The New Zealand Bill of Rights Act 1990 and the Right to Counsel

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I: INTRODUCTION

When the first draft of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights" or "the Act") was presented to Parliament in 1985 it was intended to effect fundamental constitutional reform.[1] However, when the Act was finally passed it appeared to some commentators that it "would be measured only by the floridity of its prose - impressive sounding but empty words embossed on yellowing parchment, hanging on the walls of stately public buildings, rarely if ever to be uttered in court".[2] The Treaty of Waitangi, which had been incorporated in the original draft, was gone. So too was the entrenched status of the Act and its remedies clause. Ultimately the fate of the Bill of Rights Act was never going to depend on these excisions, but rather on the approach taken to it by the judiciary.

Since the Bill of Rights came into force on 25 September 1990, the judiciary has, to some extent, enabled it to "come alive".[3] However, with respect to the right to counsel, the courts are yet to develop a clear, comprehensive, and rational approach. Such an approach is necessary to ensure judgments are consistent. In turn, consistency would enable the courts to develop guidelines for police conduct, the police to develop acceptable standards of practice, and the public to

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1 See *A Bill of Rights for New Zealand - A White Paper* (1985).

2 Paciocco, "The Pragmatic Application of Fundamental Principles: Keeping a Rogues' Charter Respectable" in *The New Zealand Bill of Rights Act 1990* (Legal Research Foundation 1992) 1.

3 See Shaw and Butler, "The New Zealand Bill of Rights Comes Alive (1)" [1991] NZLJ 400.

understand the reasons for the exclusion of evidence when these standards are violated. Such developments would reduce the quantity of litigation of the right to counsel. In addition, they would ensure that the Bill of Rights does not suffer the opprobrium usually directed at judgments which require the exclusion of evidence incriminating defendants who appear factually guilty, which occurs when the reasons for those judgments are not clearly articulated and understood.

To date, the courts have been extremely reticent about laying down guidelines for interpreting the Bill of Rights.[4] This reluctance has left the lower courts and the police with a serious lack of interpretative assistance. Such a deficiency has the potential to cripple the day to day application of the Act, and lead to inexplicable and inconsistent judgments which diminish the credibility of the Bill of Rights in the eyes of the public. This situation can be compared with a well-developed judicial approach which would enable the lower courts and the police to work within definite parameters.

The aim of this article is to develop a clear, comprehensive, and rational approach to issues arising under the right to counsel contained in s 23(1)(b) of the Act. First, basic concepts used throughout this article will be explained. Second, the purpose of the right to counsel will be examined in detail. A purposive approach will then be employed to analyse what is necessary to achieve an effective right to counsel. In conclusion, a standard form warning, setting out the right to counsel, will be suggested.

II: BASIC CONCEPTS

1. The Purposive Approach

In *A Bill of Rights for New Zealand - A White Paper*,[5] a broad interpretive approach was advocated on the basis of the proposed entrenched status of the Bill. Although the Bill of Rights was not entrenched, the Court of Appeal confirmed in *Flickenger v Crown Colony of Hong Kong*[6] that a broad approach would nonetheless be appropriate. Subsequent cases have adopted the spirit of *Flickenger*, holding that the decision obliges the courts to apply a purposive interpretation of the Bill of Rights.[7] From the cases, it is clear that this requires an interpretation

4 See, for example, *R v Butcher* [1992] 2 NZLR 257, 269 (CA) per Gault J: "In my view it is premature to attempt to formulate broad guidelines for the assurance of the rights included in the Act ...."; *Ministry of Transport v Noort* [1992] 3 NZLR 260, 271(CA) per Cooke P: "No more in New Zealand than anywhere else in the world can detailed rules be laid down in advance."

5 Supra at note 1, at paras 6.14-6.17.

6 [1991] 1 NZLR 439.

7 See, for example, *R v Edwards* [1991] 3 NZLR 463, 469 per Hillyer J; *Palmer v Superintendent Auckland Maximum Security Prison* [1991] 3 NZLR 315, 321 per Wylie J; *R v Butcher*, supra at note 4, at 264 per Cooke P; *Ministry of Transport v Noort*, supra at note 4, at 268 per Cooke P, 286 per Hardie Boys J, 292 per Gault J; *R v Goodwin* [1993] 2 NZLR 153, 168 (CA) per Cooke P, 199 per Hardie Boys J; *R v Te Kira* [1993] 3 NZLR 257, 270 (CA) per Richardson J.

which identifies and gives effect to the underlying purpose and rationale of the right being considered. Interpretations of the right are developed which are consistent with its underlying purpose,[8] although these interpretations may not always be the most generous.[9] This article will apply a purposive interpretative approach to the right to counsel.

2. Effectiveness

The aim of the purposive approach is to identify the underlying purpose of a right so that the courts are able to apply the right in accord with it. Such an interpretative aim is encompassed within the principle of effectiveness. This principle requires that the right should apply where its rationale would be served by that application. Shaw and Butler state the general dictates of the principle of effectiveness:[10]

> The principle of effectiveness is designed to ensure that full measure is given to human right guarantees. It leads to interpretations which secure the effective exercise and effective enjoyment of these rights ... [It] requires a Court's enquiry to look beyond formal tags, and to examine the application of the rights by reference to the sorts of situations in which the right is intended to operate.

Although the principle is founded in European jurisprudence under the International Covenant on Civil and Political Rights,[11] it has been impliedly adopted in New Zealand cases in a variety of contexts.[12] Once the purpose of a right is identified, it is relatively straightforward to determine what is necessary to ensure that the right is effective, since effectiveness follows directly from the purpose of the right. With respect to the right to counsel, effectiveness requires that it is available in all situations where the purpose of the right would be advanced. To be effective, the scope of the right must not frustrate its purpose, and suspects must be able to practically avail themselves of counsel when they consider it would be to their benefit. This article will develop an approach to the right to counsel which ensures its effectiveness.

8 See, for example, *R v Te Kira*, ibid, 271 per Richardson J.

9 See Paciocco, supra at note 2, at 12; Hogg, "Interpreting the Charter of Rights: Generality and Justification" (1990) 28 Osgoode Hall LJ 817, 821.

10 Supra at note 3, at 402.

11 See Shaw and Butler, ibid. Clearly, international jurisprudence on the Covenant has direct relevance to the Bill of Rights Act by virtue of the Act's preamble.

