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PHYSICAL PRIVACY IN PRISON: WHY DIGNITY IS AN INALIENABLE RIGHT AND HOW THE INTRUSION TORT CAN PROTECT IT

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Abstract

People incarcerated in psychiatric segregation units in New Zealand prisons are subject to constant CCTV surveillance. Privacy screening in these psychiatric segregation units is prohibited by the Corrections Regulations 2005; therefore, people incarcerated there are always subject to surveillance – even while using the toilet, shower, and undressing. Research shows that this kind of surveillance is detrimental to mental health and well-being, and in many cases leads to long-lasting harm and poor mental health outcomes. The tort of intrusion upon seclusion is designed to remedy this kind of harm arising from unauthorised intrusions upon physical privacy where there is a reasonable expectation of privacy. While some privacy normally afforded in society is justifiably curtailed in prison, the privacy of one's ablutions is inherently connected to human dignity and thus should be protected. The Department of Corrections is under a statutory mandate to carry out safe custodial management; however, rehabilitation is a complementary statutory objective which necessitates the preservation of human dignity. Accordingly, competing interests in safety and privacy must be re-balanced. This paper argues that the tort of intrusion upon seclusion should be extended to capture conduct that is prima facie authorised, but ultra vires in light of the Bill of Rights Act 1990. On this basis, incarcerated people subjected to intrusions into their most private moments should be able to sue the Department of Corrections using the tort of intrusion.

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Subjects and Topics

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I Introduction

> A democratic state which values individual liberty can no more tolerate an intrusion on privacy by a private person than by an officer of government and the protections afforded in tort law, like those afforded under the Constitution, are designed to protect this same value.[1]

Observing people while they are using the toilet, shower, or undressing is unmistakably a gross invasion of privacy. In New Zealand prisons, it is common practice. Incarcerated people who are segregated for mental health risk monitoring are housed in specialised units. These units are prohibited from having privacy screening around hygiene areas, rendering the occupants in full view of CCTV surveillance.[2] The Chief Ombudsman has reported extensively on this practice and criticised it as a breach of privacy.[3] The Department of Corrections refers to the Corrections Regulations 2005 in response, and cites the difficulty in balancing privacy interests with concern for appropriately monitoring safety concerns.[4]

When balancing competing imperatives, such as the preservation of life and the right to privacy, the protection of human dignity should be of paramount importance. This is particularly relevant in light of the rehabilitative purpose of the Department of Corrections.[5] While some reduction in privacy is justified in the context of incarceration, such justifications must stand up to the limitations imposed. This paper argues that current practices are tortious and in breach of the Bill of Rights Act 1990.[6] To remedy these wrongs, a re-balancing of safety and privacy interests is required.

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[1] Edward J. Bloustein "Privacy as an aspect of human dignity" in Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 156 at 181.

[2] Corrections Regulations 2005, sch 2 pt C.

[3] Peter Boshier *Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989* (Ombudsman New Zealand, OPCAT reports, August 2020) at 15.

[4] Peter Boshier *Report on an unannounced inspection of Northland Regional Corrections Facility* (Ombudsman New Zealand, OPCAT reports, August 2019) at 12; Request C169960 made pursuant to the Official Information Act 1982: *"Are At-Risk Units under CCTV monitoring? How many inmates have spent time in the At-Risk Units in the last year? How long is an average stay in an At-Risk Unit?"* Email response of 20 July 2023.

[5] Corrections Act 2004, s 5.

[6] New Zealand Bill of Rights Act 1990; Henceforth this paper shall use "Bill of Rights" to refer to this enactment.

Finally, the preservation of dignity is at the heart of the privacy interest.[7] Privacy protection has been afforded by the New Zealand common law in circumstances where physical privacy has been intruded upon.[8] The same protection should be available to incarcerated people. Accordingly, the tort of intrusion upon seclusion should be extended to provide an avenue to relief for incarcerated people who are subject to intrusions which are prima facie authorised by statute.

II Privacy in New Zealand prisons

A The status quo

In a series of unannounced inspections of prisons around New Zealand the Ombudsman publishes reports on the Department of Corrections' compliance with the Optional Convention Against Torture, providing a candid look behind the bars of New Zealand prisons. Concerns regarding privacy breaches are ubiquitous and feature in many of the recent reports.[9] Of particular concern are the practices implemented in the psychiatric segregation facilities (known as Intervention and Support Units/ISU's, At-Risk Units/ARU's, or similar).

Psychiatric segregation facilities exist for the close monitoring of incarcerated people who have presented with significant mental health difficulties, including a high risk of suicide or self-harm.[10] The facilities are equipped for mental health practitioners in conjunction with Corrections staff to supervise and attend to those incarcerated there, with a view to ensuring their safety.[11] In the last year,[12] the number of incarcerated people who have been housed in psychiatric segregation facilities is 3,195.[13] The total number of incarcerated

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[7] N.A. Moreham "Beyond Information: Physical Privacy in English Law" (2014) 73 Cambridge Law Journal 1 at 3.

[8] *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [2].

[9] Peter Boshier, above n 3, at 15; Peter Boshier *Report on an unannounced inspection of Northland Regional Corrections Facility* (Ombudsman New Zealand, OPCAT reports, August 2019) at 8 and 43; Peter Boshier *Report on an unannounced follow up inspection of Otago Corrections Facility* (Ombudsman New Zealand, OPCAT reports, June 2019) at 3; Peter Boshier *Report on an unannounced inspection of Whanganui Prison* (Ombudsman New Zealand, OPCAT reports, August 2018) at 13.

[10] Deborah Alleyne *Transforming intervention and support for at-risk prisoners* (The New Zealand Corrections Journal Volume 5 Issue 2, November 2017).

[11] Deborah Alleyne, above n 10; Request C169960, above n 4.

[12] Financial year of 2022/2023.

[13] Request C169960, above n 4.

people across that time period is 8,610,[14] indicating a significant proportion (approximately 40%) of New Zealand's incarcerated population have spent time in psychiatric segregation facilities in the last year. The average number of days spent in psychiatric segregation is seven days.[15]

Current regulations pertaining to the features of psychiatric segregation facilities prohibit the installation of privacy screening around hygiene areas.[16] Compared to standard prison cells which do feature privacy screening, the psychiatric segregation facilities ensure there is always a clear view of the whole cell and therefore prohibit privacy screening.[17] The rationale for this restriction is the necessary management of self-harm and suicide risk, which in most cases is why people are accommodated in the psychiatric segregation facilities.[18] Incarcerated people present greater risks of violence, self-harm, suicide, and serious mental health and addiction issues compared to the general population.[19] The Department of Corrections are concerned with the preservation of life, which necessitates close monitoring so rapid intervention can occur if necessary.[20]

Standard practice in psychiatric segregation facilities is constant CCTV surveillance.[21] Coupled with the prohibition on privacy screening around hygiene areas of cells, this results in incarcerated people being subjected to CCTV surveillance while they are undertaking ablutions (toileting, showering) or in various stages of undress.[22] Further, in many prisons the CCTV surveillance footage is not restricted from general view. Often the footage is viewable by any person who enters the staff base, and in worse cases the footage is viewable in communal accessways: that is, the footage is capable of being viewed by prison staff, other incarcerated people, or members of the public who are visiting the prison.[23]

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[14] Department of Corrections "Prison facts and statistics – June 2023" (June 2023) Ara Poutama Aotearoa Department of Corrections <https://www.corrections.govt.nz/resources/statistics/quarterly_prison_statistics/prison_stats_june_2023>
[15] Request C169960, above n 4.
[16] Corrections Regulations, above n 2.
[17] Corrections Regulations, above n 2.
[18] Request C169960, above n 4.
[19] Request C166446 made pursuant to the Official Information Act 1982: *"What steps have been taken to ensure the privacy of inmates doing their private ablutions since the release of the 2016 Corrections torture reports?"* Email response of 14 July 2023.
[20] Request C169960, above n 4.
[21] Request C169960, above n 4.
[22] Peter Boshier, above n 9.
[23] Peter Boshier, above n 9.

