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WHITE MAN SPEAK WITH FORKED TONGUE

ANDREW HEMMING*

I INTRODUCTION

Public policy is notoriously difficult to define with any precision. It has been described as an 'unruly horse'.[1] This paper considers past judicial and governmental responses in the Northern Territory to the public policy issue of child sex offences. The title, 'White man speak with forked tongue', is designed to reflect the author's viewpoint that the rhetoric of both the judiciary and the government in combating child sex abuse has not been matched with deeds or action until very recently.

In the case of the Northern Territory Government the catalyst appears to be the "*Little Children are Sacred Report*" followed by Federal intervention. This is not to say that those concerned are not well intentioned and honourable, but rather that the offender has been given greater consideration than the victim, and that inadequate priority/resources have been given to this insidious and endemic blight on our society.

In August 2006, the Northern Territory Government set up a Board of Inquiry to report on allegations of sexual abuse of Aboriginal children.[2] The Board's report has recently been released (15 June 2007) and it found that child sexual abuse is serious, widespread and often unreported. The report further stated that 'it is impossible to set communities

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[1] *Richardson v Mellish* (1824) 130 ER 294,303 (Burrough J).
[2] Northern Territory Board of Inquiry Into the Protection of Aboriginal Children from Sexual Abuse , Northern Territory Government, *Little Children Are Sacred*, (2007), (Rex Wild QC and Pat Anderson).

on the path to recovery from the sexual abuse of children without dealing with the basic services and social ills'.[3]

Education is seen as the key and much of the report focuses on improving existing government programs to help Aboriginal people break the cycle of poverty and violence. However, the report did discuss submissions from the Director of Public Prosecutions and the Northern Territory Police Force. Both these submissions will be considered in the body of this paper.

While recognising that a court of law is a 'blunt instrument' for dealing with widespread social problems, the focus of this paper will be to examine, in the context of sexual abuse of children, how legislative changes may assist the courts to meet the objective set out in *R v Wurramara*[4] that 'the correct message' is sent out.

Individual judges of the Northern Territory Supreme Court have recognised the wider social context in which the Courts operate. For example, Riley J in *Q v Ricky Nelson*[5]:

> It has been said on many occasions that the courts and the penal system are blunt instruments for dealing with this social problem. All the Judges and Magistrates can do is to impose ever increasing sentences of imprisonment upon the violent offenders, but as experience reveals, that has not served to stem the flow of such cases. It must be recognised that the answer must lay elsewhere. It is already too late to deal with such violence once it is before the courts. Something must be done before the violence occurs. One obvious area to tackle is the issue of widespread and extreme alcohol abuse.[6] [emphasis added]

The problems identified by Riley J have been widely documented in the Northern Territory for some time but the Northern Territory Government's response has been less

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[3] Northern Territory Board of Inquiry Into the Protection of Aboriginal Children from Sexual Abuse , Northern Territory Government, *Little Children Are Sacred*, (2007) Summary Report, (Rex Wild QC and Pat Anderson).

[4] (1999) 105 A Crim R 512, [26].

[5] *The Queen v Ricky Nelson* – SC 20624004.

[6] Sentencing Remarks, *The Queen v Ricky Nelson* – SC 20624004, (Northern Territory Supreme Court, Riley J, 14 March 2007).

than satisfactory. Ultimately, this policy failure has required Federal intervention using the Commonwealth Government's powers under s 122 of the Australian Constitution. The following is an extract from the Second Reading Speech of the Federal Minister for Indigenous Affairs, The Honourable Mal Brough MP, in introducing the Northern Territory National Emergency Response Bill 2007 (Cth):

> Six weeks ago, the *Little children are sacred* report commissioned by the Northern Territory government confirmed what the Australian government had been saying. It told us in the clearest possible terms that child sexual abuse among Aboriginal children in the Northern Territory is serious, widespread and often unreported, and that there is a strong association between alcohol abuse and sexual abuse of children.
>
> With clear evidence that the Northern Territory government was not able to protect these children adequately, the Howard government decided that it was now time to intervene and declare an emergency situation and use the territories power available under the Constitution to make laws for the Northern Territory.[7]

Since the *Little children are sacred* report was released on 15 June 2007, there has been a spate of legislative and resource allocation decisions announced by both the Federal and Northern Territory Governments. There is almost an element of competition between the two tiers of government in a seeming scramble to claim the moral high ground and demonstrate a higher level of commitment. It has certainly been difficult to keep up with the raft of initiatives that have flowed from the *Little Children are Sacred* report in the last three months. Any analysis is therefore necessarily partial. However, what can fairly be said is whatever individual views may be on the efficacy of some of the Federal initiatives in relation to the perceived problems, a searchlight has been shone on the darker reaches of isolated Aboriginal communities and for that many of the most vulnerable members of those communities, given the endemic nature of the cycle of abuse, will undoubtedly be safer.

