Law and orders: a case study

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As every law student knows, the theory of constitutional government in New Zealand draws a distinction between the powers of the executive and the command of the legislator. But in many instances theory and fact do not sit easily together. The executive is in control of the legislature and is able through that control to make its will the command of the legislator. In this article a specific case (Social Security Commission v. Macfarlane) is examined in order to show the working out of the relationship between the executive and the legislature.

I. INTRODUCTION

When the comprehensive system of social security was established in New Zealand 40 years ago, a department of state was constituted for the purpose of administering the scheme.[1] The department was the Social Security Department, now named the Department of Social Welfare.[2] The administration of the Act involves the making of myriads of decisions both as to policy and as to individual cases or groups of cases. The legislation provides that those decisions are largely to be made by a permanent Commission, called the Social Security Commission, consisting of high-ranking officers within the Department.[3] Although much of the language of the statute (first the Social Security Act 1938 and subsequently the Social Security Act 1964) might convey the general impression that the Commission is intended to function with complete independence, it was clear from the very beginning that ultimate general control remained in the hands of the Minister. By section 5 of the present Act it is provided that:

> The powers conferred on the Social Security Commission by this Act shall be exercised under the general direction and control of the Minister of Social Welfare.

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1 Social Security Act 1938, s. 3(1).
2 Department of Social Welfare Act 1971, s. 15(1).
3 Social Security Act 1964, s. 6, as substituted by s. 16 of the Department of Social Welfare Act 1971.

One of the benefits available under the social welfare scheme is the family benefit. It is payable in respect of all children under a specified age. As a general rule the benefit is payable to the mother of the child.[4] The family benefit is payable on a periodic basis. However by the Family Benefits (Home Ownership) Act 1958 and the Regulations[5] made under that Act provision was made for the family benefit to be paid or appropriated in advance for the purpose of enabling the parents of the child to acquire by purchase a dwellinghouse as a home for the child. The amount so paid or appropriated was to be secured by a charge in favour of the Crown. Eligibility for an advance was linked to the ability of the parents of the child to obtain finance for the completion of the purchase of the home from other sources. The key provision in the present legislation is section 10 of the Family Benefits (Home Ownership) Act 1964, which provides as follows:

> (1) Where the Commission is satisfied that the applicant is eligible to receive an advance and that the purpose for which the advance is applied for is a housing purpose, the Commission may issue to the applicant a certificate of eligibility in a form provided for the purpose by the Commission, stating that the applicant is eligible for an advance and specifying the housing purpose for which an advance may be made, the capitalised value of the family benefit or benefits in respect of which an advance may be made, and the date at which the capitalised value of the benefit or benefits has been ascertained:
>
> Provided that a certificate of eligibility shall not be issued to the applicant, unless —
>
> (a) The child in respect of whom the family benefit is payable has attained the age of one year; and
>
> (b) The Commission, after taking into consideration the income and assets of the applicant and of the spouse of the applicant, is satisfied that —
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> (i) The application of the future payments of family benefit towards the repayment of any advance would not cause hardship to the applicant; and
>
> (ii) The applicant or the spouse of the applicant could not reasonably be expected to arrange finance from any other source; and
>
> (c) The applicant or the spouse of the applicant has resided in New Zealand for a period or periods aggregating not less than three years during the period of ten years immediately preceding the date of his application for an advance.
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> (2) For the purposes of this section a beneficiary shall be deemed to have resided in New Zealand during any period (whether before or after the commencement of this Act) during which, pursuant to section 19 of the Social Security Amendment Act 1947, he is deemed for the purposes of Part II of the Social Security Act 1938 to have been resident in New Zealand.
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> (3) Every certificate of eligibility shall continue in force for a period of twelve months, but may from time to time, on the application of the beneficiary, be renewed for further periods of twelve months:
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> Provided that the Commission may cancel any certificate of eligibility at any time where the Commission is satisfied that the beneficiary is no longer eligible for an advance.
>
> (4) The provisions of subsections (1) to (3) of this section shall apply with respect to every application for the renewal of a certificate of eligibility as if it were an application for such a certificate:
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> Provided that the Commission may renew any such certificate on such terms and conditions as the Commission determines.
>
> (5) The decision of the Commission as to whether or not an applicant is eligible for an advance or is no longer eligible for an advance shall be final.