Consequently, the two privacy issues arising from this practice are: 1) residents of psychiatric segregation facilities being watched via CCTV while they are using the toilet, shower, or undressing, and 2) the extent to which this footage is viewable.

B What is at stake? The nexus between privacy and dignity

Understanding the right to privacy is a topic which has garnered much academic and legal discussion. It is important to grasp what the right to privacy is designed to protect so that privacy is afforded appropriate significance when it conflicts with other imperatives.

The New Zealand privacy tort is relatively narrow in scope and remains in a developmental stage. *Hosking v Runting* established the leading privacy test, which relates to publicity given to private facts.[24] However, the right to privacy pertains to more than just information. American legal scholarship articulates invasions upon the right to privacy in four separate categories: (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; and (d) publicity that unreasonably places the other in a false light before the public.[25] The American framework of the privacy tort is useful as it indicates the multifaceted nature of privacy. What, therefore, is the common interest underlying these expressions of the right to privacy?

Edward Bloustein, responding to other legal scholarship, identifies the protection of one's "inviolate personality" to be at the heart of the right to privacy.[26] He goes on to conclude that the thread tying together the four articulations of privacy invasions in the Restatement,[27] and miscellaneous statutory privacy protections, is dignity. The means by which the right to privacy is interfered with differs, as is illustrated by the different conceptions of privacy invasions.[28] Nonetheless, the various articulations of the right to privacy seek to protect the same underlying interest: human dignity. Dignity is the interest that is compromised when privacy is intruded upon.

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[24] *Hosking v Runting* [2004] 7 HRNZ 301, [2005] 1 NZLR 1 at [117].

[25] *Restatement of the Law of Torts* (2nd ed, reissue, 1981) vol 3 Privacy at [376].

[26] Bloustein, above n 1, at 163.

[27] Above n 25, at [376].

[28] Above n 25, at [376].

The right to privacy, therefore, is a protection of dignitary interests.[29] The value of this protection, according to Nicole Moreham, is to uphold a person's inherent value and entitlement to respect – to have a proper regard for human dignity.[30] The two privacy issues raised earlier in this paper are significant as the inherent dignity of incarcerated people is at stake.

Importantly, the dignitary interest underlying the four articulations of the privacy tort[31] not only underlies the privacy tort, but also statutory protections of privacy.[32] The New Zealand Bill of Rights does not contain an express right to privacy.[33] Dignity, however, is protected by s 23(5) which establishes the rights of people who are deprived of their liberty. Section 23(5) imposes a requirement to treat a person deprived of their liberty "with humanity" and "with respect to the inherent dignity" of that person.[34] Connecting the requirement to treat incarcerated people with respect to their "inherent dignity" with philosophical underpinnings of the right to privacy, it is salient that both turn on the protection of dignitary interests. This paper posits, therefore, the right to privacy is protected by s 23(5) of the Bill of Rights.

The current practice of denying privacy screening from people housed in psychiatric segregation facilities, while they are subject to constant CCTV surveillance which is unrestricted in terms of viewability, is a gross erosion of the right to privacy. Contrary to s 23(5) of the Bill of Rights, this practice does not meet the positive obligation to uphold humane treatment and respect for incarcerated people's inherent dignity.[35] As established, privacy is inextricable from autonomy and dignity, and the protection of it enhances individuals' wellbeing and sense of humanity. Watching incarcerated people via CCTV while they are using the toilet or shower, or undressing, is a clear violation of that inherent dignity. Further, that footage being viewable by an undefined audience is antithetical to notions of humanity and respect for dignity.

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[29] Peter Cane and Janet McLean *The Anatomy of Tort Law* (1st ed, Bloomsbury Publishing Plc, 1997) at 71.

[30] N.A. Moreham "Why is privacy important? Privacy, dignity and development of the New Zealand Breach of Privacy tort" (2015) 24 VUWLRP 231 at 236-238.

[31] Above n 25, at [376].

[32] For example: Search and Surveillance Act 2012 s 125(3); Privacy Act 2020 s 3(a); and Crimes Act 1961 s 216H.

[33] Above n 6.

[34] Butler, Andrew S., and Butler, Petra *The New Zealand Bill of Rights Act – a commentary* (2nd ed, LexisNexis, Wellington, 2015) at 1182.

[35] Above n 6, s 23(5).

Accepting that the right to privacy is not beyond limitations, Stanley Benn observes that the principle of respect for dignity (such as is enshrined in s 23(5)) places a burden of justification on those seeking to limit the privacy afforded to a person.[36] It is generally accepted that people who are subject to a penal regime relinquish some basic rights[37] that the general public enjoy. However, where those rights are enshrined in the Bill of Rights, a sufficient justification must be advanced to support any limitations upon such rights.

Consequently, where the limitations are unjustified, incarcerated people subjected to these privacy intrusions should be able to obtain remedies. Prima facie, the two avenues open to incarcerated people are judicial review proceedings pursuant to the Bill of Rights, and the privacy tort of intrusion upon seclusion. Analysis of a judicial review action is beyond the scope of this paper which pertains solely to the tort of intrusion and its ability to vindicate the privacy rights of incarcerated people.

III The impacts of surveillance

C Common law principles

Before showing how the requirements of the tort of intrusion upon seclusion are met, it is useful to understand the nature of the interest the tort protects and whether it could apply in an incarceration context. The leading New Zealand intrusion case, *C v Holland*, is a recent development in the law. Prior to *C v Holland*, the New Zealand test for establishing a privacy intrusion was introduced by the Court of Appeal in *Hosking v Runting*.[38] The majority judgment focuses on the existence of facts which may attract a reasonable expectation of privacy, whereas Tipping J extends this slightly in his minority judgment to information or material.[39] However, privacy is a multi-faceted interest: it can relate to information, personal identity, unreasonable publicity, and physical seclusion.[40] Equally, invasions of privacy are varied in character.[41] Effectively identifying and remedying

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[36] Stanley I. Benn "Privacy, freedom, and respect for persons" in Ferdinand David Schoeman (ed) *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, Cambridge, 1984) 223 at 232.

[37] For example, freedom of movement.

[38] *Hosking v Runting*, above n 24, at [117].

[39] Above n 24, at [259].

[40] *Restatement of the Law of Torts,* above n 25, at [376].