Noel Pearson in an ABC interview trenchantly commented in similar vein:

[7] Second Reading Speech, Northern Territory National Emergency Response Bill 2007 (Cth), (Mal Brough MP, 7 August 2007).

> Rex Wild QC said in his report the other week, he said he hopes from now on no Aboriginal child suffers abuse. We should all, we should all hold that hope, but in order to give effect to that hope, we've got to stop the grog, we've got to get the police in there and we've got to have an absolutely vigilant attitude towards the behaviour of adults around children, particularly if they're drinking and particularly if the circumstances of children are such that they're vulnerable to abuse.[8]

II BAIL AND SENTENCING

A singular example of the previous apparent policy paralysis of the Northern Territory Government is in its failure to deliver on a 2006 Council of Australian Governments agreement to address customary law as regards bail and sentencing. The Explanatory Memorandum accompanying the Northern Territory National Emergency Response Bill 2007 dealt with Part 6 on bail and sentencing as follows:

> On 14 July 2006, the Council of Australian Governments (COAG) agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agreed that their laws would reflect this, if necessary by future amendment. COAG also agreed to improve the effectiveness of bail provisions in providing support and protection for victims and witnesses of violence and sexual abuse.
>
> The Commonwealth implemented the COAG decision through the *Crimes Amendment (Bail and Sentencing) Act 2006* … [which] amended the *Crimes Act 1914* (the Crimes Act) to preclude consideration of customary law or cultural practice from sentencing discretion and bail hearings as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence or alleged offence relates.[9] [emphasis added]

The Explanatory Memorandum explains that clauses 90 and 91 of the Northern Territory National Emergency Response Bill 2007 (Cth) are modelled closely on the *Crimes*

[8] Australian Broadcasting Commission, 'Noel Pearson discusses the issues faced by Indigenous communities', *Lateline*, 26 June 2007 <http://www.abc.net.au/lateline/content/2007/s1962844.htm> at 16 September 2007.
[9] Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007 (Cth).

Amendment (Bail and Sentencing) Act 2006 (Cth). The COAG meeting of 14 July 2006 followed the recommendations of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006.

However, it should be noted that the *Little Children are Sacred* report referred to by the Minister did not support the *Crimes Amendment (Bail and Sentencing) Act 2006.* In a disparaging aside, the Inquiry states that 'the amendments will have no practical effect in the Northern Territory on any of the issues with which we are confronted, we otherwise disregard them'.[10]

This conclusion is rather surprising especially in light of cases such as *Hales v Jamilmira*[11] and *The Queen v GJ*[12] which both involved promised wives under the age of sixteen and will be discussed in more detail in the section covering the Northern Territory Supreme Court.

Lest it be supposed that the Northern Territory Government's previous failure to implement a COAG agreement was an isolated incident, a Private Member's Bill introduced into the Northern Territory Legislative Assembly on 29 November 2006 by Lorraine Braham, the Member for Braitling, with the aim 'to add serious sexual offences to the list of offences where bail is not presumed'[13] was negatived in 2 May 2007.

The Northern Territory Attorney-General, Mr Stirling, claimed that the Government's own draft legislation amending the *Bail Act 1982* (NT) was more balanced:

> One aspect of government's proposed approach, the reversal of the presumption of bail for certain serious sexual offences, is similar to that proposed by the

[10] Wild and Anderson, *Little Children Are Sacred*, above n 2, 126 (footnote 44).
[11] *Hales v Jamilmira* [2003] NTCCA 9.
[12] *The Queen v GJ* [2005] NTCCA 20.
[13] Second Reading Speech, Bail Amendment (Serious Sexual Offences) Bill 2006 (NT), (Lorraine Braham MP) 29 November 2006).