12 See, for example, *R v Taylor* [1993] 1 NZLR 647; *Ministry of Transport v Noort*, supra at note 4, at 284 per Richardson J.

3. Proportionality

Proportionality, in the context of the criminal justice system, is the attempt to rationally accommodate the fundamental conflict between the vindication of individual rights and the conviction of those who commit crimes. While the New Zealand courts have acknowledged this tension,[13] there is presently no framework in place to rationalise the discordant aims of the criminal justice system. There is an evident need for such a framework to ensure proportionality in relation to the right to counsel. This is due to the perception that counsel impede the interrogation process by advising suspects to remain silent, thereby reducing the number of confessions and consequently convictions.

Within the confines of this article there is not scope to develop a new framework for consideration of proportionality in relation to the right to counsel. However, this does not mean that the traditional balancing framework, which seeks to trade off individual rights against considerations of crime control, is accepted. The difficulty of the traditional framework is that once rights are categorised as tradeable commodities, the notion of rights is denigrated. Rights become subjugated to utilitarian considerations such as the efficiency of the criminal process. As Dworkin points out,[14] if rights are to be taken seriously then one should regard them as trumps which prevail over utilitarian goals. This means that any attempt to balance other factors against rights should be seen as illegitimate, and the courts should, at least initially, be unconcerned about issues of proportionality arising from their judgments.

This does not mean that issues of proportionality are irrelevant. However, these considerations can only be weighed by the courts, and balanced against the right at issue, once that right is sufficiently protected to ensure that it is effective. Accordingly, the court must first determine what is necessary to ensure that the right is effective. This is achieved by employing a purposive approach which gives effect to the rationale of the right. The most important aspect of effectiveness is the scope of the right. Once effectiveness has been achieved, the court is then able to consider the issue of proportionality. At this point, other elements of the criminal justice system may be meaningfully considered, and the court may balance the right against those elements, provided that the right is never reduced to the point that it is no longer effective. Proportionality may also be considered in the context of remedies.

It is imperative to examine the requirements for an effective right to counsel before considering issues of proportionality. The inquiry into effectiveness will be the focus of this article, as this is currently at issue in New Zealand courts. Development of a framework for proportionality, while an important issue, will not be addressed.

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13 See, for example, *R v Butcher*, supra at note 4, at 274 per Holland J.

14 Dworkin, *Taking Rights Seriously* (1978) ch 4, referred to in Dennis, "Reconstructing the Law of Criminal Evidence", 42 Current Leg Prob 21, 30.

III: APPLICATION OF THE PURPOSIVE APPROACH TO THE RIGHT TO COUNSEL

1. Sources of Guidance on the Purpose of the Right to Counsel

The few cases in New Zealand which have attempted to apply the purposive method to the Bill of Rights have not developed a comprehensive analysis of the rationale and purpose of the right to counsel. Instead, these cases have either failed to examine the meaning of a purposive approach,[15] outlined the meaning of a purposive approach but failed to fully explore the purpose of counsel,[16] or have purported to apply a purposive approach while in fact rendering a narrow assessment of the right to counsel.[17] Perhaps the most comprehensive analysis of the purpose of the right to counsel was that undertaken by Fisher J in *Herewini v Ministry of Transport.*[18] Fisher J adopted a classic purposive analysis to determine whether the right to counsel existed where a person was required to provide a blood sample under the Transport Act 1962. He stated:[19]

> In marginal cases, the scope of the word "detention" will be influenced by the apparent purposes of the Bill of Rights Act and the interests which it was evidently designed to protect.

Although Fisher J's judgment is a significant improvement on previous cases, his Honour did not address all the issues involved in the purpose of the right to counsel.

To develop a comprehensive rationale for the right to counsel it is necessary to examine the underlying purposes of counsel. In *R v Big M Drug Mart*,[20] the Canadian Supreme Court explained that examination of underlying purpose involves consideration of the character and larger objects of the instrument, the historical origins of concepts enshrined in the instrument, the meaning and purpose of the other rights in the text, and the language chosen to articulate the specific right.

With respect to the instrument containing the right to counsel, "[c]onsideration

15 See, for example, infra at note 44 and accompanying text, where Cooke P adopts a purposive approach, but concludes that there was a breach of s 23(1)(b) without examining the purpose of the right to counsel in depth.

16 See, for example, *Police v Kereopa* (1991) 7 CRNZ 204, 210 where the importance of the right to counsel in protecting the right to silence and privilege against self-incrimination is acknowledged, but other aspects of the right to counsel are not examined.

17 See, for example, the judgment of Gault J in *R v Butcher*, infra at note 47 and accompanying text, and the vitriolic criticism of his Honour's judgment by Shaw and Butler, supra at note 3, at 404.

18 [1993] 2 NZLR 747, 755-758.

19 Ibid, 755.

20 (1985) 18 CCC (3d) 385, 423.

of the [Bill of Rights Act] leads inevitably to the conclusion that its primary focus is rights centred".[21] This is clear from the long title, which states that the Act is "to affirm, protect and promote human rights and fundamental freedoms in New Zealand" as well as to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights. These statements indicate the importance of the Act but are not particularly enlightening in terms of an approach to the right to counsel. However, they show that the legislature intended that the right to counsel should not be interpreted narrowly to deny its protection to those who require it.

Other rights in the Act, such as the rights not to be deprived of life,[22] nor be subjected to torture or cruel punishment,[23] are generally regarded as fundamental. Consideration of these rights emphasises the need for an approach which ensures that the purpose of the right to counsel is not frustrated by a narrow interpretation. The right to silence provides specific guidance on the purpose of the right to counsel, because an important rationale for both is protection of the privilege against self-incrimination. Without a coexistent right to counsel, the inherent pressures of custodial interrogation may well compel a suspect to waive the right to silence.[24] If a purposive interpretation of the right to silence indicates it is required in a wider range of circumstances than the right to counsel, the courts should ensure that the right to counsel is expanded to cover these circumstances, since counsel are necessary to ensure an effective right to silence.

2. The Purpose of the Right to Counsel

Although the purpose of the right to counsel has not been comprehensively detailed in the cases decided under s 23(1)(b) to date, in *Ministry of Transport v Noort*[25] Richardson J alluded to some of the underlying reasons for counsel. Several purposes of counsel can be distilled from his Honour's judgment, including the role of protecting other rights of suspects, providing information and advice in technical matters, acting as facilitator of settlement, and improving communications between the police and suspects. Counsel can also ensure that the police act fairly and that the suspect's position is fully and accurately advanced. In order to explore the purposive approach it is necessary to further discuss these purposes.[26]

21 *R v Goodwin*, supra at note 7, at 193 per Richardson J.

