseil" ("conseiller de..." – which raises the possibility of a notary or paralegal being able to participate. This does not concord with English version.
 - b. Should this group do a review for language and other drafting errors?