> member for Braitling. However, simply reversing the presumption does not prevent bail being granted in some situations where a victim could potentially be put at further risk.
>
> Under the government's proposal, the criteria for the grant of bail will also be amended to ensure the court focuses on the need to protect victims when making any decisions about whether to grant or refuse bail. I look forward to bringing that bill before the Assembly. [14]

With an overwhelming majority in the Legislative Assembly, the Government churlishly was not minded to propose any amendments to this bill other than to flag its own upcoming bill regarding bail, possibly already aware of the Inquiry's Recommendation 35 which dealt with s 24 of the *Bail Act 1982* (NT) and the Inquiry's rejection of the reversal of the presumption of bail for serious sex offences.

The Northern Territory Police Force recommended to the Board of Inquiry into Protection of Aboriginal Children from Sexual Abuse that the *Bail Act 1982* (NT) be amended to include serious sexual offences against children in the presumption against bail provisions. The Board of Inquiry found that "the answer lies not in removing the presumption but in increasing the guidance given to the courts in how the discretion pursuant to section 24 [which sets out the criteria to be considered in bail applications] is to be applied".[15] The Inquiry considered that the presumption in favour of bail should not be altered because the removal of the alleged offender from the community would be a powerful tool in the hands of a mischievous complainant.

The Inquiry preferred to recommend that s 24 of the *Bail Act 1982* (NT) be amended to include a new sub-section which provides that where the offence is alleged to be a sexual offence committed against a child, the court take into consideration the protection and well being of the child having regard to: his or her age at all relevant times; the age of the

[14] Second Reading Speech, Bail Amendment (Serious Sexual Offences) Bill 2006, (Syd Stirling MP, 2 May 2007). This begs the question whether the NT Government was already aware of Recommendation 35 of the Inquiry.

[15] Wild and Anderson, *Little Children Are Sacred*, above n 2, 126.

alleged offender; the familial relationship between the child and the alleged offender; the present and proposed living accommodation of the child and the alleged offender; the need, as far as possible, to allow the child to remain in their existing residence and/or community; the emotional as well as physical well being of the child; and any other matter which to the court appears relevant.[16]

To analyse the merit of this recommendation it is necessary to consider the relevant provisions of the *Bail Act 1982* (NT) and how the courts have interpreted them.

The *Bail Act 1982* (NT) has three relevant provisions for present purposes. Section 7A deals with offences such as murder where there is a presumption against bail. It is under this section that the Northern Territory Police Force in its submission to the Inquiry suggested serious sexual offences should be included, which were in similar terms to those proposed by the Member for Braitling's Private Member's Bill.[17]

Section 8 of the *Bail Act 1982* (NT) covers the presumption in favour of bail which applies to all offences other than those listed in s 8(1). The exceptions in s 8(1) largely deal with sexual or violent offences committed in the last ten years and breach of a suspended sentence. The legal implications of falling within s 8(1) were considered by the Chief Justice of the Northern Territory Supreme Court in *Anthony*.

> The application for bail is governed by the provisions of the Bail Act 1982 ("the Act"). Section 8 of the Act creates a presumption in favour of bail unless the applicant is charged with offences identified in s 8 or unless the applicant was on a suspended sentence which would be breached if the applicant is convicted of the offence charged. In April 2003 the applicant was sentenced to a period of imprisonment which was suspended. If convicted of the offence with which he is now charged, the applicant would be in breach of that suspended sentence.

[16] Wild and Anderson, *Little Children Are Sacred*, above n 2, 126. See Recommendation 35.
[17] Wild and Anderson, *Little Children Are Sacred*, above n 2, 124-126.

> In these circumstances, there is no presumption in favour of bail. However, there is no presumption against the grant of bail. In the absence of a presumption, the Act is silent as to which party bears the onus of proof.
>
> Speaking very generally, in my opinion, in the absence of statutory direction the overall burden rests upon the Crown to persuade the court that bail should not be granted. This approach sits well with the general view that, absent statutory direction or good reason, persons who are presumed to be innocent should not be deprived of their liberty. Having made that general observation, however, it is appropriate to recognise that there may be occasions where particular facts or propositions are advanced by the applicant in respect of which an evidentiary onus will lie upon the applicant.[18]

The learned Chief Justice appears to be saying that falling within s 8(1) is neutral as regards the granting of bail but that the onus lies on the Crown. One then wonders what work did the legislature have in mind for s 8(1) to do when this section was enacted? Does not a better reading imply that the onus is on the defence to rebut the presumption against bail by virtue of falling within s 8(1)?