[41] N.A. Moreham, above n 7, at 3.

invasions of privacy requires an understanding of the conceptual differences, and applying appropriate analysis depending on the kind of privacy invasion that has occurred.[42]

When the case of *C v Holland* came before the High Court in 2012 it became apparent that the *Hosking* privacy tort is insufficient to vindicate the privacy rights of those who have experienced intrusion upon their physical privacy.[43] Rather than publicity being given to private information, the kind of wrong in intrusion cases is a "blow to human dignity, an assault on human personality".[44] Recognising this kind of wrong, Whata J found that the intrusion in *C v Holland* was so significant it demanded legal recourse and thus established the New Zealand tort of intrusion into seclusion.[45] The effect of this development in New Zealand's law of privacy is to identify the interest in physical privacy and its nexus with dignity. It is this kind of privacy interest that is at issue in the context of incarceration in psychiatric segregation facilities.

In finding that a tort of intrusion upon seclusion exists as part of New Zealand law, Whata J set out the following four elements of the tort:[46]

1) an intentional and unauthorised intrusion;
2) into seclusion (namely intimate personal activity, space or affairs);
3) involving the infringement of a reasonable expectation of privacy; and
4) that is highly offensive to a reasonable person.

As the New Zealand law of intrusion is still developing, it is useful to take guidance from other jurisdictions as to the interpretation of the tort and the underlying harm it seeks to remedy. There are a series of English common law cases which address harm resulting from an intrusion into a reasonable expectation of privacy – despite England not having an intrusion tort. These cases help to expound what may be considered an intrusion upon seclusion for the purposes of applying the New Zealand tort. For example, it was held to be a public order offence in *Vigon v DPP* to surreptitiously film customers trying on swimwear in the changing room.[47] The Court there recognised the harm done to the claimants, and construed provisions of the Public Order Act to include the "affront to

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[42] N.A. Moreham, above n 7, at 3
[43] N.A. Moreham, above n 7, at 2.
[44] Bloustein, above n 26, at 165.
[45] *C v Holland*, above n 8.
[46] Above n 8, at [94].
[47] *Vigon v Director of Public Prosecutions* [1998] Crim LR 289 (QB).

dignity" within the meaning of s 5(1).[48] Additionally, English courts have confirmed that surreptitious photography and videography can amount to harassment under the Protection Against Harassment Act.[49] The Court in *Crawford v CPS* held the defendant liable for surreptitiously taking photographs of his former wife and her new partner.[50] Further, there are statutory protections against voyeurism in the English Sexual Offences Act 2003 which render it an offence to "observe for sexual gratification a person doing a private act, knowing that that person does not consent to being observed for the observer's sexual gratification".[51] Importantly, the Act defines a "private act" to be "in a place which […] would reasonably be expected to provide privacy […]". The Act is not designed to capture journalists pursuing "legitimate journalistic activity", however photographers who obtain photographs of celebrities in the course of a "private act" could still be liable under the Act if the photographs will facilitate the sexual gratification of others.[52]

Comparably, the American privacy tort recognises intrusions into seclusion.[53] Whata J explicitly refers to American intrusion jurisprudence,[54] thus the following cases are highly relevant to the interpretation of the New Zealand formulation of intrusion. *Harkey v Abate* found the owner of an ice-skating rink liable for installing mirror panels in the roof which provided view of the women's changing room.[55] The majority of the Court of Appeals of Michigan held that the mere fact of installation of a viewing device was sufficient to establish the tort.[56] More recently, the Supreme Court of New Jersey in *Friedman v Martinez* agreed with the view taken by the Court of Appeals of Michigan:[57] that the tort turns on whether there has been placement of a surveillance device in a location reasonably expected to be private.[58] Some examples given of locations reasonably expected to be

[48] Above n 47, at [16]; Public Order Act 1986 (UK) s 5(1).
[49] N. A. Moreham "Intrusion Into Physical Privacy" in N. A. Moreham and Sir Mark Warby (ed) *Tugendhat and Christie: The Law of Privacy and the Media* (Oxford University Press, Oxford 2016) 429 at 431; Protection Against Harassment Act 1997 (UK).
[50] *Crawford v CPS* [2008] EWHC 148.
[51] Sexual Offences Act 2003 (UK) s 67(1).
[52] N. A. Moreham, above n 49, at 440.
[53] Above n 25, at [376].
[54] Above n 8, at [11]-[15].
[55] *Harkey v Abate* [1983] 131 Mich. App. 177.
[56] Above n 55, per P.J. Hood and M.R. Knoblock.
[57] *Harkey v Abate*, above n 55.
[58] *Friedman v Martinez* 242 N.J. 449 (NJ 2020).

private were private bedrooms,[59] hospital rooms,[60] toilets,[61] and dressing rooms.[62] Intrusion into these contexts where there is a legitimate expectation of privacy, according to *Soliman v Kushner Companies,* amounts to a direct assault on the personhood of the plaintiff.[63]

Cementing the concept that harm arises from an intrusion in itself, regardless of subsequent publicity, multiple judgments have explicitly recognised that no publication is required for harm to eventuate. The pivotal Ontarian intrusion case of *Jones v Tsige* found the defendant liable for repeatedly accessing the banking records of her partner's former wife, despite her not disseminating the information in any way.[64] This view is supported in English law by *Tchenguiz*,[65] a case analogous to *Jones v Tsige.* In an extension of this principle, where courts have been led to consider liability for mere photography or recording, they have found that in some cases the very fact of recording itself may be actionable.[66] These cases recognise that harm is suffered by an intrusion into one's affairs where a reasonable expectation of privacy applies – even where there is no publicity attached.

Considering the reasoning of these cases together, a theme emerges: harm is suffered by intrusions into affairs or locations where a reasonable expectation of privacy exists, even if there is no later dissemination of the information obtained by the intrusion. Courts have in various ways recognised the harm that follows unwanted and/or unknown watching. There is no reason why this harm would not also occur following comparable surveillance in prison. However, this begs the question: can there be an actionable intrusion into one's privacy, causing harm, if the person suffering the intrusion is subjected to the surveillance by law?

D Department of Corrections' legislative purpose

Both CCTV surveillance and prohibition of privacy screening in psychiatric segregation units are prescribed by statute, and prima facie consonant with the legislative purposes

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[59] *Miller v National Broadcasting Company,* 187 Cal. App. 3s 1436 (Cal. App. 1986).

[60] *Estate of Berthiaueme v Pratt,* 365 A.2d 792 (Supreme Judicial Court of Maine 1976).

[61] *Harkey v Abate*, above n 55.

[62] *Doe by Doe v B.P.S Guard Services Inc.,* 945 F.2d 1422 (8th Cir. 1991).

[63] *Soliman v Kushner Companies Inc.,* 433 N.J. Super. 153 (NJ Super. 2013).

[64] *Jones v Tsige* [2012] ONCA 32, 108 OR (3d) 241.

[65] *Tchenguiz v Imerman* [2010] EWCA Civ 908, [2011] 2 WLR 592 at [69]-[72].

