PARLIAMENT OF WESTERN AUSTRALIA

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

SEVENTEENTH REPORT:

Young Offenders Regulations 1995 and *Director General's Rules*

Presented by the Hon Bruce Donaldson (Chairman)

17
December 1995

Joint Standing Committee on Delegated Legislation

Members

Hon Bruce Donaldson MLC (Chairman)
Hon Tom Helm MLC (Deputy Chairman)
Hon Jim Scott MLC
Hon Doug Wenn MLC
Mr Bob Bloffwitch MLA
Mr Kevin Leahy MLA
Mr Ted Cunningham MLA
Mrs June van de Klashorst MLA

Advisory/Research Officer

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Committee Clerk

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Terms of Reference

It is the function of the Committee to consider and report on any regulation that:

(a) *appears not to be within power or not to be in accord with the objects of the Act pursuant to which it purports to be made;*

(b) *unduly trespasses on established rights, freedoms or liberties;*

(c) *contains matter which ought properly to be dealt with by an Act of Parliament;*

(d) *unduly makes rights dependent upon administrative, and not judicial, decisions.*

If the Committee is of the opinion that any other matter relating to any regulation should be brought to the notice of the House, it may report that opinion and matter to the House.

Report of the Joint Standing Committee on Delegated Legislation

in relation to

Young Offenders Regulations 1995 and *Director General's Rules*

Introduction

1 The *Young Offenders Regulations 1995* (the *Regulations*) were made under the *Young Offenders Act 1994* (the *Act*). They were *Gazetted* on 3 March 1995 and tabled in Parliament on 28 March 1995. The Chairman of the Committee gave notice of motion of disallowance of the *Regulations* in the Legislative Council on 11 May 1995 as the Committee had not received an explanatory memorandum in time to consider them before expiry of the Parliamentary disallowance period under s 42 of the *Interpretation Act 1984*.

2 In the course of its scrutiny of the *Regulations*, the Committee became aware of the Ministry of Justice Juvenile Justice Division *Director General's Rules* (DGR), which have been finalised since the Committee's attention was first drawn to them. The DGR were made by the Director General of the Ministry of Justice under s 181 of the *Act*. They have not been *Gazetted* or tabled in Parliament.

3 Following a preliminary discussion of issues by the Committee on 25 May 1995, David Northcott, Executive Director, Juvenile Justice Division, Ministry of Justice, was asked to appear before the Committee. He did so on 12 June.

4 In evidence given to the Committee, Mr Northcott clarified matters concerning the following issues raised by the Committee:

> Regulation 9 - relating to the taking of body samples;
>
> Regulation 34 - relating to the establishment and operation of special detention centres (SDCs, also known as boot or work camps);
>
> Regulation 39 - relating to the denial of legal representation to young offenders in respect of detention centre offences (a matter which also is expressly prohibited by the *Act* - s 174(3));
>
> Regulation 47 - relating to repeal of parts of the *Child Welfare Regulations 1977* concerning Children's Panels which have been replaced by Juvenile Justice Teams; and

Regulation 48 - relating to repeal of the *Child Welfare (Detention Centres) Regulations 1989*.

5 The Committee was generally satisfied with the evidence given by Mr Northcott in relation to all of the above issues except for r 34 and r 48 which were concerned with rules governing the operation of detention centres. On 19 June, the Committee sought legal advice from Len Roberts-Smith QC in relation to r 34 in the context of rules relating to detention centres. The Committee received that advice on 28 June. On 29 June, the Committee asked David Grant, Director General of the Ministry of Justice, to appear before it. The first available time for Mr Grant to appear was 10 August.

6 On 30 June, Parliamentary Counsel gave an opinion to Mr Northcott on matters of concern raised by the Committee. Following the concerns expressed by the Committee and receipt by Mr Northcott of Parliamentary Counsel's opinion, the Committee was informed that a number of the draft *Director General's Rules* were amended or deleted. A copy of Parliamentary Counsel's opinion was later provided to the Committee.

7 Also on 30 June, a news item regarding the Committee's inquiry into the *Regulations* appeared on the front page of *The West Australian*.

8 Messrs Grant and Northcott appeared before the Committee on 10 August. A list of the questions that the Committee anticipated asking Mr Grant was delivered to him on 4 August. In his evidence to the Committee, Mr Grant advised that he had consulted with Parliamentary Counsel in the preparation of his answers to the questions. He also informed the Committee that, following receipt of the questions which included a list of a number of **examples** of the Committee's concerns about the finalised *Director General's Rules*, some of those *Rules* were amended or repealed.