22 Section 8.

23 Section 9.

24 See infra at notes 29 and 71 and accompanying text.

25 Supra at note 4.

26 For the remainder of the article police officers will be referred to as "she" and suspects as "he".

(a) Protection of other rights

The main role of counsel is to ensure that other rights are effectively secured:[27]

> It has great "strategic" value as a safeguard against violations of undoubtedly fundamental rights such as the right not to be arbitrarily arrested or detained.

The right to counsel is the practical means for protecting individual liberty, which is universally regarded as a fundamental human right to be abrogated only by due process of the law. Counsel is able to determine the legality of a detention, ultimately by writ of habeas corpus, and to determine whether an apparent detention is a detention in fact.[28]

However, the most important right protected by the right to counsel is the right to silence. Opponents of the right to silence have characterised it as a "bogus right"[29] which provides only illusory assistance to suspects. Without a coexistent right to counsel, this observation is correct. However, the right to counsel ensures that the benefits of the right to silence can be effectively secured by the suspect. The presence of counsel, and the knowledge that there is a right to silence, reduce both the internal pressure to confess and the pressure to make a statement which is inherent in custodial interrogation. It is the pressure of interrogation which the presence of counsel is most able to dissipate, since counsel is the only participant in the interrogation process concerned with the interests of the suspect. Counsel is able to convert an otherwise unbalanced and unsupervised inquisitorial process into a more evenly balanced accusatorial process. In the presence of counsel the suspect has the opportunity to accurately put forward his position, without the prejudice caused by disadvantages such as inarticulateness or suggestibility.

The presence of counsel ensures that the decision to either invoke or waive the right to silence is well informed. In addition, where there is a risk that a failure to mention a defence prior to trial could receive adverse judicial comment,[30] counsel can ensure that all relevant facts are advanced as soon as possible.

(b) Facilitation of police/suspect communication

Counsel can improve communications between police and the suspect, particularly as the latter may often be inarticulate or confused. Counsel can assist both the suspect and the police by explaining complex legislation such as the breath and blood testing provisions of the Transport Act 1962, and advising about various pre-trial procedures such as interrogation, identification parades, finger print or

27 Supra at note 4, at 270 per Cooke P.

28 See *R v Te Kira*, supra at note 7, at 282 per Thomas J.

29 Thomas, "The So-Called Right to Silence" (1991) 14 NZULR 299.

30 See *R v Ryan* [1973] 2 NZLR 611, 615 (CA).

DNA analysis, medical examinations, and polygraph tests.[31] Counsel can also assist both the suspect and the police by explaining the situation to the suspect. This advice could potentially impact on the factual accuracy of the verdict. Bacon and Lansdowne give an example of a 15 year old girl who incorrectly assumed she could not be imprisoned for as long as her older boyfriend, so made a confession even though she had not actually committed the crime.[32] Additionally, counsel can represent the suspect on continued detention, bail applications, and complaints of maltreatment, all of which would be very difficult for a suspect to manage without counsel.

Perhaps one of the most important subsidiary functions of counsel is as facilitator of negotiation within a system which relies largely on conceded rather than adjudicated guilt. Guilty pleas are necessary for both the efficiency of the criminal justice process, and the rehabilitation of the offender. Without the presence of counsel, the suspect is ill-equipped to effectively take part in the negotiation process. The presence of counsel will often help the police and the suspect to reach an agreed position. This undoubtedly improves the efficiency of the criminal process. For example, the police may agree to favourable bail conditions for a suspect arrested on a minor offence who provides a confession and additional information on a more serious crime committed by another person. The police are then able to avoid a trial on the minor charge, and may be able to solve a crime which may otherwise have remained unresolved. The suspect secures liberty more quickly and on more favourable terms than might have been possible without counsel.

(c) Prevention of unfair process

The presence of counsel prevents the use of unacceptable police tactics more effectively than the videotaping of interrogations. Videotaping can ensure impartiality to some extent, but it cannot provide an assurance of the fairness of the entire interrogation process. Consequently, it cannot ensure that the voluntariness of a suspect's statement has not been undermined by unrecorded events.[33]

Perhaps the most insidious example of unfairness which can arise without the presence of counsel is police fabrication of confessions, commonly known as verballing. One commentator who studied verballing in New South Wales concluded:[34]

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31 See supra at note 4, at 265 per Cooke P.

32 Bacon and Lansdowne, "Women homicide offenders and police interrogation", in Basten *et al* (eds), *The Criminal Injustice System* (1982) 4, 29.

33 See McConville, "Videotaping Interrogations: police behaviour on and off camera" (1992) Crim LR 532, where the author concludes that videotaping tends to protect the police rather than suspects.

34 Dimelow, "Police Verbals in New South Wales" in Basten *et al* (eds), supra at note 32, at 89.

> [T]he miserable reality is that police verbal - the fabrication of confessions - is the biggest single issue of organised corruption in the criminal courts and lawyers are having very little success in fighting and exposing it.

The possibility of verbals is not eliminated by requiring confessions to be signed. Bacon and Lansdowne give the example of a woman who signed the bottom of the interview record several inches under her last answer. When the record was finally produced it ended with an incriminating response which the defendant alleged she had never given.[35] The authors also give anecdotal evidence of defendants who gave no more than a cursory glance over their statements before signing them.[36]

Although there is little empirical evidence in New Zealand on the incidence of police verbals, it could occur, since the police generally align themselves with the crime control rather than the due process model of the criminal justice system. Where a police officer is personally convinced of a suspect's guilt she could well feel justified in fabricating a confession, in light of the focus within the crime control model on factual rather than legal guilt.

Police verballing can be eliminated by either the presence of counsel, or video or audio recording. However, video or audio recording (or ordinary note taking) without the presence of counsel may give rise to problems of accuracy of statements, particularly when it is appreciated that the truth is often constructed, rationalised, and negotiated. For example, a suspect could make unnecessary or inaccurate concessions, give ambiguous statements which could subsequently be misinterpreted, or omit vital facts on which he may wish to rely at trial. Any attempt by the defendant to explain, or add to the record of the interrogation at trial raises problems of credibility. Bacon and Lansdowne give an example of a woman who was unable to proffer mitigating factors in the absence of counsel.[37] This woman allegedly was raped by the man she had subsequently killed. She specifically asked for a woman lawyer, possibly because, understandably, she felt uncomfortable explaining these circumstances to male police officers in the presence of a male solicitor. Unfortunately, a woman lawyer was not available. She did not advance information of the alleged rape during the interrogation, and when it was lead in evidence at trial the judge commented adversely on this.