4 Social Security Act 1964, s. 37(1).
5 Family Benefits (Home Ownership) Regulations 1959 (S.R. 1959/37).

(6) Where a certificate of eligibility is issued to a beneficiary, and so long as it continues in force, the family benefit or benefits shall be withheld from the beneficiary on and from the date specified in the certificate as the date as at which the capitalised value of the benefit or benefits has been ascertained.

It will be seen that the legislature has entrusted the decision-making power to the Commission. However by section 4[6] of the Act, which is similar to section 5 of the Social Security Act 1964, the relationship between the Commission and the Minister was stated as follows:

> This Act shall be administered in the Department of Social Welfare by the Social Security Commission, and the Commission shall administer this Act and shall exercise all the powers conferred upon it by this Act under the general direction and control of the Minister of Social Welfare.

Invoking the apparent authority conferred upon him by section 4 of the Family Benefits (Home Ownership) Act 1964 the then Minister of Social Welfare, Mr N. J. King, issued a directive dated 19 November 1975 to the Commission in the following terms:

> Pursuant to section 4 of the above Act, *I hereby direct* that the Social Security Commission determine applications for family benefit capitalisation on income and assets grounds, on the following basis:
>
> (a) Unless there is a special housing need, decline applications where the applicant's gross chargeable income is in excess of $80 a week for a family with one child, increased by $5 a week for each additional child;
>
> (b) Unless there is a special housing need, decline applications where the value of the applicant's chargeable assets, including the value of any section owned, is more than $10,000 for a family with one child, increased by $500 for each additional child;
>
> (c) The following circumstances shall constitute a special housing need for the purposes of paragraphs (a) and (b) of this direction:
>
> (i) Where the present housing is inadequate and there is a need for other housing, e.g., too small for the needs of the family, derelict, etc.;
>
> (ii) Where the present housing is damp or where there is medical evidence that it is causing a health hazard;
>
> (iii) Where the family is required to vacate the property for reasons other than non-payment of rent;
>
> (iv) Where failure to purchase the property currently occupied would result in loss of the accommodation;
>
> (v) Where a State Rental house, Government pool house or departmental house will be vacated by the family following the purchase of other accommodation;
> and
>
> (vi) Where the rental paid by the family exceeds 25 percent of the gross chargeable income of the family, including overtime.
>
> (d) In any case where the applicant's chargeable income or assets is in excess of the limits specified in paragraphs (a) or (b) of this direction, and a special housing need is established in terms of paragraph (c), a capitalised advance shall only be approved if —
>
> (i) the applicant's chargeable income is not more than $10 a week in excess of the normal income limit referred to in paragraph (a);
> and

6 As amended by s. 19(3) of the Department of Social Welfare Act 1971.

(ii) the applicant's chargeable assets are not more than $3,000 in excess of the normal assets limit referred to in paragraph (b).

(e) Except as provided in paragraph (c)(vi) of this direction, no regard shall be had to overtime earnings or, in the case of a married couple, to any earnings of the wife;

(f) Except as provided in paragraph (e) of this direction, all supplementary payments received from other than tool and clothing allowances, in respect of 40 hours employment a week, shall be included as income;
and

(g) Except in the case of seasonal workers, the earnings taken into account shall be the applicant's average earnings during the 12 months immediately prior to application for capitalisation or his weekly earnings at the time of application, whichever is the lesser. For seasonal workers the earnings taken into account shall be the applicant's average earnings during the 12 months immediately prior to application for capitalisation.

N. J. KING
Minister of Social Welfare

Responsive to that direction both the Commission and officers in the Department of Social Welfare assessed all applications for the capitalisation of family benefits by applying the rules that it purported to prescribe. The result was that the discretionary element in the Commission's decision-making process was reduced almost to vanishing-point. Ministerial directive replaced the Commission's discretion: arithmetic superseded judgment.