[66] For example: *Wood v Commissioner for Police of the Metropolis* [2009] EWCA Civ 414, [2009] 4 All ER 951 at [34]; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB), [2008] EMLR 20 at [17].

which underpin the Department of Corrections. Ensuring that custodial sentences are carried out in a safe manner, improving public safety generally, rehabilitating offenders, and contributing to the maintenance of a just society are all components of Corrections' statutory mandate.[67] Given the greater presence of mental health risks in psychiatric segregation facilities,[68] CCTV surveillance serves these statutory purposes and thus fits into the objectives of Corrections. Upon this basis, it is ostensibly justifiable to monitor incarcerated people via CCTV. However, there are strong sociological and psychological reasons why these surveillance measures may lead to perverse outcomes rather than meeting the objectives they are designed for – casting doubt on the strength of the justifications for this surveillance. The following paragraphs comprise a brief interdisciplinary analysis of the impacts of surveillance in order to articulate how these measures may thwart rehabilitation and safety objectives.

E Sociological perspectives on surveillance

Surveillance in an incarceration context, while perhaps justifiable, is an intrusion upon privacy. Especially being watched while using the toilet, showering, or undressing due to the prohibition of privacy accommodations for ablutions.[69] Justifications advanced, even if robust, do not reduce the harm endured by the incarcerated people who are disproportionately subjected to these kinds of state intrusions upon privacy.[70]

Sociological literature on surveillance has examined the nexus between privacy and wellbeing, and recognises ontological security as correlated with improved mental health and positive social relationships.[71] The concept of ontological security refers to a stable mental state derived from a sense of continuity in regard to the events in one's life.[72] Ontological security is an important facet of wellbeing, as it signifies a general sense of stability and security in one's life. Privacy is inherently connected to ontological security. In a study of people with serious mental illness housed after homelessness, it was identified that privacy and freedom from supervision are dimensions of ontological security.[73]

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[67] Above n 5, s 5.

[68] Request C166446, above n 19.

[69] Above n 2, sch 2, pt C.

[70] Sydney Ingel et al. "Privacy violations and procedural justice in the United States prisons and jails" (2020) 15 Sociology Compass at 2.

[71] Alana Rosenberg et al. ""I don't know what home feels like anymore": Residential spaces and the absence of ontological security for people returning from incarceration." (2021) 272 Social Science & Medicine at 2.

[72] Tony Bilton et al. *Introductory Sociology* (3rd ed, Macmillan, London, 1996) at 665.

[73] Rosenberg et al., above n 71, at 2.

Additionally, ontological security in New Zealand homeowners has been studied and found to be related to a "feeling of control based on being free from surveillance".[74] The relationship between privacy and wellbeing is multifaceted, and ontological security is one illustration of this.

Another illustration of the centrality of privacy in the wellbeing of people generally is the role of architectural privacy and its relationship to wellbeing. Studies done on prison architecture have found that privacy is an essential component of humanising prison environments.[75] Some of this research has shown that privacy in correctional contexts can have three principal purposes: "to deal with incarceration, for introspection, and to regain a sense of oneself".[76] With specific regard to privacy while undertaking ablutions, it has been shown that the presence of a privacy screen to conceal a toilet can increase one's sense of privacy, which in turn lowers levels of stress hormones and increases residents perceptions of environmental control.[77] Privacy is part of a humane living environment in prison, and some element of architectural privacy can have beneficial effects on residents who otherwise are subject to significant limitations on their privacy due to their incarceration.

Research has shown that the usage of CCTV expands the power and control of correctional staff which impedes any remaining sense of privacy that residents might have.[78] This is demonstrative of the significant impacts of surveillance in an incarceration context and raises questions as to how justifiable these practices are. There is limited research surveying the moral and ethical implications of surveillance in prison contexts,[79] but other literature analysing the effects of surveillance can be used to draw inferences as to the effects of surveillance on residents of psychiatric segregation facilities.

Finally, there is a distinction between surveillance for the purposes of monitoring versus voyeuristic purposes. Surveillance for monitoring purposes is primarily about safety and security concerns, whereas voyeuristic surveillance is undertaken to obtain sexual

[74] Rosenberg et al., above n 71, at 2.

[75] Kelsey V. Engstrom and Esther F.J.C van Ginneken "Ethical Prison Architecture: A Systematic Literature Review of Prison Design Features Related to Wellbeing" (2022) 25(3) Space and Culture 479 at 491.

[76] Engstrom and van Ginneken, above n 75, at 492.

[77] Engstrom and van Ginneken, above n 75, at 492.

[78] Engstrom and van Ginneken, above n 75, at 495.

[79] Engstrom and van Ginneken, above n 75, at 495.

gratification.[80] Non-consensual voyeurism is generally considered to be highly offensive and is explicitly denounced by statutory prohibitions on such behaviour.[81] On the contrary, monitoring, while not always appropriate, is justifiable in some circumstances and is even carried out to achieve positive societal aims. In appropriate contexts there is societal support for monitoring, and there are instances of statutory warrants which allow monitoring by surveillance.[82] Considering CCTV surveillance in prisons, the primary purpose for such surveillance is monitoring incarcerated people to mitigate safety concerns.[83] The statutory provisions which empower Corrections to conduct CCTV surveillance do not suggest voyeuristic purposes. However, considering the second privacy issue – the extent to which the CCTV footage is viewable – it is possible that the careless broadcasting of the footage is reckless towards the opportunity for voyeurism to be engaged in. That is not to allege voyeurism against Corrections staff, but rather to acknowledge that there is at least a risk of this footage being used inappropriately given the nature of the private moments being intruded upon.

F Psychological impacts of surveillance

Literature on the psychological effects of surveillance both in an incarceration context and otherwise indicates that it can exacerbate pre-existing mental health issues, negative emotions, and can lead to outcomes that are at odds with the correctional purpose of rehabilitation.

In one qualitative study assessing the impact of surveillance on women on parole, it was found that high levels of stress, fear, and anxiety were associated with being subjected to surveillance.[84] Surveillance in that context was implemented to assist these women getting their lives back on track upon release from prison. However, the surveillance appeared to produce perverse outcomes where these women experienced increased stress and anxiety, and a sense of powerlessness. These findings echo the experiences of the claimant in *C v Holland*, who after suffering an unauthorised intrusion upon her physical privacy,

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[80] Daniel Chandler and Rod Munday *A Dictionary of Media and Communication* (2nd ed, Oxford University Press, published online, 2016) "voyeurism".

[81] For example: Crimes Act 1961 s 216H and Harmful Digital Communications Act 2015 s 22A.

[82] For example: Corrections Regulations 2005 s 113; Search and Surveillance Act 2012 s 46.

[83] Request C166446, above n 19.

[84] Tara D. Opsal "Women on Parole: Understanding the Impact of Surveillance" (2009) 19 Women and Criminal Justice 306 at 320.

experienced ongoing distress such as "insomnia, nightmares, mistrust of others".[85] The context of the wrongdoing in *C v Holland* was voyeurism, which is important to distinguish from monitoring. How different the distress would have been for C if the intrusion was for the purposes of monitoring her to mitigate risk is difficult to identify. However, it is noteworthy that the surveillance carried out upon the women on parole led to similar experiences of distress to those suffered by C, granted perhaps at a lower degree of severity.[86]

Further, reports of staff members and patients at an inpatient psychiatric hospital indicate that the use of continuous surveillance is injurious to long-term mental health and may increase negative emotions such as anger and paranoia.[87] Applying these findings to an incarceration context yields concern, as this exacerbation of negative emotions and mental illness could lead to erratic behaviour, violence, and self-harm – all of which are contrary to the correctional purposes of safety and security.[88] Further, if these privacy intrusions are characterised as unjustified, procedural justice may be undermined. An equally concerning prospect is that a lack of procedural justice may erode institutional legitimacy and lead to poorer relationships between residents and correctional staff, and generally a poorer relationship between the public and the Department of Corrections.