9 A copy of a portion of the opinion given to the Committee by Len Roberts-Smith QC (relating to the meaning of "legislative effect" in the context of the DGR) was given to Mr Grant on 10 August. Mr Grant sought further advice from Parliamentary Counsel and the Crown Solicitor's Office. Copies of that advice[1] were provided to the Committee by Mr Grant by letter dated 18 August.

10 After deliberating upon the matter, the Committee considered that the evidence given by Messrs Grant and Northcott and the brief opinions given by Mr Calcutt, Parliamentary Counsel, and Graham Delaney, a Senior Assistant Crown Solicitor, did not satisfactorily answer the Committee's concerns.

11 On 31 August, the Chairman of the Committee wrote to the Attorney General and identified the following as being the Committee's 3 main areas of concern:

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[1] Memorandum from GA Calcutt, Parliamentary Counsel to Executive Director, Juvenile Justice Division, Ministry of Justice, 30 June 1995; letter from GA Calcutt, Parliamentary Counsel to Director General, Ministry of Justice, 14 August 1995; letter from Graham Delaney, Senior Assistant Crown Solicitor to Director General, Ministry of Justice, 17 August 1995.

11.1 It appears that the *Director General's Rules*, or some of them, are rules having legislative effect and therefore should have been *Gazetted* and tabled in Parliament under the *Interpretation Act 1984*. As they have not been *Gazetted* or tabled, they are unenforceable or voidable.

11.2 Regulation 34 of the *Young Offenders Regulations 1995* may be *ultra vires* as an invalid sub-delegation of power or so vague and uncertain as not to be a proper exercise of the power.

11.3 The Committee has not been provided with any rules, or adequate rules, that have been specifically made for the formal establishment and operation of a special detention centre or work camp.

12 The Attorney General replied to the Committee on 30 October in the following terms:

> "1. The Director General's Rules do not have legislative effect, and accordingly it is not intended that they be gazetted and tabled. A review of the Rules will of course continue to be carried out and should any of them be clearly identified by the officers of the Ministry of Justice as having legislative effect, they will be removed from the Rules and included in the Regulations and therefore gazetted and tabled.
>
> 2. Regulation 34 has been carefully reconsidered in light of your suggestion that it may be invalid. However, given the actual wording used in section 119 of the Young Offenders Act, it is believed that the forms of activity which may be undertaken at a Special Detention Centre are adequately described in regulation 34, which expresses the principles and objectives by which it will function.
>
> 3. It is not anticipated that any Rules or Standing Orders that are made in respect of Special Detention Centres will require to be gazetted and tabled, because they will not come within the requirements of sections 41 and 42 of the Interpretation Act, in that they will not have legislative effect.
>
> To conclude on a more general note, much of the work of the Corrective Services and Juvenile Justice Divisions of the Ministry of Justice is carried out through the sensible development and operation of directions and instructions for the guidance of staff and inmates. Flexibility and discretion are often important considerations. On the occasions in which matters are raised which require to be given greater "legislative effect" they are embodied in Regulations which are gazetted and tabled. Whilst it is recognised that the concept of "legislative effect" is far from clear, any possible areas of uncertainty will continue to be brought to the attention of the law officers of the Crown for their advice."

13 On 6 November, the Chairman wrote to the Attorney General to advise her that the Committee's concerns with the *Regulations* and the DGR remained and that it may be necessary for the Committee to report the matter to Parliament.

14 On 20 November, a further news item on the Committee's inquiry into the *Regulations* and the DGR appeared in *The West Australian* (page 9).

15 On 28 November 1995, the Chairman of the Committee met with the Crown Solicitor, Peter Panegyres, provided him with a copy of Table 1 (see page 8) and explained that the DGR listed in Table 1 were the ones of most concern to the Committee.

16 On 5 December 1995, Mr Delaney, with the approval of the Attorney General, wrote to the Chairman and advised that:

16.1 the Crown Solicitor's advice to the Attorney General is that r 34 of the *Young Offenders Regulations 1995* is valid;

16.2 following further examination of the DGR contained in Table 1, rules 205(3), 213(2) & (3), 217, 218(2), 405(5), 406, 409, 502 and 608(4) should be removed, amended or dealt with by regulations; and

16.3 though there is no sufficient legal warrant for action, the Crown Solicitor's Office will discuss the other DGR identified by the Committee with the Director General of the Ministry of Justice to determine whether he wishes to amend or shift them for the avoidance of any further question.