An inability to explain mitigating factors in the absence of counsel could well have a negative impact on a defendant's case, particularly in light of the finely balanced mens rea requirements of many charges. Counsel can ensure that the suspect avoids inappropriate concessions, resolves any ambiguity contemporaneously, and presents all the facts which may subsequently be helpful in his defence at trial.

35 Supra at note 32, at 11.
36 Ibid, 15.
37 Ibid, 28.

(d) Conclusion

Although the right to counsel, in conjunction with the right to silence, is an essential device for protecting the privilege against self-incrimination, it is clear that its purpose is wider than this. Its purpose includes providing information to suspects, facilitating negotiated settlements, monitoring police conduct, and ensuring that the suspect's statement is fully and accurately recorded. Counsel is also the essential practical mechanism for ensuring an effective right to liberty.

IV: THE REQUIREMENTS OF AN EFFECTIVE RIGHT TO COUNSEL

Although New Zealand courts have impliedly accepted the concept of effectiveness,[38] there has been no comprehensive analysis of the meaning of the concept in the context of the right to counsel and its purpose.

To be effective, the right to counsel should be available in all situations where the purpose of the right would be advanced. The scope of the right must accord with its underlying purpose. Two important aspects of the scope of the right to counsel will be examined below. The first is the point at which the right to counsel arises, otherwise known as the trigger point. The second is the detail of the right to counsel, including the suspect's understanding of the right, and the availability of counsel. This article considers the practical extent of these two aspects of the scope of the right to counsel necessary to achieve effectiveness.

V: EFFECTIVENESS I: THE TRIGGER POINT OF THE RIGHT TO COUNSEL

1. The Wording of s 23(1)(b)

Probably the most important aspect of the scope of the right to counsel is the point at which the right arises, as this establishes the trigger point for the duty of the police to inform a person of his right to counsel. Under s 23(1)(b) of the Act, this point occurs when a person is "arrested or detained under an enactment". When the Bill of Rights Act was introduced into Parliament in 1989, the expression used as the trigger for the right to counsel was where a person is "arrested or detained", which was taken from s 10(b) of the Canadian Charter of Rights and Freedoms. However, when the Bill of Rights was finally enacted the expression

38 See supra at note 12 and accompanying text.

"under any enactment" had been added as a qualification to the concept of detention.[39]

Where a person has been formally arrested within the common law concept of arrest, they will have been arrested within the meaning of s 23(1).[40] However, it is not clear that the rights in s 23(1) will be triggered where there has been no formal arrest, but the police are nonetheless treating the suspect as not free to go. Under the Canadian Charter, this situation may be held to constitute detention in accordance with the definition of this concept laid down in *R v Therens*.[41] However, in New Zealand the addition of the limiting phrase "under any enactment" suggests that a detention short of formal arrest, where there is no statute expressly granting the right to detain, will not trigger the rights in s 23(1). As there is no common law power of detention in New Zealand,[42] the result of this interpretation is that a suspect will have no right to be advised of the right to counsel, even where his detention is illegal.[43] Only by extending the concept of arrest for the purpose of the Act can this result be avoided.

2. New Zealand Case Law on the Trigger Point

(a) R v Butcher

The first opportunity for the Court of Appeal to consider the issue of the trigger point under s 23(1) arose in *R v Butcher*.[44] Cooke P extended the common law definition of arrest by including in it the concept of de facto detention. He defined this concept, and considered that it arguably included the situation where the suspect holds a reasonable belief in detention which is induced by the police.[45] Holland J agreed with the judgment of Cooke P, even though he later expressed concerns about the impact of s 23(1)(b) on the balance "between the rights of the individual and the need to bring lawbreakers to justice".[46]

Gault J was less expansive. He considered that arrest under s 23(1) should be given a meaning no different to the common law definition. His Honour required "overt communication or seizure"[47] and therefore rejected Cooke P's suggestion

39 The reasons for the addition of this eventually problematic expression were explored by Casey J in *R v Goodwin*, supra at note 7, at 196.

40 See, for example, *R v Edwards*, supra at note 7; *R v Kirifi* [1992] 2 NZLR 8 (CA).

41 (1985) 18 DLR (4th) 655, 678-680, per Le Dain J (dissenting).

42 See *Blundell v Attorney-General* [1968] NZLR 341.

43 The distinction between an illegal and an unlawful arrest is as follows: "illegal" describes a detention where there is no legal power to arrest; "unlawful" describes a detention made under a legal power, but which imperfectly fulfils the legal requirements accompanying the exercise of that power.

44 Supra at note 4.

45 Ibid, 264.

46 Ibid, 273.

47 Ibid, 271.

that a reasonable belief in detention could be sufficient to trigger s 23(1)(b). He stated:[48]

> A mere unexpressed belief of being unable to leave or unexpressed intention to arrest if there is an attempt to leave would not be sufficient.

However, in spite of his narrow definition of arrest, Gault J concluded that "[f]ew in Burgess' position would not have thought he was arrested",[49] and agreed with the orders for exclusion.

The majority of cases decided after *R v Butcher* also accepted a wide concept of arrest based on de facto detention, which could accommodate a suspect's subjective belief on reasonable grounds.[50] However, the lack of clarity[51] and consistency[52] in *R v Butcher* meant that the concepts of arrest and detention needed re-examination.

(b) R v Goodwin

An opportunity for re-examination arose in *R v Goodwin*.[53] The decision effectively renounced the views expressed in *R v Butcher*, and now represents the position on arrest.

The principal issue on appeal was whether the defendant's reasonable belief that he was not free to go was sufficient to constitute arrest within s 23(1). Notwithstanding Cooke P's optimistic observation that "[d]espite verbal refinements ... [there is] a wide measure of agreement between the members of the Court",[54] there are in fact significant and disconcerting differences between the judgments. The majority[55] held that Goodwin was neither arrested nor detained under an enactment. In dissent, Cooke P held that Goodwin had been arrested and that the resulting statements were inadmissible. However, more important than the particular decision on the facts of the case are the Court's observations on the requirements for an arrest. All members of the Court agreed that arrest is not restricted to formal or lawful arrest. This is made clear from s 23(1)(c), which gives the right to challenge the validity of an arrest or detention by application of

48 Ibid.

49 Ibid, 273.

50 See *Herewini v Ministry of Transport*, supra at note 18, at 751-752. Cf *Police v Smith* and *Herewini* [1994] 2 NZLR 306 (CA).

