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Please Respect My Privacy: Proposal to Create Safeguards for Non-Intimate Visual Recordings Taken In Public

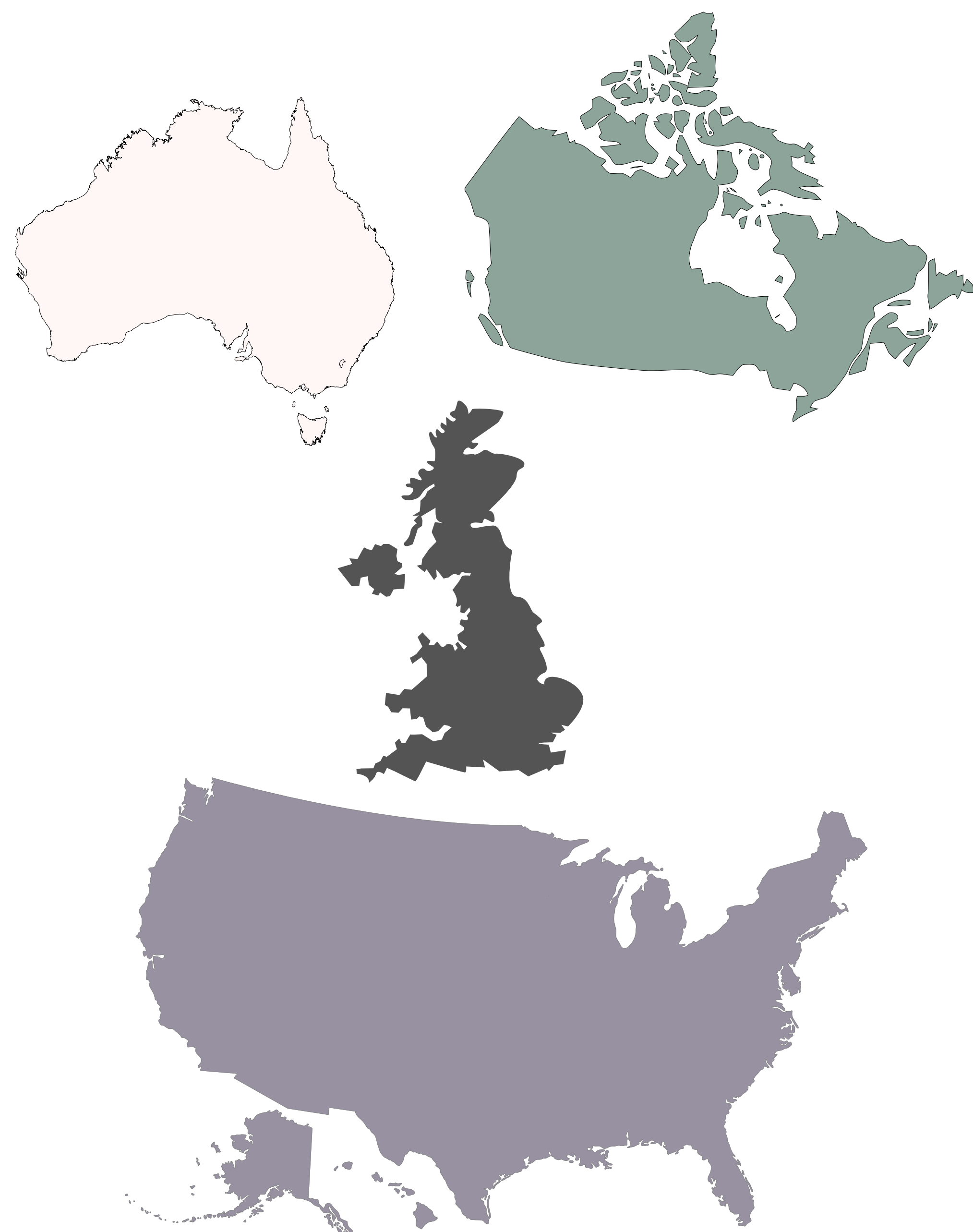
Through Amendments to the *Privacy Act, RSS 1978, c P-24*