IV Tort of intrusion into seclusion

Having established the harm that flows from this kind of surveillance, the question is: what legal avenues are open to victims of the privacy intrusions ingrained in Corrections' surveillance practices? As previously discussed, a judicial review action pertaining to the Bill of Rights would be open to a claimant but is beyond the scope of this paper. Instead, the following analysis seeks to articulate the unlawfulness of Corrections' practice using the tort of intrusion.

Surveying the privacy interest at a broad level, Whata J found that New Zealand has "embraced freedom […] from unauthorised recordings of personal, particularly intimate

[85] NA Moreham "New Technologies, Established Ideas: Drone Cameras and the Privacy Torts" (2023) 55 VUWLR at 11.

[86] Tara D. Opsal, above n 84, at 320.

[87] Kirsten Barnicot, Bryony Insua-Summerhayes, Emily Plummer, Alice Hart, Chris Barker, and Stefan Priebe "Staff and patient experiences of decision-making about continuous observation in psychiatric hospitals" (2017) 52 Social Psychiatry and Psychiatric Epidemiology 473 at 477.

[88] Ingel et al., above n 70, at 8.

affairs whether published or not”.[89] Prior to that, Tipping J regarded the invasion of privacy as a “common law wrong which is founded on the harm done to the plaintiff by conduct which can reasonably be regarded as offensive to human values”.[90] The point here is that the impacts of surveillance practices in psychiatric segregation facilities are sufficiently harmful that in other contexts we regard it as screaming out for a remedy. To borrow a phrase from Sharpe JA of the Ontario Court of Appeal: “[T]he law of [New Zealand] would be sadly deficient if we were required to send [the victims] away without a legal remedy”.[91] The fact that New Zealand has adopted the tort of intrusion symbolises that this is a type of harm that our society has condemned. Therefore, incarcerated people should be able to use the tort of intrusion to obtain relief for these intrusions also. The proceeding analysis considers whether a viable common law action of intrusion upon seclusion exists in this context.

G Intentional and unauthorised intrusion

Applying the first limb of the tort to the privacy intrusions suffered by residents of CCTV monitored psychiatric segregation units, it becomes apparent that authorisation is a key issue. Granted the intrusions are intentional, they cannot be said to be unauthorised. In his elaboration on the tort, Whata J unequivocally states that “unauthorised” excludes lawfully authorised intrusions. Corrections are authorised by ss 200(1)-(3) and 202(b) of the Corrections Act 2004 to undertake visual recording of incarcerated people pursuant to the Corrections Regulations 2005. However, for these regulations to be lawful they must comply with the Bill of Rights.[92] Further, in applying and developing the common law, courts must give effect to the rights and freedoms contained in the Bill of Rights.[93] Therefore, where apparent authorisation is found to be contrary to the Bill of Rights, the intrusion should be considered to be unauthorised for the purposes of satisfying the first limb of the tort.

While the Bill of Rights is not supreme law in New Zealand, the presumption of consistency indicates a parliamentary intention that the Bill of Rights be upheld. This view is supported by commentators who advance the argument that any legislation which

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[89] *C v Holland*, above n 8, at [32].
[90] *Hosking v Runting*, above n 24, at [246].
[91] *Jones v Tsige* [2012] ONCA 32, at [69].
[92] Above n 6, s 6.
[93] *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 at 32; *Solicitor-General v Radio New Zealand* [1994] 1 NZLR 48 at 58; *Duff v Communicado Ltd* [1996] 2 NZLR 89 at 99; *Hosking v Runting*, above n 24, at [111].

prescribes how detained people are to be treated must be sufficiently flexible to allow for interpretative consistency with the Bill of Rights.[94] Notwithstanding s 4 of the Bill of Rights, the presumption of consistency applies to the Corrections Act 2004. Section 4 however, prohibits the implied repeal of any enactment that is inconsistent with the Bill of Rights.[95] Accordingly, the CCTV surveillance of incarcerated people and denial of privacy screening may be lawful despite breaching the Bill of Rights.

However, in tension with s 4 of the Bill of Rights, s 6 determines that where an enactment can be given a Bill of Rights consistent meaning, that meaning will be preferred.[96] Therefore, because ss 200(1)-(3) and 202(b) of the Corrections Act 2004 do not unambiguously overrule the Bill of Rights, these empowering provisions must be read in light of the Bill of Rights.[97] The question is whether the presumption of consistency extends to the Corrections Regulations 2005, as delegated legislation.

According to *Cropp*[98] and *Unison Networks*[99] if the delegated legislation is in line with the empowering provision, it will not be ultra vires. However, delegated legislation must also conform to any limitations imposed on the empowering provision.[100] As established above, ss 200(1)-(3) and 202(b) of the Corrections Act 2004 must be interpreted consistently with the Bill of Rights, therefore any subordinate legislation[101] must also comply with the Bill of Rights. Consequently, the Corrections Regulations 2005[102] are subject to the constraints of the Bill of Rights.

As discussed earlier,[103] the relevant right is the right of incarcerated people to be treated with humanity and with respect for human dignity per s 23(5).[104] However, guarantees in the Bill of Rights are not absolute: common law developments can legitimately impinge on these rights and freedoms where justified.[105] When state bodies seek to limit rights and

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[94] Butler and Butler, above n 34, at 1183.

[95] Above n 6.

[96] Above n 6.

[97] Above n 6, s 6.

[98] *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [33]-[35].

[99] *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50]-[55].

[100] Above n 99, at [50]-[55]; Above n 98, at [33]-[35].

[101] Above n 2, sch 2 pt C.

[102] Above n 2, sch 2 pt C.

[103] See *What is at stake? The nexus between privacy and dignity.*

[104] Above n 6.

[105] Above n 6, s 5.

freedoms contained in the Bill of Rights, the state must show that the limitation is "demonstrably justified".[106] The rationale for s 5 is to create a culture of justification, which is integral to the function of the Bill of Rights.[107] To comply with this culture of justification, the Department of Corrections cannot satisfy the Bill of Rights by deferring to wholesale justifications such as "safety" without meeting evidential and proportionality demands. Section 5 of the Bill of Rights creates a "two-stage process" whereby, 1) the scope and purpose of the relevant right is determined, and 2) consideration is given to the reasonableness of any limit placed on the right.[108] The following analysis sets out to determine if the limitations on s 23(5) are demonstrably justified,[109] and therefore whether the intrusions are authorised.