The Committee considers that the content of the letter from Mr Delaney was unsatisfactory and failed to justify the conclusions he came to.

Director General's Rules

Background and source of power

17 The DGR have been made[2] by the Director General of the Ministry of Justice and have been countersigned by the Attorney General. They contain provisions relating to:

Management philosophy and definition (rr 101 - 107);

Management, control and security of detention centres (rr 201 - 218);

Assessment, security ratings and placement of detainees (rr 301 - 302);

Custody, removal and release of detainees (rr 401 - 409);

[2] Most of the DGR provided to the Committee by the Ministry of Justice were made on 16 July 1995.

Detention centre visits (rr 501 - 504);

Communications involving detainees (rr 601 - 608);

Disciplinary procedures (r 701);

Authorised absences (rr 801 - 804); and

Non-Australian detainees (r 901).

18 The DGR are made under s 181 of the *Act* which relevantly provides:

> (1) The chief executive officer may, with the approval of the Minister, make rules for the management, control, and security of detention centres generally or a specified detention centre and for the management, control, and security of detainees and the management of officers of the Department...
>
> (3) The chief executive officer is to publish rules made under this section in such manner as is appropriate to bring relevant rules to the attention of persons affected by them.

19 In his evidence to the Committee on 12 June Mr Northcott said:

> "Work camps will be regulated by the fact that they will be covered under the Director General's rules so that the administrative management of them is spelt out very clearly. The work camps also have standing orders which are local rules. The Director General's rules are signed off by the Director General, and we have asked the Attorney General whether she would also like to sign them off so that she is satisfied and we are satisfied that she is comfortable with them. The standing orders are dealt with at the prison superintendent and director custodial services level, although I obviously look at them as well. The day to day administrative management is spelt out clearly in those two procedural guidelines..."[3]

20 It is noted that Mr Northcott stated that the Attorney General was asked to "sign off" on the DGR. This, in any event, is a statutory requirement (s 181(1) of the *Act*).

21 Mr Northcott informed the Committee that the DGR and their former equivalents have never been tabled in Parliament.

Interpretation Act 1984

22 The *Interpretation Act 1984* relevantly provides:

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[3] Uncorrected Hansard transcript, p8.

> 41(1) Where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power shall -
>
> (a) be published in the *Gazette*...
>
> 42(1) All regulations shall be laid before each House of Parliament within 6 sitting days of such House next following publication of the regulations in the *Gazette*.
>
> (2) Notwithstanding any provision in any Act to the contrary... if any regulations are not laid before both Houses of Parliament in accordance with subsection (1), such regulations shall thereupon cease to have effect, but without affecting the validity or curing the invalidity of anything done or of the omission of anything in the meantime...
>
> (8) In this section... **"regulations"** includes rules and by-laws.

23 "Subsidiary legislation" is defined in s 5 of the *Interpretation Act* as meaning:

> any proclamation, regulation, rule, by-law, order, notice, rule of court, town planning scheme, resolution, or other instrument, made under any written law **and having legislative effect**. (emphasis added)

24 Based on its legal advice, the Committee considers that the DGR, or significant numbers of them, are both "subsidiary legislation" and "regulations" (in the context of s 42 of the *Interpretation Act*). Consequently, as they have not been *Gazetted* or tabled, they are of no effect.

Legislative effect

25 It appears that a principle difference between the view taken by the Committee and the view taken by the Ministry of Justice and the Attorney General is in the meaning and application of the term "legislative effect". The Attorney General and the Ministry of Justice appear to have taken the view that none of the DGR are of legislative effect and therefore are not subject to ss 41 & 42 of the *Interpretation Act*. The Committee, on the other hand, considers that some of the DGR, or parts of them, are of legislative effect.

26 It has been said that, broadly, legislative action involves the formulation of general rules of conduct, usually operating prospectively, whilst executive or administrative action, by

contrast, applies general rules to particular cases[4]. A number of more specific characteristics which distinguish legislative action from executive action are[5]:

26.1 whether a rule determines the content of the law rather than applying it;

26.2 whether a rule is binding rather than a mere guideline (and particularly whether it imposes liability to civil or criminal penalty for breach); and

26.3 whether a rule has general application.

27 The Committee accepts that many of the DGR are rules which are administrative in nature and not of legislative effect and therefore do not require to be *Gazetted* or tabled. Whilst some such DGR are purely administrative, others are mixed in with rules which the Committee considers have legislative effect. Thus, some confusion arises. Additionally, in respect of some of the DGR it is difficult to determine whether they should be characterised as legislative or administrative.