II. THE HUMAN ELEMENT

A few months before the date of the Minister's direction a Mrs K. M. Macfarlane, who was receiving a family benefit in respect of each of her two children, applied on 13 October 1975 to the Director of the Department of Social Welfare in Christchurch to be classified as eligible for an advance for housing purposes under the Family Benefits (Home Ownership) Act 1964. Her application was for the purpose of building a first home for herself, her husband, and her two children. The application related to the family benefit payable in respect of one of the children only. In the application form Mrs Macfarlane and her husband gave particulars of Mr Macfarlane's income, which, exclusive of overtime, exceeded the maximum subsequently laid down in the Minister's direction in respect of an applicant with two children. The Director of Social Welfare declined the application. The form embodying the report and decision on family benefit capitalisation stated the decision to be as follows:

> Decision: Decline as present income . . . and average income . . . over part 12 months exceed the limit of $85 for 2 child family.

The report was signed on 17 October 1975 by the recommending officer and on the same day on behalf of the Director. The decision was notified to Mr and Mrs Macfarlane by letter dated 21 October 1975.

Three days later Mrs Macfarlane applied to the Director for a review of the decision upon the grounds which had been stated in her husband's letter dated 13 October 1975 accompanying the original application. That letter deserves to be quoted in full:

My wife and I would like to apply for $830.00 capitalization on our 3 year old son so that we may build our first home.

Two years ago we bought a section to the value of $3,500 at Rolleston hoping one day to build when the mortgage was down to a level where we felt we could afford it.

It seems we have been victims of the inflation rate which has made us unable to afford our house. I feel that in some ways we are being punished because of the fact that I am earning just over the limit to capitalize which has been the same for sometime and we can't afford to build without it.

At the moment we live in a small 2 bedroom house situated in the biggest industrial area in Christchurch on a stretch of 70 k.p.h. highway which is used by huge vehicles all day and half the night. As you can imagine the sooner we are out of this environment the better. The risk of one of the youngsters getting out onto the road is high at all times.

We realise that we have little finance of our own as we have put most of it back into the section and if we don't get in and build now it will be imposisble as building costs seem to rise daily. We won't be able to afford a large second mortgage because of money still owing on the section.

Our lawyer has said that we shall be able to build if you see fit to grant us this amount.

Hoping that you keep these points in mind in regards to our application.

But Mr and Mrs Macfarlane's arguments were unavailing. By letter dated 17 November 1975 and written on behalf of the Director-General of the Department of Social Welfare they were informed that the unfavourable decision of the Director would stand. They were told:

No doubt you are aware that the Commission is bound by the Government policy which fixes the income limit of $85 per week for a two child family but that the Commission has a discretion to consider any special circumstances when deciding applications for capitalisation.

After carefully examining all aspects of your case the Commission has decided to adhere to the original decision to decline capitalisation as your husband's current income . . . is considerably in excess of the amount of $85 per week for a two child family.

If you are dissatisfied with this decision you have a right of appeal within three months to the Social Security Appeal Authority. A form for this purpose is available from any office of this Department.

I am sorry I am unable to forward you a more favourable reply.

The departmental records showed that the housing need of the applicant was conceded, but that after the amount to be later specified in the Ministerial directive (described as 'exempt' income) had been deducted together with a 'housing need concession' of $10.00 per week, there was still an excess over the maximum eligibility. The records show no articulate appreciation of the crucial question whether Mrs Macfarlane or her husband 'could not reasonably be expected to arrange finance from any other source', as required by the proviso to section 10 of the Family Benefits (Home Ownership) Act 1964. The recommendation recorded in the document was 'Adhere as income well in excess'. The decision made by the Director and by the Assistant Director-General on 5 November and 7 November 1975 respectively was encapsulated in the single word 'Adhere'.