51 See, for example, *Marson v Police* (1992) 9 CRNZ 97 where Eichelbaum CJ considered that the issue whether a subjective belief could give rise to a claim of arrest within s 23(1)(b) had not been definitively determined.

52 Cf, for example, cf the prima facie exclusion rule favoured by Cooke P in *R v Butcher* supra at note 4, at 266, with the apparently more conservative approach of Gault J, at 273.

53 Supra at note 7.

54 Ibid, 181.

55 Richardson, Casey, Hardie Boys and Gault JJ.

habeas corpus. However, there were differences in the members of the Court's interpretations of what constitutes a purported arrest so as to trigger a suspect's rights under s 23(1).[56] Richardson and Gault JJ considered that it meant an unlawful arrest, such as where there were no reasonable grounds for the arrest, but did not include the situation where there was no underlying authority for the arrest (an illegal arrest).[57] Cooke P considered that both of these situations constituted a purported arrest and would therefore be covered by s 23(1). Hardie-Boys J and possibly Casey J fell between these two positions.

All members of the Court agreed that arrest requires a manifest intention on the part of the police to deprive a person of his liberty.[58] Cooke P's approach suggests he would take a broad view of the issue and conclude that there would be sufficient manifestation of intention if the suspect is treated as not free to go. However, most significant, at least as a comparison to the result which follows from a purposive approach, is the rejection by the majority of the concept of psychological detention.[59] In *R v Butcher*, Cooke P indicated that he favoured a definition of de facto detention which includes psychological detention, but he left the matter unresolved. By holding that arrest requires "overt communication or seizure",[60] the majority in *Goodwin* impliedly rejected Cooke P's preference. In addition, Richardson J went on to expressly disagree with Cooke P's view.[61]

(c) Police v Smith and Herewini

In *Police v Smith and Herewini,*[62] the Court of Appeal considered the meaning of "detained under any enactment" in s 23(1) of the Act. Specifically, the Court had to consider whether a requirement to permit the taking of a blood specimen from a person already hospitalised as a result of a traffic accident, under s 58D of the Transport Act 1962, constituted a detention under an enactment. The decision of the majority[63] resembled the decision in *Goodwin*:[64]

> In *R v Goodwin* the majority agreed that arrest involves a restraint of liberty conveyed by act or words. So I think must "detained".

56 See *Adams on Criminal Law* ch 10-58(a).

57 See supra at note 43 regarding the distinction between illegal and unlawful arrest.

58 See, for example, *R v Goodwin,* supra at note 7, at 189 per Richardson J.

59 Strictly speaking the majority's view on this issue is obiter in light of the Crown's concession that Goodwin had been told he would have to remain in the station.

60 *R v Goodwin,* supra at note 7, at 204, quoting from the judgment of Gault J in *R v Butcher*, supra at note 4.

61 *R v Goodwin,* supra at note 7, at 189-190.

62 Supra at note 50.

63 Richardson, Hardie Boys, McKay JJ; Cooke P and Casey J dissenting.

64 *Police v Smith and Herewini*, supra at note 50, at 327 per Hardie Boys J. Reference omitted.

The Court concluded that detention for a blood test under s 58D was temporary and minimal and did not constitute a detention under an enactment.[65] The decision is specific to s 58D of the Transport Act, and therefore complements rather than overrules the *Noort* decision. However, Richardson J made the following statement regarding the appropriate approach to s 23(1):[66]

> It must not be overlooked that the test under s 23(1) is whether or not there has been a detention under an enactment. That is quite a different inquiry from whether a citizen reasonably requires counsel's assistance.

The decision in *Smith and Herewini* is significant because it continues the general trend, as seen earlier in *Goodwin*, away from a purposive approach to s 23(1) and the right to counsel.

(d) Problems with R v Goodwin and Police v Smith and Herewini

The result of the Court's decisions in *Goodwin* and *Smith and Herewini* is a seriously ineffective right to counsel, because the scope of the right now covers neither an illegal detention nor a psychological detention. Ironically, the decision in *R v Goodwin (No 2)*[67] means that a capricious and arbitrary arrest or detention will be a breach of s 22 of the Act (which covers general liberty of the person),[68] but will not trigger the rights in s 23(1), even though the detention would be illegal.[69] Accordingly, a person so detained would not have a right to be advised of his right to counsel, even though the situation is one where counsel would be invaluable in determining the legality of the detention, and consequently securing the person's liberty.

If the Court in *Goodwin* had employed a purposive approach, neither of these defects would have arisen. The most important purpose of counsel, in combination with the right to silence, is to dispel the pressure inherent in custodial interrogation. As this pressure can arise simply through a suspect's belief in detention, to be effective the right to counsel should be available where that belief is held on reasonable grounds and results from the actions of the police (ie a psychological detention). Additionally, the importance of counsel in determining the legality of a detention, emphasised by the right to habeas corpus in s 23(1)(c), shows that the right to counsel must also be available when there is an illegal detention.

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65 Ibid, 317 per Richardson J.

66 Ibid, 316.

67 [1993] 2 NZLR 390.

68 Section 22 states: "Everyone has the right not to be arbitrarily arrested or detained."

69 The irony of this situation was recognised before *Goodwin* by Judge Young in *Police v Kereopa*, supra at note 16, at 211.

When the decision in *Goodwin* is compared with the Court of Appeal's decision in *Ministry of Transport v Noort*, a further irony comes to light. *Noort* established that a person required to supply a breath or blood sample pursuant to the Transport Act has a right to be advised of the right to counsel. Under *Goodwin* a person accused of a serious crime such as manslaughter or murder may not have the same right. In light of the arguments made above that an important purpose of the right to counsel is to ensure that the truth is correctly constructed, this anomaly clearly indicates an ineffective right.