28 However, the Committee considers that at least some of the DGR are intended to formulate general rules of conduct in relation to their subject matter; they determine the content of an area of law; and they are manifestly intended to be binding on those subject to them (and those who disobey them are subject to statutory penalties - ss 170(a) & 173(2) of the *Act*). Thus the Committee considers that some of the DGR are rules which have legislative effect and therefore must be *Gazetted* and tabled.

29 An example of a rule which the Committee considers has legislative effect is r 217(3.1), which provides:

> The certificate referred to in sub-rule 2.1 shall be admissible in evidence against a detainee charged with a detention offence and shall be *prima facie* evidence of the matters certified in the certificate.

30 It would appear to be difficult, if not impossible, to argue that this rule is not a rule

> "made under a power delegated by Parliament... [which] determines the law at the level of general application... [and] has the direct or indirect effect of imposing an obligation... [and] is binding in its application, usually in the sense that it is enforceable in criminal or civil proceedings"

which is in fact the test proposed by Graham Delaney, Senior Assistant Crown Solicitor, in a letter to the Director General of the Ministry of Justice dated 17 August 1995.

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[4] Australia, Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report 35, March 1992, p20.

[5] Australia, Administrative Review Council, *Rule Making by Commonwealth Agencies*, Report 35, March 1992, p20; *Commonwealth v Grunseit* (1943) 67 CLR 58, 82; *Queensland Medical Laboratory v Blewett* (1988) 84 ALR 615, 633; *Minister for Industry and Commerce v Tooheys Ltd* (1982) 42 ALR 260, 265.

31 It is a rule which purports to bind magistrates (and others) in their hearing of detention centre offences, ie, judicial proceedings. It is purported to be made under the power delegated by Parliament to make DGR; it is of general application (ie it does not just apply to the offence committed by John Citizen on 23 August 1995); it directly imposes an obligation on magistrates (and others) to regard a certificate as being *prima facie* evidence of its contents; and it purportedly is binding in its application (there is no discretion to ignore it). It has legal as opposed to purely administrative consequences. Furthermore, an equivalent provision under the *Prisons Act 1981* is contained in the *Prisons Regulations 1982* (r 28); and a similar provision relating to admissibility and legal effect of a certificate given by a superintendent is contained in s 187 of the *Young Offenders Act* itself.

32 This is but one example of a DGR which the Committee considers may be of legislative effect. There are numerous other such examples, some of which the Committee concedes are not as clear as this one. The Committee pointed out some other such examples to officers of the Ministry of Justice, as a result of which some former DGR have been repealed.

33 Additionally, some of the DGR appear to have been copied directly from the *Prisons Regulations 1982*. These include rules 217(1.1), (2), (3) & (4), which relate to drug testing of detainees and which are copied from regs 26 - 29 of the *Prisons Regulations 1982*. Another such example is rule 405 which is largely copied from regs 38 & 39 of the *Prisons Regulations*. It is incongruous that these matters were included in regulations in 1982, but were not considered to be important enough to be included in regulations in 1995[6].

34 The Committee considers that the DGR listed in Table 1, or parts of them, have, or may have, legislative effect, based on the tests already stated or the fact that they have previously been considered to have legislative effect (and have been included in statutes or regulations). There are a few other DGR about which the Committee has some doubts as to their administrative or legislative nature but, on balance, has concluded that they are more likely to be characterised as administrative rules. Some of the DGR listed in Table 1 as having legislative effect are a combination of rules having legislative effect and administrative rules - the rules which the Committee considers have legislative effect have been identified as specifically as possible using the numbering system utilised in the DGR. As has already been noted, the Crown Solicitor now considers that rules 205(3), 213(2) & (3), 217, 218(2), 405(5), 406, 409, 502 and 608(4) should be removed, amended or dealt with by regulations.

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[6] The Committee concedes that there are some matters in the *Prisons Regulations 1982* which could be included in administrative rules: for example, r 62 regarding haircuts of remand prisoners. However, the Committee considers that in cases of doubt it is preferable, in the absence of a clear necessity for immediate flexibility, for administrative matters to be included in regulations where this is not strictly necessary, rather than to include legislative matters in administrative rules which are not subject to the scrutiny processes of the legislature.