By Gayani Rajapaksha, Laiba Tanoli and Sarah Rezazadeh

Overview of the Privacy Act

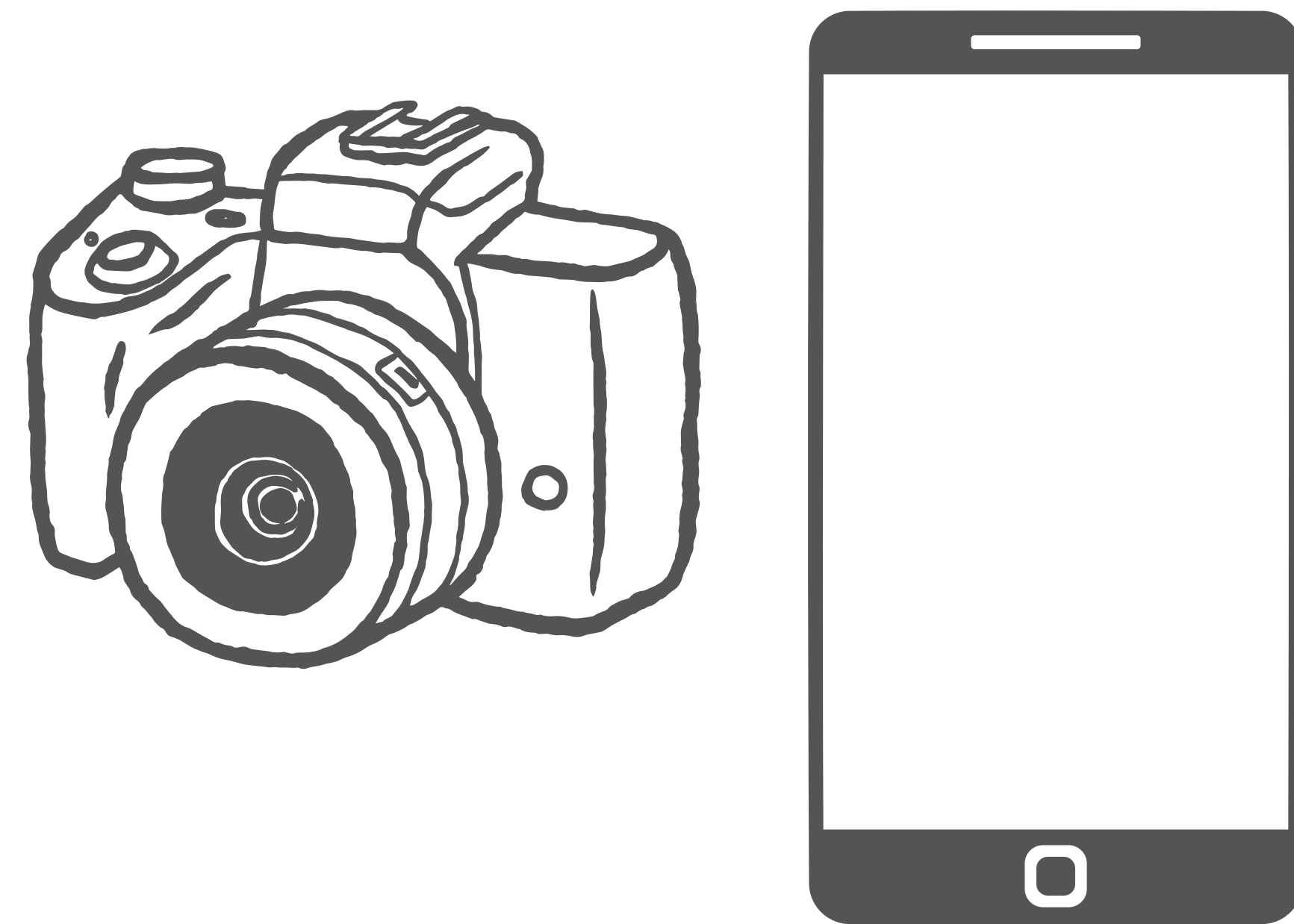
- The Privacy Act is the governing piece of legislation regarding the tort of the violation of privacy and states that it is a tort, actionable without proof of damages, for a person wilfully and without claim of right, to violate the privacy of another person.
- This violation includes surveillance on another person, listening to conversations, use of name or likeness of another person, and use of letters or personal documents of another person.
- Part 1 of the statute deals with violations of privacy and appropriate remedies in a general manner. Subsection 3 of the Privacy Act enumerates scenarios, which if proven, establish a prima facie violation of privacy.
- Part 2 of the Privacy Act addresses the violation of privacy regarding intimate images, including the non-consensual recording of and distribution of them, and expanded remedies to redress the violation.
- While Part 2 deals with intimate images, no provisions, beyond subsection 3a, make reference to the applicability of the statute to the recording or distribution of non-intimate images.
- **Subjects of non-intimate visual recordings taken in public spaces have no express protection under the Privacy Act . To address this gap, our research focused on the sharing of non-intimate visual recordings taken in public with respect to Part 1 of the Privacy Act.**