III. THE LEGAL PROCESS

Having exhausted procedures for intra-departmental review many applicants would have retired from the fray, disappointed and frustrated. Fortunately, Mrs Macfarlane took further legal advice, and with the assistance of her solicitor,

Mr M. J. Sweeney of Messrs Cavell, Leitch, Pringle & Boyle of Christchurch, lodged an appeal with the Social Security Appeal Authority on 24 November 1975 against the decision of the Commission. In support of the appeal Mrs Macfarlane's solicitors submitted a letter which amplified the arguments that had previously been advanced by her husband. Nowhere in their letter did Mrs Macfarlane's solicitors expressly question either the validity of the Minister's direction (of which they were probably unaware) or the relevance of the Government policy that fixed the income limit at $85 per week for a two child family. Among the material which the Commission is required by section 12K(4) of the Social Security Act 1964 to send to the Secretary of the Appeal Authority as soon as possible after the receipt of a copy of the notice of appeal is a report setting out the considerations to which regard was had by the Commission in making the decision. In that report the Commission referred to the requirement of section 10(1) of the Family Benefits (Home Ownership) Act 1964 that the Commission was to be satisfied that Mrs Macfarlane could not reasonably be expected to arrange finance from any other source than the capitalised family benefit, but then stated:

> In order to determine the ability of an applicant to finance a housing proposition without the aid of family benefit capitalisation income limits set by Government are applied and where the income of an applicant (sic) exceeds these limits the Commission declines to issue a certificate of eligibility . . . Where a housing need is established the limit may be increased by $10.00 a week. The income limits are not extended or disregarded for any other reasons. . . .
> A housing need has been conceded thus enabling the income limit to be increased by $10 from $85 a week, for a two child family, to $95 a week. However the average income . . . is still . . . over the extended limit. . . . Because of the fact that the income of the appellant (sic) excluding overtime and tool allowance, is . . . in excess of the extended limit the Commission considers that this is not a case where capitalisation should be granted.

The appeal came on for hearing in Wellington on 2 February 1976 before the Social Security Appeal Authority consisting of Mr A. J. L. Martin, Mrs M. P. Dell, and Mr D. Paul. Mrs Macfarlane attended the hearing and was examined on oath. She was represented by counsel, Mr M. J. Sweeney, and the Commission was represented by Mr J. T. Hughes. In a brief decision delivered on 3 March 1976 the Social Security Appeal Authority allowed the appeal. The only substantive sentence in the decision is as follows:

> Having regard to the provisions of s. 10(1)(b)(ii) of the Family Benefit (sic) (Home Ownership) Act 1964 and notwithstanding the generally applied income limits, as set out in the report submitted, the Authority considers that this is a proper case for the issue of a certificate of eligibility.

It is an inarticulate premise of the decision that the Ministerial directive was not considered by the Appeal Authority to be binding on the Commission and consequently upon the Authority itself.

Mrs Macfarlane had at last succeeded. She would have been amply justified in feeling that now at last she would receive a certificate of eligibility to enable her and her husband to make an early start in the building of their long deferred house. But she had not counted on the staying power of the Social Security Commission. An important principle was involved for the Commission, for the

Department of Social Welfare, and, most of all, for the Minister. Was the Minister's direction valid and binding on the Commission and on the Appeal Authority? Another principle, no less important, was also at stake, but there was no institutionalised group charged with the function of promoting and vindicating it. Does the general direction and control conferred upon the Minister over the exercise by the Commission of its powers authorise him to impose binding rules for the determination of eligibility when the statute remits that question to the discretion of the Commission? Another subordinate issue was raised by the Ministerial direction: was it consonant with the purpose and intendment of the legislation that exclusive emphasis should be placed on the income and allowances not of the applicant but of her spouse? The Ministerial direction referred to the income of the applicant only. Since the Family Benefits (Home Ownership) Act 1964 contemplates that the applicant for a certificate of eligibility is the person to whom the family benefit is payable and since that person is normally the mother, it might reasonably have been assumed that the reference in the application form to the 'applicant' meant the mother. Certainly in Mrs Macfarlane's case it did. Consequently the criteria in the Ministerial directive might have been interpreted as applying to her only. However, it is clear that departmental practice treated the husband of an applicant as the applicant for the purpose of assessing whether the tests contained in the Ministerial directive had been satisfied. No doubt that view was influenced to some extent by paragraph (e) of the directive:

> . . . no regard shall be had . . . , in the case of a married couple, to any earnings of the wife.