Table 1: DGR which have, or may have, legislative effect[7]

Rule	Title of Rule and Comment
103	*Rules of Detention Centre*: Issue raised with MOJ 4.8.95; subsequently repealed by MOJ
201(1)	*Association of Male and Female Detainees*: cf s 44 *PA*
204(2)	*Physical Force*: cf s 48 *PA*
205(3)	*Requests and Complaints by Detainees*: re-states s 170(c) *YOA*
206	*Specific Complaints of Inappropriate Sexual Conduct* (particularly 206(1.4)): cf s 100 *PA*; who is an appropriate authority? Is this, in all cases, a criminal investigation?
213(3)	*Mechanical Restraints*: cf s 42 *PA*
215(1), (2), (5)	*Regimen for Detainees Placed in Observation Cells*: 215(1) - "have any other reasons causing a risk of imminent harm"?; 215(2), (5) - cf s 82 *PA*
216(1), (2), (5)	*Regimen for Detainees Placed in Isolation*: Issue raised with MOJ 4.8.95; subsequently amended by MOJ, but Committee's concerns remain; cf s 82 *PA*, s 173(2)(e) *YOA*
217(1), (3), (4), (5)	*Procedure when a Detainee Suspected of Being under the Influence of or in Possession of Alcohol or Drugs*: cf ss 170 & 187 *YOA*, rr 26-29 *PR*
218	*Searches*: cf ss 49-50 *PA*; rr 78-81 *PR*
301(3)	*Assessment, Security Ratings, Supervision, Classification and Placement of Detainee within Detention Centres*: cf r 55-62 *PR*
401	*Clothing and Property of Detainees upon Admission & Release from Custody*: cf rr 32-37 *PR*
402(2)	*Escape Procedures* [notification]: cf r 13 *PR*
403(1.1)	*Escort of a Detainee* [duty of Superintendent]: Issue raised with MOJ 4.8.95; subsequently amended by MOJ, but Committee's concerns remain; cf s 11 *YOA*; ss 7 & 36 *PA*

[7] MOJ = Ministry of Justice
PA = *Prisons Act 1981*
PR = *Prisons Regulations 1982*
YOA = *Young Offenders Act 1994*
YOR = *Young Offenders Regulations 1995*

405	*Recording of Detainee's Particulars*: Issue raised with MOJ 4.8.95; subsequently amended by MOJ, but Committee's concerns remain; cf rr38-39 *PR*; Why is it necessary to maintain records of a detainee's name "for statistical purposes" after her or his records have been destroyed?
406	*Placement of Detainees at Police Lockups*: "Detainees may be detained in police lock-ups... when the collective accommodation in detention centres is insufficient"
408(1.3), (1.4), (3)	*Death of a Detainee*: cf rr 74-75 *PR*
409	*Supervised Release*: cf Part 8, Div 3 *YOA* (some provisions unnecessarily repeated; possible fetter on Board's discretion)
501	*Official Visits to Detainees*: cf ss 61-65 *PA*; r 53 *PR*
502	*Visits to Detainees from Family, Relatives and Friends*: cf ss 59-60 *PA*; rr 52-54 *PR*
503(1), (2)	*Inter-detention Centre Visits between Detainees*: cf ss 59-60 *PA*; rr 52-54 *PR*
504	*Visits to Detainees by Ex-detainees*: cf ss 59-60 *PA*; rr 52-54 *PR*
601(1), (2), (5)	*Access to Information Pertaining to Detainees*: cf s 17 *YOA*
603-606	*Letters Written by or Addressed to Detainees; Parcels to and from Detainees; Inspection of Letters or Parcels; Special Communications*: cf ss 67-68 *PA*
607	*Provision of Information to Detainees*: cf r 51 *PR*
608(4)	*Telephone Calls to Legal Representatives*
701(1.1)	*Management of Disruptive Adolescent Behaviour Other than by a Charge of a Detention Offence*: s 172 *YOA*; r 216 DGR
901	*Procedure on Receipt of a Foreign National*: gives domestic effect to an international treaty

Importance of publication

35 In the context of the importance of publication of subordinate legislation, in *Watson v Lee*[8] the question of a citizen's right to know the laws by which he or she is bound arose. Barwick CJ stated:

> To bind the citizen by a law, the terms of which he has no means of knowing, would be a mark of tyranny... That would be so fundamentally unjust that it is an

[8] (1979) 144 CLR 374

> intention I could not attribute to the Parliament unless compelled by intractable language to do so. In my opinion, no semantic quirks of the draftsman would lead me to that conclusion - a conclusion which would attribute to the Parliament an intention to act tyrannically[9]...
>
> No inconvenience in government administration can, in my opinion, be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing.[10]

Stephen J, with whom Gibbs and Aickin JJ agreed, said:

> ... But notification is a critical step in the statutory process of delegated law-making and without it that process is incomplete...
>
> Its great importance is apparent from the history of delegated legislation. That history reflects the tension between the needs of those who govern and the just expectations of those who are governed. For those who govern, subordinate legislation, free of the restraints, delays and inelasticity of the parliamentary process, offers a speedy and flexible mode of law-making. For the governed it may threaten subjection to laws which are enacted in secret and of whose commands they cannot learn: their reasonable expectations that laws shall be both announced and accessible will only be assured of realization by the imposition and enforcement of appropriate controls upon the power of subordinate legislators, whose power, as Fifoot observed "requires an adequate measure of control if it is not to degenerate into arbitrary government": *English Law and its Background* (1932)...
>
> These two enactments of the Commonwealth Parliament [the equivalent of the relevant scrutiny sections of the Western Australian *Interpretation Act 1984*] provide a mechanism for parliamentary oversight of delegated legislation and, no less importantly, allow those whom such laws affect to learn of their making and of their terms. As Scott LJ said in *Blackpool Corporation v Locker* [[1948] 1 KB 349, 361], speaking there of sub-delegated legislation, "there is one quite general question... of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what the law is". The maxim that ignorance of the law is no excuse forms the "working hypothesis on which the rule of law rests in British democracy" but to operate it requires that "the whole of our law, written or unwritten, is accessible to the public - in the sense, of course, that at any rate its legal advisers have access to it at any moment, as of right". It was, his Lordship said, "vital to the whole English theory of the liberty of the subject, that the affected person should be able at any time to ascertain what legislation affecting his rights has been passed".

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9 (1979) 144 CLR 374, 379

10 (1979) 144 CLR 374, 381

> All this applies with at least equal force to the present day in Australia...[11]

36 Many of the DGR themselves provide that they are to be provided to SDC detainees[12]. Whilst this is important, the Committee is firmly of the view that all DGR which have legislative effect must, in accordance with the *Interpretation Act 1984*, be published in the *Gazette* and tabled in both Houses of Parliament. This is, apart from the requirements of the *Interpretation Act*, a fundamental tenet of our system of representative democracy based on the rule of law.

No reason why DGR cannot be published

37 In response to a question from the Chairman about availability of the DGR to lawyers and members of Parliament, Mr Northcott said:

> "My view is that they should have access to them, with the exception of those which have an impact on the security and running of the centre... In my view we should be open and confident in the procedures that we put in place; also, we are not the sole fount of all knowledge."[13]

38 On this basis there is no apparent reason why those DGR which have legislative effect, other than those relating to security, could not be *Gazetted* and tabled (or included in the *Young Offenders Regulations 1995*). Alternative legislative arrangements would have to be made in respect of legislative rules directly relating to security which would be adversely affected by publication.

DGR of no effect

39 Consequently the Committee considers that those of the DGR which have legislative effect are of no effect and cannot be enforced. The Ministry of Justice nevertheless purports to be using and enforcing all of the DGR. As has already been noted, the Crown Solicitor considers that a number of rules should be removed, amended or dealt with by regulations. Presumably the Ministry will now act on the advice of the Crown Solicitor. The question remains as to the other concerns expressed by the Committee.

40 It is not open to the Parliament to disallow the DGR in accordance with the procedures in s 42 of the *Interpretation Act* as they have not been *Gazetted* or tabled. However, the Committee considered that this matter should be brought to the attention of Parliament.

Young Offenders Regulations 1995

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[11] (1979) 144 CLR 374, 393-5. See also *Blackpool Corporation v Locker* [1948] 1 KB 349, 361-2, 367-370

[12] This reflects the requirements of s 181(3) of the *Act*.

[13] Uncorrected Hansard transcript, pp9-10.

Background and source of power

41 The Committee's principal remaining concern with the *Regulations* is with r 34 which relates to "detention centres established and operated as special detention centres". SDCs are commonly referred to as boot or work camps[14].

42 Section 196 of the *Act* relevantly provides that the "Governor may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act".

43 The operative provision of the *Act* concerned with SDCs is s 119, which relevantly provides:

> (1) If -
>
> (a) the regulations provide for the establishment and operation of detention centres where detainees are required to undertake particular forms of activity; and
>
> (b) a detention centre of that kind has been declared under section 13,
>
> the court, on sentencing the offender to a term of detention of not less than 9 months for a prescribed offence, may direct that the offender be detained in a detention centre of that kind for a period of 4 months.