Jurisdictional Scan



Reasonable Expectation of Privacy (REOP)

- While the Privacy Act makes no express mention of REOP in public versus private spaces, traditional conceptualizations of privacy have disintegrated a person from a reasonable expectation of privacy in public spaces. Canadian jurisprudence has generally followed this approach.
- However, a more nuanced analysis has been adopted by the Supreme Court of Canada (SCC) in recent years. In *R v Jarvis 2019 SCC 10*, the court held that privacy isn't a black-and-white issue: people being in a public or semi-public place doesn't mean they have no expectation of privacy regarding being recorded. Whether such an an is an invasion of privacy depends on many factors.
- We agree with other law reform bodies that individuals, acting lawfully, can expect a reasonable level of privacy in public settings, as long as those activities are not intended to gain public attention or attract the notice of others.



REOP in the Digital Age

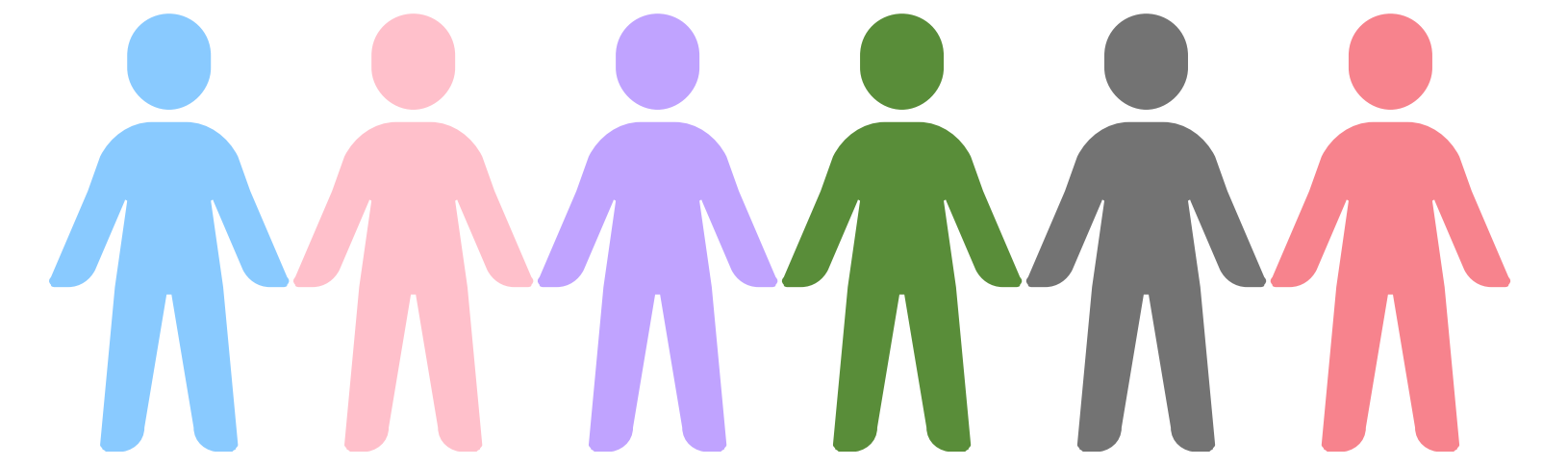
- Characteristics unique to photography and its subsequent sharing can heighten the impact of violations of privacy
- However, the more imminent problem is what follows the possession and seems to do the most harm: publishing the visual recording to the internet.
- A visual recording published to an account with relatively few followers can gain overnight virality and be viewed by millions. The immortality of the internet means digital content, can continue to persist long after the initial violation, and continuously impinge on the privacy of the subject..
- Social media has also been effective and revealing a person's identity through mechanisms like doxxing, which undercuts the notion that in public people are generally anonymous.
- **The unique characteristics of visual recordings, the potential of virality and/or doxxing, and associated adverse consequences signal a need for modern reform to privacy laws.**