3. The Trigger Point of an Effective Right to Counsel

a) Situations in which the right to counsel must be triggered

For the right to counsel to be effective it must be triggered in all situations where the purpose of the right applies. Accordingly, it should be available where there is a danger of compelled self-incrimination, where there is a need for an informed decision whether to waive the right to silence, and where there is a need for advice on technical matters such as the Transport Act. The right to counsel should be available where a facilitator is required to negotiate an outcome satisfactory to both the police and the suspect, where there is a possibility of unfair tactics, where there is a need to ensure a suspect's position is fully and accurately recorded, and where improved communications between the police and the suspect are necessary. Counsel should be available when it is important to determine the legality of a purported detention, or to ascertain whether an apparent detention is a detention in fact. Finally, counsel must be available where there is an interrogation and the suspect wants to make a statement, but desires counsel to ensure its accuracy.

(b) The need for the trigger point to include psychological and all purported detentions

It has already been stated that there is a need for counsel where there is a danger of compelled self-incrimination. Several New Zealand cases have followed the finding of the United States Supreme Court in *Miranda v Arizona*,[70] that custodial interrogation is inherently compulsive.[71] However, none of these decisions has explored why this is the case. Essentially there are four justifications for this

70 384 US 436, 461 (1966).

71 See, for example, *R v Butcher*, supra at note 4, at 266 per Cooke P. See also *R v Goodwin*, supra at note 7, at 163 per Cooke P, 196 per Casey J; *R v Te Kira*, supra at note 7, at 272 per Richardson J, 281-282 per Thomas J.

conclusion. First, custodial interrogation typically takes place in an unfamiliar environment. Second, it often involves intrusive questions, the answers to which can expose the suspect to very serious consequences.[72] Third, suspects are typically ignorant of the actual authority of the police to detain them and ask questions, and consequently they will tend to assume authority exists and comply with directions from the police. Finally, a suspect may be, and often is, guilty. This in itself can lead to a sense of compulsion to make an incriminating statement.[73]

Psychological detention must trigger the right to counsel because an assumption of police authority and a sense of guilt can lead to compulsion, even though the detention is assumed rather than real. Accordingly, an effective right to counsel would ensure the availability of counsel where the words or actions of the police would have induced a reasonable person in the position of the suspect to believe that he was not free to leave. This position would take into account differences in the experience of suspects, and therefore ensure equality of access to counsel, which is a key element in ensuring an effective right. For example, a man who has had copious prior dealings with the police may well conclude he is not being detained when a police officer has telephoned him and asked him to come to the police station. However, a suspect who has had no previous experience with the police may reasonably reach the opposite conclusion in the same circumstances. If the latter situation amounts to psychological detention, it should trigger the right to counsel. This would compensate for the suspect's lack of experience.

In *R v Goodwin*, Richardson J specifically rejected Cooke P's view in *R v Butcher* that a subjective belief in detention could trigger the rights in s 23(1)(b).[74] His Honour did so on the basis that the police would be unable to discharge their duty to inform a person of the right to counsel when that right is triggered by the unknown belief of that person. In reply, it is submitted that there is a significant difference between unknown and unknowable. Although the ultimate inquiry is the subjective belief of the suspect, this can be ascertained by considering objective factors created by the police themselves through their words or actions. When a police officer is concerned that her words or actions may cause a suspect to believe that he is not entitled to leave, it is always open to the officer to explain to the suspect that he is in fact free to go. Also, contrary to the fears of Richardson J, experience in both Canadian[75] and American[76] jurisdictions has shown that a right

72 These two justifications were specifically recognised by the majority in *Miranda v Arizona*, supra at note 70.

73 Where a suspect is not guilty in fact, but feels a sense of guilt, it can lead not only to an undermining of the privilege against self-incrimination, but also to an inaccurate verdict. For example, a woman who kills a violent husband after years of abuse may well be guilty of manslaughter, but not of murder. However, the guilt of knowing that she killed her husband might lead to her making statements which are inaccurate, and subsequently make it difficult to defend a charge of murder.

74 See supra at notes 44 and 45 and accompanying text.

75 See *R v Therens*, supra at note 41.

76 See *Florida v Royer* 460 US 491, 503 (1983) per White J.

to counsel which is triggered by a reasonable subjective believe in detention based on the objective conduct of the police is workable.

Finally, if the right to counsel is available in all cases of detention, the role of counsel in determining the legality of detentions will be advanced. There should be no distinction between the situation where an officer intends to arrest, and wrongly applies a statutory power to do so, and the situation where she purports to arrest on the basis of an authority which does not exist at all.[77] Counsel is necessary to determine the legality of the arrest in both situations, so a purposive approach would dictate that the right to counsel be available in both. Hence, to be effective, the trigger for the right to counsel must incorporate both the subjective belief in detention, and all purported detentions, illegal and unlawful.[78] This ensures that the full purpose of the right to counsel is adequately recognised.

(c) Implementation of an effective trigger point

Having established the trigger point necessary for an effective right to counsel, the issue now becomes how this can be achieved within the wording of s 23(1)(b). Cooke P's efforts in *R v Butcher* were laudable, but it was clear that some of his brethren were not as committed to such a relaxed position.[79] Dissatisfaction with Cooke P's decision manifested itself in *Goodwin*. In light of *Goodwin* it is impossible to contend that there is currently an effective right to counsel. However, if the rejection of *R v Butcher* which occurred in *Goodwin* is reversed in a subsequent case, the credibility of both the Bill of Rights Act and the Court of Appeal itself would be seriously undermined.

There would appear to be three other alternatives. The first, and least preferable, would be to accept that the Act, as interpreted by the courts, means that New Zealand does not have an effective right to counsel. However, the result of this would be a Bill which is truly debilitated. A variation on this alternative would be to gain a few more years experience with the problems of the Act[80] and then pass a replacement document "ironing out the creases," in a similar way to the replacement of the Canadian Bill of Rights by the Canadian Charter of Rights and Freedoms. A less dramatic alternative, which could be combined with the replacement document, would be to amend s 23(1) to remove the problematic expression "under any enactment". This would enable the courts to develop an effective right to counsel by interpreting "detention" as a new concept, rather than trying to reinterpret the settled common law definition of arrest. It would be preferable for the legislature to make this minor amendment, rather than the courts try to cover the current anomalies by using s 22.[81]

77 *Adams on Criminal Law* ch 10-59.

78 This broad concept of purported detention is used in the same sense as that employed by Cooke P in *Goodwin*; see supra at note 57 and accompanying text.

79 See supra at note 47 and accompanying text.

80 Such as the complexities caused by the interaction of ss 4, 5, and 6. See, for example, *Ministry of Transport v Noort*, supra at note 4.