1 Determining the scope of s 23(5)

The scope and purpose of s 23(5) was discussed by the High Court in *Taunoa v Attorney General*.[110] The Court compared the overlapping language of s 23(5) and s 9[111] – the "right not to be subjected to torture or cruel treatment" – to establish the threshold for a breach of s 23(5). *Taunoa* establishes that the threshold for establishing a s 9 breach is much higher than the respective threshold applicable to s 23(5).[112] Leading commentary on the Bill of Rights agrees that s 23(5) includes conduct that is less reprehensible than conduct which will trigger s 9, but "still unacceptable in New Zealand society".[113]

The Supreme Court in *Taunoa v Attorney General* found the conditions of the "Behaviour Management Regime" were in breach of s 23(5).[114] Those subject to the regime were segregated and lost privileges such as access to television and hobbies, and could only leave their cell for one hour each day.[115] Further, the conditions of the regime were more strict than those endured by those with maximum security classifications.[116] The Supreme Court formulated an approach later summarised by the Court of Appeal in *Toia v Prison Manager*: (a) Section 23(5) is infringed by state conduct that is not outrageous or

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[106] Above n 6, s 5.
[107] Butler and Butler, above n 34, at 162.
[108] Butler and Butler, above n 34, at 162.
[109] Above n 6, s 5.
[110] *Taunoa v Attorney General* [2004] 7 HRNZ 379 (HC) at [272].
[111] Above n 66.
[112] Above n 110, at [272].
[113] Butler and Butler, above n 34, at 1183.
[114] *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429.
[115] Above n 114, at [15]-[21].
[116] Above n 114, at [21].

reprehensible, but still worthy of being marked as unacceptable in our society; (b) The section affirms the obligation of the state to ensure humane treatment of those it has deprived of liberty; and (c) It captures conduct that lacks humanity but falls short of cruelty, conduct that is demeaning but not degrading and conduct that is clearly excessive in the circumstances but not grossly so.[117]

Subsequent cases have illustrated the application of s 23(5), providing helpful guidance in understanding how s 23(5) might apply to the privacy breaches occurring in psychiatric segregation facilities. Corrections' treatment of the claimant in *Reekie v Attorney-General* included having his ankles restrained on a tie-down bed, being held in isolation cells without windows, denial of recreation time, and unnecessary routine strip searches.[118] The High Court considered the ongoing deficiencies in the treatment of the claimant to be highly relevant, indicating the relevance of an enduring practice where it is found to be inhumane.[119] Comparatively, the Court found in *Toia v Prison Manager* that an incident that was brief in nature, coupled with a lack of harm, was not sufficient to meet the threshold required by s 23(5).[120] This shows a court may be more prepared to take incidences together to find a breach of s 23(5), especially where the inhumane treatment is ongoing. This approach is also reflected in the case of *Minister of Immigration & Anor v Udompun* which preceded *Taunoa*. In *Udompun* the claimant was a female immigration detainee who had not been provided with sanitary products or the opportunity to change her clothes and have a shower while she was menstruating.[121] She had arrived on a flight from Thailand and had been questioned for a long time. There the Court of Appeal held that the circumstances taken together could amount to a breach of s 23(5).[122]

Applying the case law considering s 23(5) and the threshold established by *Taunoa* to the privacy intrusions occurring in psychiatric segregation facilities, s 23(5) is engaged. The act of watching people while using the toilet, shower, or undressing would be deemed outrageous or reprehensible in everyday contexts, and therefore easily satisfies the requirement that the conduct be "worthy of being marked as unacceptable in our society".[123] While a lower degree of privacy may be justified in the context of incarceration

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[117] *Toia v Prison Manager* [2015] NZCA 624 at [28].

[118] *Reekie v Attorney-General* [2012] NZHC 1867 at [290].

[119] Above n 118.

[120] *Toia v Prison Manager* [2015] NZCA 624 at [30].

[121] *Minister of Immigration & Anor v Udompun* [2005] NZCA 244 at [141]-[147].

[122] Above n 121, at [148].

[123] *Taunoa*, above n 114, at [170] per Blanchard J.

and mental health risk, watching people undertaking ablutions without any degree of privacy afforded to them is excessive in the circumstances.[124]

Corrections may take the view that the intrusion upon privacy while residents undertake ablutions is merely incidental, rather than an intentional watching, and therefore less blameworthy. However, Elias CJ is unequivocal in *Taunoa* that s 23(5) imports a positive obligation of humane treatment.[125] Further, the Court of Appeal found in *Udompun* that an inadvertent omission may still amount to a breach of s 23(5), that is: intention to subject a person to inhumane treatment is not required for s 23(5) to be breached.[126] On this basis, it would be inappropriate for Corrections to avoid the ambit of the Bill of Rights by arguing that the inhumane treatment in question is not intended but incidental.

Thus, the scope of s 23(5) includes a positive obligation to provide incarcerated people the requisite degree of privacy while undertaking ablutions to ensure their inherent dignity is protected and humane treatment achieved.

2 Demonstrably justified limitations?

A limitation of the right to private ablutions might, however, be demonstrably justified in a free and democratic society and therefore lawful.[127] Corrections have advanced safety as a justification for the privacy intrusions in psychiatric segregation facilities.[128] As a paramount statutory objective[129] of Corrections in carrying out custodial sentences, safety concerns may justify limitations of the right to private ablutions. However, s 5 of the Bill of Rights confers an onus on the party seeking to enforce a limitation, in this instance Corrections, to prove the validity of that limitation.[130] Corrections must demonstrate that the limitation is reasonable per s 5 for it to be valid.[131] To determine when this is the case the Supreme Court in *Hansen v R* developed the following methodology for applying s 5.[132]

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[124] *Taunoa*, above n 114, at [177] per Blanchard J.

[125] *Taunoa*, above n 114, at [7] per Elias CJ.

[126] Udompun, above n 121, at [134].

[127] Above n 6, s 5.

[128] Request C169960, above n 4.

[129] Corrections Act, above n 5.

[130] Butler and Butler, above n 34, at 162.

[131] Above n 6.

[132] *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] per Tipping J.

For the limitation to be valid, it must serve a purpose sufficiently important to justify the curtailment of the right to private ablutions.[133] The purpose of the limitation is to monitor incarcerated people who are at risk of episodes of mental ill-health. Given the statutory imperative of safe custodial management, Corrections are concerned with ensuring those housed in psychiatric segregation facilities are kept safe and protected from incidences of self-harm and suicide. The European Court of Human Rights has upheld consonant reasoning: there are instances where constant CCTV monitoring of certain areas of penal institutions is justified to prevent harm to the incarcerated person's health.[134] The Department of Corrections is concerned with the preservation of the lives of incarcerated people, acknowledging the significant vulnerability of the incarcerated population.[135] Therefore, preventing the self-harm or suicide of people in custody is a sufficiently important purpose and consequently some curtailment of the right contained in s 23(5) may be justified in these circumstances.

However, the limiting measure must also be rationally connected with its purpose.[136] The purpose of constant CCTV monitoring in psychiatric segregation facilities is to ensure that Corrections staff are always aware of the state of residents and thus able to intervene to protect their safety if necessary.[137] International jurisprudence supports this approach, indicating that CCTV surveillance in penal institutions is acceptable in some circumstances. For example, the European Court of Human Rights held that permanent camera surveillance of the applicant in *Van der Graaf v. the Netherlands* "pursued the legitimate aim of preventing the applicant's escape or harm to his health".[138] The same Court in *Gorlov and Others v Russia* accepted that having regard to the standard requirements of detention, it may be necessary to install permanent CCTV surveillance in certain areas of penal institutions.[139] CCTV surveillance and the prohibition of privacy screening are therefore rationally connected to the purpose of safe custodial management.