Balancing Interests

- An understanding of REOP which includes public settings raises a risk that the amended legislation is too broad and could have a chilling effect on freedom of expression.
- Balancing constitutional concerns related to freedom of expression is paramount.
- *Jarvis* states that given the ubiquity of visual recording technology in society, individuals reasonably expect that they may be incidentally photographed, or video recorded in many situations in day-to-day life.
- This includes being captured on video surveillance while in a certain location, or being in the background of someone else's photograph or video, that they may be recorded as part of a cityscape, or that the news media may record them at the scene of a developing news story.
- A middle-ground approach acknowledges that no one has an absolute right to privacy, but also permits some level of privacy protection and recovery for harm caused by privacy violations.
- An amendment to the Privacy Act stating that non-consensual publication of visual recordings constitutes a prima facie violation of privacy raises new concerns about trivial violations
- Proof of loss on the part of the plaintiff could mitigate this concern to a certain extent.
- A standard which requires some form of harm (psychological or financial) to have been caused by the violation, could address incidents of social media virality without being overly permissive.



Consultations



Final Recommendations

1. Implement additional clarifications to the defamation tort, expanding on what "published" entails in the context of the digital age.
2. Implement additional details on how a non-consensual picture or video posted without words or audio, which, under holistic assessment (such as username, bio, etc).
3. Implement additional criteria to section 7 of the *Privacy Act* in order to: (1) expand on profit, damages, and injunctions (2) include some criteria that is more specific to internet usage.
4. Revisit the tort of false light, consider how it has been applied in other jurisdictions, and assess if the elements can be used to expand the *Privacy Act*.
5. Amended to expressly provide for a REOP of privacy for individuals engaged in lawful conduct not directed at attracting attention in public spaces.
6. Amended to provide that non-consensually taken visual recording an individual engaged in lawful activities in public settings that are published to a media hosting platform(s) is prima facie evidence of a violation of privacy.
7. Remedies pertaining to the non-consensual publication of visual recordings allow for the court to order the defendant to take every reasonable step to remove the documents from publication.
8. The new amendments pertaining to the non-consensual publication of visual recordings require that the violation must be non-trivial and thus must show loss to establish a prima facie violation.
9. The *Privacy Act* should be amended to reflect an objective requirement of intent (knew or ought to have known) rather than a subjective one (wilful).

Conclusion

We conclude that in order to keep up changing technology that easily permits the invasion of privacy, the *Privacy Act* should be amended to ensure the privacy of Saskatchewan citizens is being respected and guarded. This would allow citizens to enjoy their rights and freedoms without apprehension of their privacy being violated.