44 It is noted that such an order can only be made if the offender consents to it (s 119(2)). A SDC was declared under s 13 of the *Act* by the *Young Offenders (Detention Centre) Order 1995* published in the *Gazette* on 10 March 1995 (p902).

45 As has already been noted, s 181 of the *Act* provides that the chief executive officer (Director General) may make rules for the management, control and security of detention centres.

46 Regulation 34 provides:

> (1) Detention centres to be known as special detention centres may be established and operated where detainees are required to undertake designated work and other developmental programmes in a structured and disciplined environment in order to attain predetermined goals.
>
> (2) In attaining predetermined goals, detainees in special detention centres are required to undertake activities that demonstrate progress in their self-discipline, work performance and capacity to participate in developmental programmes.

[14] The DGR in some instances refer to "work camps": see, for example, r 409.

47 This regulation, in terms of establishment of SDCs, adds little to a declaration of a SDC under s 13. In terms of operation of SDCs, all it reveals is that:

47.1 detainees are required to undertake, and demonstrate progress in, work and other developmental programmes,

47.2 in a structured and disciplined environment,

47.3 in order to attain predetermined goals.

48 This leaves open questions such as:

48.1 What kind of work and developmental programmes are contemplated (eg physical labour, psychological therapy, etc)?

48.2 What kind of structure and discipline will be imposed (eg working hours, corporal punishment, etc)?

48.3 What are the predetermined goals (eg rehabilitation/reintegration to the community, passing a psychological test etc)?

48.4 Who assesses these things?

48.5 Who may establish and operate SDCs?

48.6 What are the functions and powers of SDC staff (similar to the relevant provisions of the *Prisons Act 1981* and the *Prisons Regulations 1982*)?

48.7 Are there to be any restrictions on who may be appointed as staff at SDCs (similar to the relevant provisions of the *Prisons Regulations 1982*; see also s 11 of the *Young Offenders Act* which provides that the Minister may appoint officers and employees of such classes as are prescribed by regulations and s 181(2) of the *Act* relating to functions that the DGR may confer on prison officers)?

48.8 What are the general management provisions relating to SDCs (such as those contained in the *Prisons Act 1981* and the *Prisons Regulations 1982*)?

49 The Committee has not received from the Ministry of Justice, and is not aware of the existence of, any rules that specifically relate to the establishment and operation of SDCs in the context of matters such as those listed in the preceding paragraph.

The legislative hierarchy

50 The Chairman asked Mr Northcott the following question:

> "Why are the principles for the establishment and operation of work camps not spelt out in the *Young Offenders Act* as they are in the *Prisons Act*?"[15]

51 Mr Northcott's reply included the following:

> "... I suppose at one level you are right in that it does not go into a great deal of detail other than to specify that it is a special detention centre. I do not know whether that is a result of the Parliamentary Counsel's draftsmanship or otherwise. That issue has not been raised with me before. It is an interesting question...
>
> The work camp is a pilot program and I guess one of the drawbacks of specifying it in more detail in the *Regulations* and/or the *Act* is that that could to some degree hinder our ability to be flexible in regard to seeing what works and what does not work."[16]

52 In the leading Australian work on subordinate legislation, under the heading *Legislation to deal with rapidly changing or uncertain situations*, Dennis Pearce says:

> One of the consequences of limited parliamentary sittings is that Acts cannot be readily amended. And even where a parliament is sitting, the process for amending Acts is laborious and slow. Accordingly, if an Act attempts to deal with a fact situation that is fluid, it is likely to impose controls that are too rigid... The inflexibility of an Act makes it an unsatisfactory legislative instrument in such cases. One alternative would be to vest a broad discretion in an official or tribunal. But this then creates the problem that no statement of "the law" is available to the public. Nor is there any effective parliamentary control over the actions of the recipient of the power. The middle course between excessive rigidity and unfettered discretion is the adoption of delegated legislation. The parliament can check the rules laid down by its delegate; the public can turn to the rules for information.[17]

Thus there is a compromise between flexibility in law-making and the fundamental requirements of a representative democracy that the people's representatives control the law and the people may know the law. This uneasy compromise of democratic principles should not be further eroded by a bureaucratic decision that flexibility is more important (and will make the bureaucrat's job easier).

53 In his advice to the Committee Mr Roberts-Smith says:

> The legislative hierarchy is ordinarily such that the most important matters are dealt with in the statute, those matters of detail of lesser importance are dealt with

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15 Uncorrected Hansard transcript, p9.