Next, the limiting measure must impair the right or freedom "no more than is reasonably necessary for sufficient achievement of its purpose".[140] Considering current surveillance

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[133] Above n 132, at [104] per Tipping J.

[134] *Van der Graaf v the Netherlands* ECHR 8704/03, 1 June 2004 at 19; *Gorlov and Others v Russia* ECHR 27057/06, 2 July 2019 at 23.

[135] Request C166446, above n 19.

[136] Above n 132, at [104] per Tipping J.

[137] Request C166446, above n 19.

[138] *Van der Graaf v the Netherlands*, above n 134, at 19.

[139] *Gorlov and Others v Russia*, above n 134, at 23.

[140] *Hansen v R,* above n 132, at [104] per Tipping J.

practices in New Zealand prisons, incarcerated people's right to be treated with humanity and respect for their inherent dignity is seriously impaired. The objectives of safe custodial management and rehabilitation can be achieved through a lesser intrusion into incarcerated people's privacy.

Auckland South Corrections Facility is a private prison not subject to the Corrections Regulations which prevents privacy screens in psychiatric segregation units.[141] The practices there exemplify that safe custodial management in psychiatric segregation facilities can be achieved while maintaining the right to privacy. The Ombudsman commended the installation of privacy screening to maintain the dignity and privacy of incarcerated people subject to CCTV monitoring.[142] In response to a request made under the Official Information Act, Corrections have confirmed that Auckland South Corrections Facility has privacy screening installed in its psychiatric segregation units.[143] Over the last five years in these units there have been only eleven instances of self-harm where there has been no threat to life,[144] and zero instances of suicide or self-harm which posed a threat to life.[145] Corrections unequivocally state that the privacy screening has not proved to be a barrier to achieving safe custodial management: "No events in the At-Risk Unit at ASCF have been related to the installation of privacy screens".[146] Evidently, safe custodial management and rehabilitation can be achieved via a lesser limitation of privacy rights. Installing privacy screens in units subject to constant CCTV monitoring would lead to an increase in incarcerated people's privacy, and therefore better protection of their s 23(5) rights, without curtailing the objectives of those cells.

Additionally, in 2017, a National Working Group was tasked with exploring how incarcerated people's privacy could be protected. A successful trial of pixilated CCTV footage was completed in January 2023, and the pixilation of CCTV cameras identified

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[141] Auckland South Corrections Facility Report, above n 4, at 14.

[142] Auckland South Corrections Facility Report, above n 4, at [8].

[143] Request C170141 made pursuant to the Official Information Act 1982: *"In the ARU's at Auckland South Correctional Facility, have there been any incidences of self-harm, suicide, or other serious mental-health related events? If yes, have these been related to the existence of privacy screening installed around the hygiene areas of the cell? Has the privacy screening posed any challenges to Corrections staff seeking to ensure the safety of those housed in the ARU's?"* Email response of 27 July 2023.

[144] Self-harm – no threat to life is defined (by Corrections) as an intentional act of harm to oneself which would have most probably not have led to death if there was no immediate intervention.

[145] Request C170141, above n 143.

[146] Request C170141, above n 143.

which cover cell toilets is progressing currently.[147] To the credit of Corrections, this project aims to "balance the need to enhance prisoner privacy, while providing the necessary oversight to ensure people's safety".[148] This project demonstrates that achieving safety objectives while imposing much lesser restrictions on the s 23(5) right is possible.

The second privacy issue regarding the extent to which the footage is viewable is simply an unreasonable infraction upon residents' rights per s 23(5).[149] CCTV footage of psychiatric segregation cells has been reported by the Ombudsman to be viewable in communal accessways, staff bases with unrestricted access, and therefore is open to be viewed by other residents, unconcerned staff, and even members of the public.[150] There appears to be no reason for the unrestricted broadcasting of this footage. It is merely sloppy practice, demonstrating a flagrant disregard for the humanity and inherent dignity of residents of psychiatric segregation facilities. The extent of the broadcasting of this CCTV footage is thus irreconcilable with the requirement that a right limitation is no more than what is reasonably necessary for sufficient achievement of its purpose.[151]

Illustrated by privacy screening and pixilation software being shown to be viable methods to protect privacy while maintaining the necessary oversight, current practices amount to an impairment of the s 23(5) right that is more than reasonably necessary.[152]

Lastly, the *Hansen* methodology requires consideration of whether the limit is in due proportion to the importance of the objective.[153] Regarding the importance of the objective, it must be recognised that the preservation of life and safe custodial management are of paramount importance. Particularly as a public institution, Corrections ensuring the safe custodial management of residents in psychiatric segregation facilities is a matter of public interest and public importance. However, the limit on the s 23(5) right is extensive.

Safety is a significant objective and may justify a significant limitation; however, the relevant objectives of Corrections comprise more than safety per se. Another aspect of Corrections' purpose is to assist in the rehabilitation of incarcerated people, therefore

[147] Request C166446, above n 19.
[148] Request C166446, above n 19.
[149] Above n 6, s 23(5).
[150] Otago Corrections Facility Report, above n 4, at [3].
[151] *Hansen v R,* above n 132, at [104] per Tipping J.
[152] *Hansen v R*, above n 132, [104] per Tipping J.
[153] *Hansen v R,* above n 132, at [104] per Tipping J.

rehabilitative considerations should inform the analysis here.[154] In this case, the infraction on privacy and human dignity is so severe that the limitation on the right undermines the purpose of the limitation itself. Referring to the psychological impacts of surveillance discussed earlier, the ongoing privacy intrusions suffered by residents of psychiatric segregation facilities are linked to poor mental health outcomes.[155] If safety and rehabilitation are the rationales underpinning this kind of surveillance, the perverse outcome of increased mental health distress surely indicates that the limitation of the s 23(5) right is out of all proportion to the importance of the objective.

While the limitation of privacy serves an important purpose, that of safe custodial management, the limitation is more than reasonably necessary to achieve that purpose. The current measures result in the perverse outcomes of metal health distress and erosion of inherent dignity, which are disproportionate to the importance of the objective. In particular, the safety rationale becomes very thin when it comes to the CCTV footage being viewable by members of the public upon visiting these facilities. Therefore, the limitation upon the privacy rights protected by s 23(5) of the Bill of Rights are not demonstrably justified in a free and democratic society, per s 5.[156] Consequently, the Corrections Regulations which prevent privacy screening in psychiatric segregation cells are ultra vires. Accordingly, the intrusion upon incarcerated people's privacy is unauthorised for the purposes of satisfying limb one of the intrusion tort.[157]

H Seclusion

Per the second limb of the tort, the intrusion must be into intimate personal activity, space, or affairs, i.e., seclusion.[158] Whata J makes it clear not all intrusions into private matters will be actionable, rather they must be private matters that "most directly impinge on personal autonomy".[159] Using the toilet, showering, or undressing are private instances that are at the heart of what should be captured by this limb of the tort – what could impinge on personal autonomy more than intrusion into these moments? The defendant's conduct of surreptitiously recording C while she was undressing and in the shower was found to be an intrusion into private matters sufficient enough to establish the tort of intrusion upon