81 See *R v Goodwin (No 2)*, supra at note 67.

V: EFFECTIVENESS II: THE DETAIL OF THE RIGHT TO COUNSEL

1. The Need for Detail to Ensure an Effective Right to Counsel

Although the trigger point of the right to counsel is perhaps the most obvious aspect of the right, there are many other more detailed aspects which are essential to ensuring its effectiveness. Courts have often considered whether it is necessary to follow the wording of s 23(1)(b) itself when advising suspects of the right to counsel.[82] This inquiry fails to appreciate that s 23(1)(b) simply establishes the right, and to be effective the advice given to suspects must contain considerably more detail.[83]

Unless the courts deal proactively with the detailed aspects of the right to counsel, the police will be unable to develop standard practices which practically guarantee an effective right to counsel, and there will be copious unnecessary litigation on the detail of the right.[84] However, it is not surprising that to date the courts have failed to analyse comprehensively the detailed scope of the right to counsel, since this cannot be done without a full appreciation of the purpose of the right. Once the purpose of the right to counsel and the notion of effectiveness are understood, it is relatively straightforward to analyse what detail is required for an effective right to counsel. From that point it is a very short step to develop a standard warning which would ensure suspects are effectively informed of their rights. This would consequently reduce the amount of litigation arising under s 23(1)(b).

Two key elements in effectiveness are ensuring that a right is adequate and available. With regard to the detailed scope of the right to counsel, this means ensuring that the right is adequately understood,[85] and consequently that an equal opportunity to invoke the right is given.

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82 See, for example, *R v Grant* (1992) 8 CRNZ 483, 486 (CA) where McKay J concluded "that if the police are to issue a written form for this purpose it is desirable that the form should follow fully the wording of the section". Cf *R v Mallinson* (1992) 8 CRNZ 707, 709 (CA) where Richardson J held that "[n]o particular formula is required so long as the content of the right is brought home to the person arrested".

83 This has been recognised in at least one judgment. See *R v Tunui* (1992) 8 CRNZ 294, 297 per Anderson J.

84 See, for example, *R v Doctor and Broughton* (1992) 9 CRNZ 142, 152 where Williams J had to consider a submission that the word "solicitor" rendered the s 23(1)(b) advice invalid.

85 In the United States there is empirical evidence showing that a significant proportion of suspects do not comprehend their *Miranda* rights. See Mendalie, Zeitz and Alexander, "Custodial Interrogation in our Nation's Capitol: The Attempt to Implement Miranda" (1969) 66 Mich L Rev 1347, where a survey of 85 suspects who had been read their *Miranda* rights showed that 15 percent misunderstood the right to silence, 18 percent misunderstood the right to counsel, and 24 percent misunderstood the right to have counsel appointed by the State.

2. The Suspect's Understanding of the Right to Counsel

(a) Understanding of the existence of the right

To ensure a suspect has an effective understanding of the right to counsel, it is first necessary to ensure that he understands the existence of the right. Essentially this means that the right to counsel must be advised in language that all suspects can understand. In *R v Tunui*,[86] Anderson J pointed out that the expression "consult and instruct" may not be particularly enlightening for suspects. A more universally comprehended phrase, such as "you have the right to talk to a lawyer and have that person act for you", would be preferable. Ensuring understanding may also involve both oral and written advice. Although McKay J in *R v Grant* [87] decided that "[t]here is nothing in the Act to require an arrested person to be advised of his rights verbally rather than in writing", this is contrary to the equality principle which underlies the effectiveness of rights. Suspects tend to come from lower socio-economic groups, and frequently exhibit literacy problems, so written advice alone cannot secure an equal and therefore effective right to counsel.

The need for understanding of the existence of the right to counsel means that advice of the right must be given at a time which is meaningful to the particular suspect.[88] The circumstances of arrest will in most cases require repetition of the Bill of Rights once the suspect arrives at the police station.[89] An intoxicated suspect may have to be given time to become sober, and then be re-advised of the right to counsel.

(b) Understanding of the need for counsel

Consideration of the purpose of the right to counsel leads to the conclusion that knowledge of the need for counsel is required for an effective right. There are two aspects of this knowledge. First, a suspect must be informed of the charge which he faces. This is because a suspect could validly consider that he did not require counsel for a minor offence, but might well require counsel for a more serious offence. Counsel may be necessary if the ultimate defence could be seriously prejudiced by an unwise or inaccurate confession. This situation can be illustrated by the decision in *R v Tawhiti*.[90] The defendant had stabbed a person who subsequently died. He was arrested for carrying an offensive weapon, and was interrogated without being advised that the victim had died. Thomas J concluded:[91]

86 Supra at note 83, at 297.
87 Supra at note 82.
88 See, for example, *R v Mallinson* (1992) 8 CRNZ 409, 416 per Neazor J.
89 See, for example, *R v Tunui*, supra at note 83, at 297.
90 [1993] 3 NZLR 594.
91 Ibid, 595-596.

> I consider that, for the purposes of s 23(1)(a), Constable McIntyre should have told Mr Tawhiti of the real reason for his arrest. He was being arrested on suspicion of murder. It was not acceptable to adopt the least serious of the two "options" and therefore to give the wrong reason. It did not convey to Mr Tawhiti why he should submit to arrest nor assist him to effectively exercise his right to a lawyer.

Thomas J later confirmed that this position also applied to the advice given under s 23(1)(b).[92]

The second aspect of the knowledge of the need for counsel which is required, is an understanding that the police are going to ask questions, and that any statement that the suspect makes may be admissible as evidence against them. American experience indicates that suspects often do not understand that oral as well as written statements may be used against them at trial.[93] Consideration of the purpose of counsel shows that a suspect's ignorance of the admissibility of his statements results in an ineffective right to counsel. For example, counsel's role in protecting the privilege against self-incrimination, and ensuring the accuracy of any statement, is rendered ineffective if the suspect incorrectly understands that an oral statement cannot be used in evidence.

(c) Understanding of the nature of the right to counsel

The third aspect of understanding required for an effective right to counsel is an understanding of the nature of the right. All suspects should possess equal levels of information, so that the decision to invoke or waive the right to counsel relates only to whether they consider counsel necessary, rather than because they misunderstand the scope of the right. For example, a suspect may either invoke or waive the right to counsel depending on whether he considers counsel necessary to reduce the compulsion of custodial interrogation. However, the effectiveness of the right will be undermined if he wants counsel for this purpose but wrongly concludes that he is not entitled to counsel because of his impecuniosity.