Whatever the reasons may have been, the Commission decided to appeal against the decision of the Social Security Appeal Authority. As a party to the proceedings before the Authority which was dissatisfied with its determination the Commission appealed under section 12Q of the Social Security Act 1964 to the Supreme Court. Such an appeal is available only where the determination of the Authority is considered to be 'erroneous in point of law'. The appeal is brought by way of case stated for the opinion of the court on a question of law only. The question of law posed by the Authority, as set out in paragraph 12 of the case stated, was:

> Are the specific directions of the Minister . . . binding both upon the Commission and the Authority so as to preclude the Authority from allowing the respondent's appeal and from ordering the issue of a certificate of eligibility under the said Act?

Of course, as is clear from section 12Q(4) of the Social Security Act 1964 the initiative in preparing a case stated lies with the appellant. By formulating the question of law in the manner set out in paragraph 12 of the case stated the Commission was clearly indicating the fundamental issue: which is to be master[7] — the Commission or the Minister?

IV. IN THE SUPREME COURT

The case stated was dated 23 August 1976 and was sent to the Registrar of the Supreme Court at Wellington shortly afterwards.[8] However it was not until

7 See *Liversidge* v. *Anderson (Home Secretary)* [1942] A. C. 208, 245.
8 *Social Security Commission* v. *Macfarlane* (M331/76, Wellington Registry).

21 September 1977 that the appeal was heard by White J., sitting in the Administrative Division[9] of the Supreme Court. On this occasion Mr D. P. Neazor, Crown Counsel, appeared for the Commission: Mrs Macfarlane was represented by two counsel, one of whom (Mr E. F. R. Cooke of Greytown) was solicitor for an applicant for capitalisation who had been refused a certificate of eligibility on precisely the same grounds as those relied upon by the Commission in Mrs Macfarlane's case. In fact, a large number of appeals were standing adjourned before the Social Security Appeal Authority pending the outcome of Mrs Macfarlane's appeal. It was because of the importance of the issues raised in the appeal that the Department of Social Welfare undertook to pay Mrs Macfarlane's legal costs.

In White J.'s view the key question for determination was one of construction, whether the direction of 19 November 1975 was properly given pursuant to the power of 'general direction and control' under section 4 of the Family Benefits (Home Ownership) Act 1964. Noting that there appeared to have been no cases in which those words had been construed, the Judge cited *Laker Airways Ltd* v. *Department of Trade* [1977] 2 W.L.R. 234, C.A., where the relevant statute had referred to 'directions' and to 'guidance' by the Secretary of State for Trade. That decision had been canvassed at length in the argument of counsel on each side. As White J. observed, when the language of the statute considered in *Laker*'s case is contrasted with section 4 of the Family Benefits (Home Ownership) Act 1964, the lack of clarity in the words used in the latter is apparent. A similar lack of clarity was evident when the New Zealand section was compared with other United Kingdom statutes to which the Judge's attention was directed by counsel for Mrs Macfarlane.