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[154] Corrections Act, above n 5, s 5.
[155] See *The impacts of surveillance*.
[156] Above n 6.
[157] *C v Holland*, above n 8, at [94].
[158] Above n 8, at [95].
[159] Above n 8, at [95].

seclusion.[160] Analogous to the facts in *C v Holland* is the practice of CCTV surveillance, albeit not surreptitious, of residents of psychiatric segregation facilities in New Zealand prisons. The similarity lies in the fact that in both cases the inherent dignity of the person is at stake while they are undertaking ablutions normally considered to be private. In moments such as using the toilet, showering, or undressing, any reasonable person would expect a degree of privacy to uphold their inherent dignity. Further, in these moments there is a strong interest in personal autonomy: to decide whether, and how, a normal expectation of privacy may be reduced in certain contexts and with certain individuals. Therefore, the second limb of the tort is unquestionably satisfied.

I Reasonable expectation of privacy

The third and fourth limbs of the tort are designed to reflect the privacy tort established in *Hosking* and require that the intrusion must infringe upon a "reasonable expectation of privacy", and that this intrusion is "highly offensive to a reasonable person".[161] Regarding the reasonable expectation of privacy, using the toilet, showering, or undressing are fundamentally private activities in our culture. Such was found in *C v Holland*.[162] What will constitute a reasonable expectation of privacy in prisons will differ to general society due to the level of oversight required to maintain safe custodial management. It is accepted that the nature of a prison environment inhibits one's privacy. However, the earlier discussion of limb one and s 23(5) of the Bill of Rights[163] has established that privacy considerations are not completely obliterated in prison. It would be unreasonable to conclude that they are. Therefore, a reasonable expectation of privacy with respect to toileting, showering, and undressing, does endure. The third limb of the tort is correspondingly satisfied.

J Highly offensive intrusion

The final element of the tort requires that the infringement of the reasonable expectation of privacy is highly offensive.[164] Whata J gives no guidance as to how he determined that the defendant's intrusion was highly offensive – it appears that this is self-evident in the fact of the intrusion being into intimate personal activity. It is noteworthy that the "highly

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[160] Above n 8, at [99].
[161] Above n 8, at [96].
[162] Above n 8, at [98].
[163] See *Intentional and unauthorised intrusion*.
[164] *C v Holland*, above n 8, at [94].

offensive" limb of the *Hosking* privacy tort is doubted by Tipping J, and academics.[165] At the heart of the privacy interest is dignity, an interest which a focus on objectively "highly offensive" intrusions obscures.[166] Where a reasonable expectation of privacy has been established, any intrusion upon that will be highly offensive – thus rendering this limb of the tort practically useless. In the context of the privacy tort, this focus on the "highly offensive" requirement has led to a judicial focus on the tone of a publication, i.e., has the plaintiff been cast in a positive or negative light?[167] The problem with this in the intrusion upon seclusion tort is that it demands consideration of the manner in which the intrusion occurred, and whether this was itself "highly offensive". Where the intrusion upon intimate personal activity has already been found to be in breach of a reasonable expectation of privacy, this further consideration is spurious.

C v Holland the defendant took only two videos of the victim,[168] and without minimising the severity of those intrusions, it is important to recognise that fact in conjunction with the long-lasting distress and negative impacts on her mental health that the victim suffered.[169] If that is the consequence of two intrusions comprising less than five minutes of video footage,[170] imagine the level of distress suffered by a person subjected to similar intrusions on a constant basis. This should be highly offensive to a reasonable person.

With the critique in mind, applying the "highly offensive" limb to the surveillance practices in psychiatric segregation facilities, the threshold would be met.

An additional matter to address is that unlike the privacy tort,[171] publication is not required for there to be an action under intrusion upon seclusion.[172] Accordingly, it was not a hurdle that there was no evidence the defendant in *C v Holland* published or showed the footage to anyone.[173] Comparably, it is salient that the CCTV footage obtained by Corrections in psychiatric segregation facilities, while not published, is capable of being viewed by a

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[165] Above n 24, at [256]; N.A. Moreham, above n 30, at 240-243.
[166] N.A. Moreham, above n 30, at 240.
[167] N.A. Moreham, above n 30, at page 241.
[168] Above n 8, at [2].
[169] N.A. Moreham, above n 85, at page 11.
[170] Above n 8, at [2].
[171] *Hosking v Runting*, above n 24, at [117].
[172] *C v Holland*, above n 8, at [94].
[173] Above n 8, at [2].

broad class of people.[174] This puts the privacy intrusions of Corrections at a greater degree of severity than that in *C v Holland*.

The preceding analysis demonstrates that the tort of intrusion is a viable avenue to recourse for incarcerated people subject to surveillance of their private ablutions. The strict requirements of the tort should be extended to capture intrusions that are prima facie authorised, but in breach of the Bill of Rights. The tort was designed for precisely this kind of harm, and the state should not escape liability for such harm by relying on statutory regulations that fail to uphold the rights and freedoms protected by the Bill of Rights.[175]

V Conclusion

This paper has interrogated the justifications underlying Corrections' intensive surveillance of psychiatric segregation units in prisons, which results in severe privacy intrusions. Analysis of the competing imperatives of safety and privacy has demonstrated that the current settings are tortious, and the justifications advanced are categorically insufficient. Illuminating Corrections' disproportionate favouring of safety interests without the evidential foundation to do so, this paper argues that s 23(5) of the Bill of Rights is consequently breached.[176]

The harm suffered by people who are being watched via CCTV monitoring while using the toilet, shower, or undressing, is egregious. This type of intrusion upon physical privacy is shown to have ongoing negative impacts on victims' mental health, personal autonomy, and sense of self-worth and personhood.[177] Sloppy surveillance practices and the lack of privacy screening in psychiatric segregation facilities in New Zealand prisons means that residents of these facilities are subject to these gross privacy intrusions on a routine basis. Whata J's intrusion upon seclusion tort is designed to remedy intrusions upon physical privacy of this kind.[178] Thus, the state should be liable under the intrusion upon seclusion tort on the basis that the intrusions are in breach of the Bill of Rights and are, therefore, unauthorised.

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[174] Peter Boshier, above n 9.

[175] Above n 6, s 23(5).

[176] Above n 6.

[177] See *The impacts of surveillance*.

[178] *C v Holland*, above n 8, at [3], [14], [27], and [32].

Protecting incarcerated people's privacy and correctly balancing safety and privacy interests is ultimately about upholding the rule of law. The state should not get away with unjustified limitations upon personal rights, and it is particularly appalling in the incarceration context where the victims have little resource to challenge these infractions. While it must be accepted that "[t]he capacity for conflict between the right to seclusion and other rights and freedoms is very significant",[179] it does not mean they are irreconcilable. In the incarceration context the state is wielding some of its most significant coercive powers. Ensuring those powers are employed in the most minimal and justified way is a matter of procedural justice and institutional legitimacy.

[179] *C v Holland*, above n 8, at [97].

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