All suspects ought to be given equal levels of information. All should be advised that the scope of the right to counsel includes the following entitlements: first, the right to private consultations with counsel to avoid the possibility of a suspect declining counsel because he incorrectly believes he would not have the opportunity to discuss his situation without the presence of the police; second, the right to counsel of choice, to avoid the eventuality that a suspect may not request a lawyer out of the fear that a lawyer will be appointed by the police, and consequently represent only the police's interests; third, the right to the presence of counsel during any interrogation, to avoid the possibility of a suspect declining counsel because he incorrectly assumes he would eventually have to face police

92 Ibid, 597. Cf the decision of Williams J in *R v Doctor and Broughton*, supra at note 84.

93 Supra at note 85.

interrogation without the counsel; and finally, the right to counsel without delay, to ensure s 23(1)(b) is not misunderstood to mean the right to counsel at trial.

In addition, the suspect should be informed of the availability of legal aid. This is perhaps the clearest illustration of the need for equality of understanding in order to ensure an effective right to counsel. None of the purposes of the right to counsel depends on the financial position of the suspect. Accordingly, the scope of the right must ensure that suspects do not decline to avail themselves of counsel for financial reasons. The courts have not yet established a positive requirement on the part of the police to inform all suspects of the availability of legal aid.[94] If this means that the police need only advise on these matters when a suspect indicates that he wants counsel but cannot afford to retain one, there will be a disquieting inequality of access to counsel. Once it is appreciated that custodial interrogation is inherently compulsive, it is clear that the same pressures are likely to mean that a suspect is too intimidated to query whether legal aid is available, or to state that except for his impecuniosity he would request counsel. This situation limits the effective scope of the right to counsel for the suspect who needs it most - the one who is feeling compelled by his circumstances. Accordingly, to ensure an effective right to counsel, it is essential that all suspects are advised as part of a standard warning of the availability of duty counsel and legal aid. Speculation over whether a particular suspect's knowledge of the availability of legal aid would have made a difference to his decision is unproductive and dangerous.

(d) Understanding of the availability of counsel

The fourth aspect of understanding required for an effective right to counsel is an understanding of the availability of counsel. This includes knowledge that a list of lawyers is available,[95] and requires knowledge of the right to a reasonable opportunity to consult and instruct counsel.[96] The words of s 23(1)(b) themselves establish a right to consult and instruct counsel without delay. In substance, this means that a suspect must be specifically asked whether he wants counsel at the time of his detention. Failure to do this may result in a suspect interpreting the recitation of his rights as an empty incantation. In contrast, a specific query of the suspect's intentions ensures that a suspect who is too intimidated by his situation to request counsel unprompted is not disadvantaged.

94 See Cooke P's sympathy for the sentiment behind such a requirement, but failure to establish it in practice in *R v Butcher*, supra at note 4, at 266; see also *R v Barber* (1993) 10 CRNZ 301.

95 See the judgment of Richardson J in *Noort*, supra at note 4.

96 See *R v Taylor*, supra at note 12, at 653 per Thomas J: "[R]egard should be had to the basic objective of s 23(1)(b) itself. It is accepted that to be effective an accused's right to consult and instruct a lawyer means that he or she must have a reasonable opportunity to do so".

VII: CONCLUSION

Once the purpose of the right to counsel is understood, it is clear that to be effective it must be available both for psychological detentions and for all purported detentions. An appreciation of the purpose of the right to counsel and the notion of effectiveness has enabled an analysis of the detailed scope of the right in this article. It is now possible to suggest a standard warning:

> "We are detaining you because we suspect you were involved in [the offence], and we want to ask you some questions about it. If you do not want to answer our questions, you do not have to. You can say at any time that you do not want to answer any more questions and we will stop asking any. If you do answer any questions, then your answers can be used as evidence at your trial. Your answers can be used whether you make a written statement, or answer orally.
>
> You have the right to talk to a lawyer of your choice in private before we ask you any questions. You are also able to have a lawyer with you if you decide to answer any questions we ask. If you do want a lawyer but do not know who to contact, there is a list of lawyers available who would be prepared to represent you. If you want a lawyer but you cannot afford one, you may be entitled to legal aid which could provide a lawyer to represent you.
>
> Do you want to speak to a lawyer at this time?
>
> Do you want to answer the questions we are about to ask you?"

Acceptance by the courts of such a standard form warning would resolve much of the inconsistency and incoherence that has characterised the courts' approach to the right to counsel to date. Without resolution of the issues raised in this article, the words of s 23(1)(b) will increasingly appear to be empty rhetoric.

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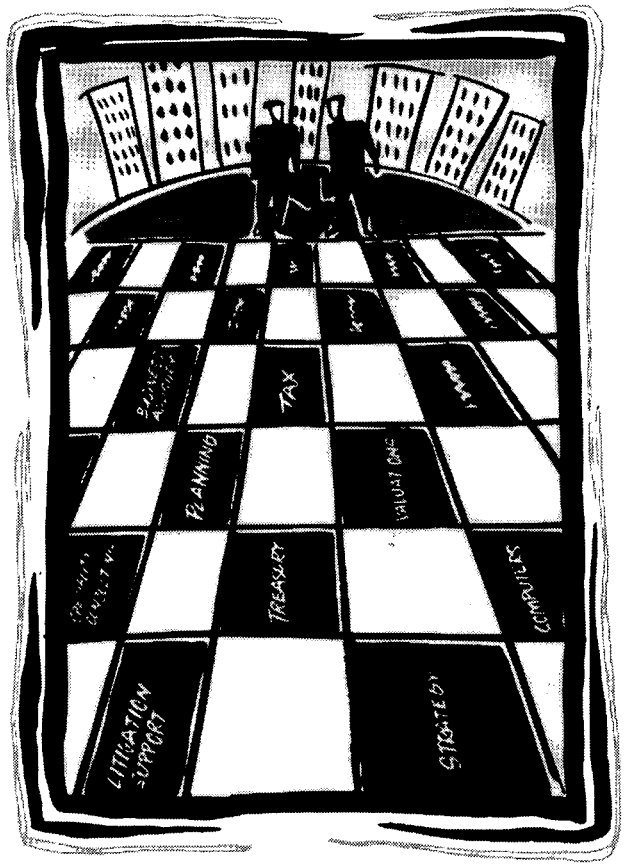

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