The effect of section 10 of the Family Benefits (Home Ownership) Act 1964 was to require the Commission to be satisfied that the applicant in any given case is eligible and that the conditions of the proviso are met. It was for the Commission in the exercise of the discretion which was vested in it to decide whether to issue a certificate of eligibility. Having restated the effect of the relevant provision in that way, White J. turned to the Ministerial direction in order to determine its effect. In that task he found useful guidance in the decision of Stephen J. in the High Court of Australia in *Green* v. *Daniels* (1977) 13 A.L.R. 1; 51 A.L.J.R. 463, which was first cited by counsel for Mrs Macfarlane. That case was concerned with the validity of a general rule of administration adopted as departmental policy by the Australian Director-General of Social Services and contained in departmental instructions for the determination of the eligibility of 'school-leavers' for unemployment benefits. It was held by Stephen J. that the applicant was entitled to a declaration in general terms that the Director-General ought to have applied his mind, undistracted by a policy laid down in a manual, to the applicant's eligibility for an unemployment benefit by ascertaining whether the applicant satisfied the criteria prescribed by the relevant section of the statute. White J. considered that a similar approach should be followed with respect to the Ministerial direction of 19 November 1975 purporting to have been made under the Family Benefits (Home Ownership) Act 1964.

9 See s. 12Q(2) of the Social Security Act 1964.

When considered in their context, the words 'general direction and control' have a meaning which falls short of direction in the sense of dictation. Where a statute contains detailed provisions as to its application, White J. considered that clear language would be necessary to show that Parliament intended that a drastic alteration could be made by Ministerial direction. There were, in the Judge's opinion, other provisions in the Act which reinforced that conclusion, particularly those which conferred a right of appeal against decisions of the Commission. The existence of a right of appeal was not in accord with a statute giving the Minister the power of override the judgment of the Commission by direction. On the other hand White J. rejected the argument of counsel for the Commission that section 23 of the Family Benefits (Home Ownership) Act 1964 had a 'peripheral bearing on the matter'. That section contains certain financial provisions conferring power not on the Minister of Social Welfare but on the Minister of Finance; but, as White J. pointed out, a section which gives powers to the Minister of Finance cannot assist in the construction of section 4 of the Family Benefits (Home Ownership) Act 1964. It is important to bear in mind that the statute itself has imposed in section 6 specific limits within which the Commission is to be empowered to exercise its discretion in providing financial assistance by way of the capitalisation of family benefits. White J. concluded his judgment as follows:

> For these reasons I am unable to agree that the words "general direction and control" were intended in the context of the Act to empower the Minister to compel the Commission to reach a particular decision. In my opinion, s. 4 is not expressed in language which gives the Minister power to override in the sense of giving "binding instructions by a superior", which the direction in question undoubtedly purports to do. Had it been the intention of Parliament to give that power it could have been stated simply and specifically.

There ended the litigation: a slight vindication of the rule of law, a setback for encroaching executive power. But it was by no means the end of the story.

V. THE EXECUTIVE IN PARLIAMENT[10]

White J.'s judgment became available at 5 p.m. on Wednesday, 14 December 1977. There was then in progress through the House of Representatives a Government measure introduced by the Minister of Social Welfare. It was the Social Security Amendment Bill (No. 2) 1977, which made many miscellaneous alterations in Part I to various monetary benefits; in Part II to medical and hospital benefits and other related benefits; and in Part III to the definition of offences. The Bill had reached the stage of consideration in Committee. There was absolutely nothing in the Bill that touched upon the issues that had been central in *Social Security Commission* v. *Macfarlane*. It is obvious that the decision of White J. caused consternation in the Department of Social Welfare, which, it is reasonable to assume, must have informed the Minister. The news can hardly have been congenial to him either. At all events at 10.36 p.m. on the following day, Thursday, 15

10 See "The Rule of Law in Action" in [1978] N.Z.L.J. 17-18, which introduces a justifiable element of emotion more appropriate to an editorial.

December 1977, after the Committee had agreed to Clauses 1 and 2 of the Bill, the Minister moved[11] to insert a new Clause with two sub-clauses as follows:[12]

> 2A. Commission to comply with directions — (1) Section 5 of the principal Act is hereby amended by adding the following subsection:
>
> "(2) In the exercise of its powers, functions, and discretions under this Act the Commission shall comply with any general or special directions given to it in writing by the Minister. As soon as practicable after giving any such direction, the Minister shall publish in the GAZETTE and lay before Parliament a copy of the direction."
>
> (2) Section 4 of the Family Benefits (Home Ownership) Act 1964 is hereby amended by adding the following subsection:
>
> "(2) In the exercise of its powers, functions, and discretions under this Act the Commission shall comply with any general or special directions given to it in writing by the Minister. As soon as practicable after giving any such direction, the Minister shall publish in the GAZETTE and lay before Parliament a copy of the direction."