16 Uncorrected Hansard transcript, p9.

17 Pearce, DC, *Delegated Legislation in Australia and new Zealand*, Butterworths, 1977, p6.

by regulation and the minutiæ (in respect of which the greatest administrative flexibility is needed) are dealt with by, in this instance, [the DGR]. That hierarchy is recognised in Section 181 itself, subsection (5) of which states that -

> "(5) If there is any inconsistency between a rule made under this section and a regulation, the rule has effect, to the extent of the inconsistency, subject to the regulation."

Applying that approach to the relationship between and wording of Section 119(1) and 181 respectively, the view could be taken that the legislature quite deliberately saw matters going to the establishment and operation of detention centres as broader in scope than detailed provisions dealing with the management, control and security of such centres, detainees and departmental officers. It would be consistent with this for the legislature to then intend and expect substantial provision for the establishment and operation of such centres to be contained in the regulations rather than the [DGR] - and much less in orders etc issued by a Superintendent!

Is regulation 34 valid?

54 As has been noted, r 34 is very brief and non-specific in its terms. The Committee considers that it is arguable that, as a result of its brevity and non-specificity, r 34 effectively sub-delegates the power to provide for the establishment and operation of SDCs. The Committee concedes that there is doubt about this proposition but notes that such a sub-delegation would be invalid[18].

55 Again as a result of its brevity and generality, the Committee considers that it is arguable that r 34 is so vague as not to pose any objective standard nor impose any objectively ascertainable requirement of conduct or effect and therefore does not constitute a true exercise of the regulation making power. Whilst the Committee again concedes that there is doubt about this proposition, it notes that, if the proposition were correct, r 34 would be invalid[19].

56 The Committee is aware that the courts have already sentenced a number of young offenders to detention in SDCs under s 119 of the *Act* and therefore it is possible that the sentencing courts have assumed that r 34 is valid. However, the Committee is not aware if the validity of r 34 has been challenged in any court.

57 Notwithstanding the advice of the Crown Solicitor, as a result of its uncertainty about the validity of r 34 taken in conjunction with its views on the validity of the DGR, and the potential legal consequences that would follow if r 34 were to be found by a court to be

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[18] *R v Lampe; ex parte Maddalozzo* (1963) 3 FLR 160; *Hawke's Bay Raw Milk Producers Cooperative Co Ltd v New Zealand Milk Board* [1961] NZLR 223.

[19] *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184, 194; *Cann's Pty Ltd v The Commonwealth* (1946) 71 CLR 210; *Racecourse Cooperative Sugar Assoc. Ltd v Attorney General for Queensland* (1979) 53 ALJR 758, 764.

invalid, the Committee considered that this was a matter which it should draw to the attention of Parliament.

Conclusions

58 It is important to note that the Committee is not concerned with the policy of the creation of SDCs or indeed with the delegation of power to the Director General to make rules of an administrative nature. The Committee's concerns relate solely to the legal form in which these policies have been effected.

59 The Committee is concerned by the apparent lack of understanding in the Ministry of Justice of the general nature of the legislative hierarchy, of the distinction between matters which are of legislative effect and matters which are administrative in nature and of the importance of publication of rules which have legislative effect. From its experience in reviewing most regulations, rules and by-laws made in the State since 1987, the Committee is aware that many agencies in Western Australia have a similar lack of understanding. The DGR provide an example of this misunderstanding. The Committee does concede, however, that the distinction is not always clear: consequently efforts need to be made to increase awareness of the distinction and encourage consistency in its application.

60 It is the function of the Committee to scrutinise subordinate legislation and identify matters of concern such as those contained in the *Regulations* and DGR. Nevertheless, the Committee considers it essential that agencies address issues such as whether or not proposed rules have legislative effect and are within power at an early stage in their preparation. The Committee notes that Parliamentary Counsel has an important role to play in this area.

61 It would be an extremely time-consuming and inefficient exercise if it became necessary for the Committee to identify many such errors in many pieces of subordinate legislation and, in each case, justify its conclusions in a report to Parliament, simply because agencies were not considering these matters. Where the Committee identifies legitimate concerns, agencies must be encouraged seriously to re-consider the relevant subordinate legislation.

62 The Committee recently tabled a report on the subordinate legislation system in Western Australia[20]. It is hoped that the recommendations for reform made in that report will significantly improve agencies' understanding of the importance and legal effect of subordinate legislation.

[20] Joint Standing Committee on Delegated Legislation, *The Subordinate Legislation System in Western Australia*, 16th Report, 23 November 1995.