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21 July 2004

Julia Thoener
Inquiry Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600

Dear Julia

Re: The Heiner Inquiry and the Ensbey Indictment – Supplementary Submission by Alastair MacAdam

I refer to our telephone conversations and your fax to me.

Form 82 or Form 83?

Originally there were the *Criminal Practice Rules 1900* (Qld). These rules contained the optional forms of indictment for the provisions of the *Criminal Code [1899]* (Qld). In respect of s 129 (Destroying evidence) of the *Criminal Code [1899]* (Qld), the optional form of indictment was form 83 of the *Criminal Practice Rules 1900* (Qld).

In 1999, the *Criminal Practice Rules 1900* (Qld), were replaced by the *Criminal Practice Rules 1999* (Qld). In respect of s 129 (Destroying evidence) of the *Criminal Code [1899]* (Qld), the optional form of indictment in the new 1999 rules is form 82.

Form 83 of the *Criminal Practice Rules 1900* (Qld) read:

No. 83-Destroying evidence Section 129

Knowing that a certain book [*or* deed (*or as the case may be*)], namely a ledger (*or as the case may be*), was [*or* might be] required in evidence in an action then pending in the Supreme Court of Queensland between one E.F. and one G.H. (*or as the case may be*),wilfully destroyed the same [*or* wilfully rendered the same illegible (*or* undecipherable *or* incapable of identification)], with intent thereby to prevent it from being used as evidence in the said action (*or etc*).

Form 82 of the *Criminal Practice Rules 1999* (Qld) reads:

Form 82-Destroying evidence

(Section 129. Destroying evidence)

Knowing that [*describe the book, document or thing*], was (*or* might) [sic] be required in evidence in a judicial proceeding namely [*describe it*], wilfully destroyed it (*or* wilfully rendered it illegible (*or* undecipherable *or* incapable of identification)), with intent to prevent it from being used in evidence.

In *R v Douglas Roy Ensbey*, as the trial in the District Court of Queensland took place in March 2004 after the commencement date of the *Criminal Practice Rules 1999* (Qld), 1July 1999, the form of indictment used was form 82 of the *Criminal Practice Rules 1999* (Qld).

However, if you refer to the attached transcript of those proceedings, you will note that the alleged destruction of the documents in that case occurred in 1996. Consequently, Ensbey had to be prosecuted (in the absence of subsequent amendments having retrospective effect) in accordance with the substantive law as it stood at that date.

What the defence and somewhat surprisingly the prosecution both sought to argue was that form 83 of the *Criminal Practice Rules 1900* (Qld), which were the rules in existence in 1996, could be used to read down the clear words of s 129 of the *Criminal Code [1899]* (Qld). Judge Samios clearly rejected this argument. (I have highlighted the relevant passages of the transcript for your convenience.)

You might ask if Ensbey had to be prosecuted in accordance with the law as it stood in 1996, why the form of indictment at that date, that is form 83 of the *Criminal Practice Rules 1900* (Qld) was not required to be used? The reason is that the form of the indictment was a mere matter of procedure, and therefore the form used was the form that existed at the date of the trial in 2004, that is, form 82 of the *Criminal Practice Rules 1999* (Qld). On this point see for example the decision of the High Court of Australia in *Rodway v R* (1990) 169 CLR 515.

I trust the above explanation demonstrates why the contention that the decision in *R v Douglas Roy Ensbey* strongly supports the view that the approach of the Criminal Justice Commission and others that the optional form of indictment in form 83 of the *Criminal Practice Rules 1900* (Qld) could be used to read down the clear words of s 129 of the *Criminal Code [1899]* (Qld), was never maintainable. The substantive issue of law in *Ensbey* was the interaction of form 83 and s 129. The actual use of form 82 the *Criminal Practice Rules 1999* (Qld) in *Ensbey* did not affect the substantive issue in any way and is essentially a 'red herring'.

Other Cases

In addition to the above, enclosed for your information are two further cases which I have come across and which also support the contention that the approach of the Criminal Justice Commission and others was never maintainable. Those cases are:

> *R v His Honour Judge Morley and Mellifont* [1990] 1 Qd R 54; and
> *R v Bailey* [2003] QCA 506.

R v His Honour Judge Morley and Mellifont involved an indictment under 123 (Perjury) of the *Criminal Code [1899]* (Qld). The relevant form of indictment was form 79 of the *Criminal Practice Rules 1900* (Qld). In the Full Court of the Supreme Court of Queensland, Connolly J, with whom McPherson and Williams JJ agreed, said (at 56):

> It [the form of the indictment] was in one of the alternate forms provided for under the *Criminal Practice Rules* [*1900* (Qld)], Form 79 and was therefore correct in form pursuant to O.2 r.2. Nonetheless, as is obvious, it departs from the words of *The Criminal Code.* Plainly enough it is the formulation of the offence in the Code which must prevail.

The High Court granted special leave to appeal *R v His Honour Judge Morley and Mellifont* [1990] 1 Qd R 54, but dismissed the appeal, see *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289. The above point dealt with in the Queensland Full Court did not arise in the High Court.

R v Bailey involved an indictment under s 408C (Misappropriation of property) of the *Criminal Code [1899]* (Qld). In the Queensland Court of Appeal, McPherson JA, with whom Mackenzie J agreed on the point, said (at [14]);

> Although the charge of aggravation in the indictment, being the form prescribed, was declared by s 707 of the *Code* to be sufficient, the learned trial judge was nevertheless required to direct the jury in terms of the relevant section or sections of the *Code*...

I have highlighted the relevant passages for your convenience.

If I can be of further assistance to you or your Committee please contact me.

Kind regards

Alastair MacAdam
Senior Lecturer in Law