Since the authority of the Committee is limited by Standing Order 308 to consider such matters only as shall have been referred to it by the House, it was obvious that the Minister's amendment was out of order. Accordingly, it was declined[13] by the Acting Chairman (Mr W. F. Birch) 'on the ground that it was incompatible with other clauses in the Bill'. When consideration of a Government amendment to a Government measure is frustrated in that way, a solution lies ready at hand. By Standing Order 317

> A motion may be made during the proceedings of a Committee of the Whole House "That the Chairman report progress, and ask leave to sit again", and such question shall be put forthwith and decided without amendment or debate.

With an ever-present majority a Government motion to that effect can hardly fail. The record of Parliamentary Debates notes[14] that the Minister of Social Welfare moved

> That the Chairman report progress and ask for leave to sit again

The motion was agreed to.

The Bill was now before the House. The following day was the final sitting day of the session, not normally dedicated to careful analysis and criticism of legislation. Shortly before 1.8 p.m. on that last day the Minister moved,[15] in accordance with Standing Order 338,

> That it be an instruction to the Committee of the Whole House on the Social Security Amendment Bill (No. 2) that it has power to consider, and, if it thinks fit, to incorporate into the Bill the amendments contained in the Supplementary Order Paper of 15 December 1977 . . .

The motion was, of course, agreed to. The Bill was immediately re-committed.

11 [1977] N.Z.J.H.R. 588.
12 Supplementary Order Paper (typewritten) dated 15 December 1977.
13 Parliamentary Debates (Hansard) House of Representatives, 15 December 1977, p. 5403.
14 [1977] N.Z.J.H.R. 589.
15 [1977] N.Z.J.H.R. 609.

Four minutes later the Minister moved in Committee to insert after Clause 2 a new Clause 2A, which was identical with the amendment which he had attempted, unsuccessfully, to have inserted in the Bill on the previous day. The new clause was agreed to and the Bill as a whole was reported to the House with that amendment. There appears to have been no explanation for the amendment, certainly no reference to the decision of White J. delivered two days previously, and no discussion or debate. Shortly after 2.38 p.m. the Social Security Amendment Bill (No. 2) 1977 was read a third time. At Government House on 23 December 1977, having been 'printed fair' in accordance with Standing Order 254, it received the Royal Assent. By virtue of section 8 of the Acts Interpretation Act 1924 the amendments both to the Social Security Act 1964 and to the Family Benefits (Home Ownership) Act 1964 came into operation at 0001 hours on that day. White J.'s judgment remained provisional until it was entered, in the sense that it was subject to recall in accordance with the principles referred to in *Horowhenua County* v. *Nash* (No. 2) [1968] N.Z.L.R. 632. To all intents and purposes however it operated as an effective judgment immediately.[16] But its effect was short-lived. Although no doubt it operated to invalidate all of the unfavourable decisions made by the Commission on the basis of the directive dated 19 November 1975, it would have no effect at all on any decisions that might be based on any similarly particularised direction that the Minister might decide to issue to the Commission in the exercise of his newly acquired power.

VI. FINALE

Exercising his new powers the Minister issued a special Ministerial direction to the Commission on 22 August 1978 specifying new monetary limits to be applied in the consideration of applications for the capitalisation of family benefits: see 1978 *New Zealand Gazette* 2419, dated 31 August 1978.

Thus we have come full circle. Ministerial control of the Commission in matters of detail and Ministerial interference with the exercise of discretionary power were foiled by the rule of law. Ministerial control and Ministerial interference are now legitimated by rule by law. It is not a pretty sight.

16 See *In re Seaford* [1968] P. 53, C.A., for a discussion of the Common Law doctrine of the relation back of judgments to the earliest moment of the day on which they were entered.