If serious sexual offences are not to be included in s 7A, then there is a strong argument for including them in a revised s 8(1) where the rebuttable presumption is clearly defined in the section to overcome the ruling of neutrality in *Anthony*. In any event, aware of Martin CJ's interpretation of s 8(1), the Northern Territory Government sat on its legislative hands for three years before being forced to act to amend the *Bail Act 1982* (NT) by unfolding developments.

Finally, there is s 24 of the *Bail Act 1982* (NT) which identifies criteria to be considered in bail applications, and is the section into which the Inquiry considers a new sub-section should be introduced taking into consideration the protection and welfare of the child (Recommendation 35). This new sub-section is desirable but as a supplement to either an

[18] *Anthony* [2004] NTSC 5,[6]-[8], (Martin CJ).

amended s 7A or to an amended s 8(1) especially for repeat sexual offenders such as in *G v The Queen*.[19]

The Northern Territory Government delivered on its promise to introduce its own planned amendments to the *Bail Act 1982* (NT) in August 2007 with its Bail Amendment Bill 2007 (NT). A crucial amendment is to accept the Northern Territory Police Force's recommendation (which was not supported by the Inquiry) that there should be a reversal of the presumption in favour of bail for those charged with serious sexual offences. This will be achieved by inserting after s 7A(1)(e) a new section (f) a serious sexual offence. The amendments also implement the Inquiry's Recommendation 35 by amending s 24, which deals with criteria to be considered in bail applications, to specifically consider the protection of the alleged victim in deciding whether to grant bail. Section 27A is to include conduct agreements which are to apply when an alleged offender is released on bail.

These proposed amendments to the *Bail Act 1982* (NT) are to be welcomed if long overdue.

III THE CROFTS DIRECTION

The Inquiry also considered the role of the prosecution and discussed the Office of the Director of Public Prosecutions' submission to the Inquiry. Much of the submission dealt with resources and training of legal professionals in relation to sexual abuse matters. For present purposes, the discussion in relation to a proposed amendment to section 4 of the *Sexual Offences (Evidence and Procedures) Act 1983* (NT) will be the focus.

The ODPP recommended that legislation be enacted to abolish the *Crofts*[20] direction. The Inquiry supported this recommendation as follows:

[19] (2006) 19 NTLR1, [7]-[8], quoted in Wild and Anderson, *Little Children Are Sacred*, above n 2, 121, footnote 40.

> The *Crofts* direction is a decision of the High Court which provides that the Court may (emphasis added) give a warning to a jury relating to the quality of the evidence in a case where there is long delay. There has been an amendment to the law in Queensland[21] which effectively abolishes this direction and a similar amendment here is supported by the ODPP and by this Inquiry.[22]

In *Crofts*, the High Court reviewed the situation where there was a delay in making a complaint of sexual assault in Victoria (six months after the last alleged assault but six years from the first assault) where the legislation required the judge to warn the jury that absence of complaint or delay did not necessarily indicate that the allegation of sexual assault was false.[23] The judge was also required to inform the jury that there may be good reasons why such a person may hesitate in making or refrain from making a complaint. The High Court held that the trial judge was also required to invite the jury to use lack of recent complaint to impugn the credit of the complainant where this was necessary to ensure that the accused secured a fair trial.[24]

Notwithstanding the legislation in Queensland, the Uniform Evidence Acts preserve the common law powers (and obligations) of the trial judge to give warnings such as the *Crofts* warning as per section 165(5): "This section does not affect any other power of the judge to give a warning to, or to inform, the jury."[25] This is reflected in similar language in the Northern Territory's *Sexual Offences (Evidence and Procedures) Act* at

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[20] *Crofts v R* (1996) 186 CLR 427.

[21] In Queensland, the decision in *Crofts* has been overridden by s 4A(4) of the *Criminal Law (Sexual Offences) Act 1978* (Qld). This section provides that a judge must not warn or suggest to the jury that the complainant's evidence is more or less reliable because of the length of time before a complaint was made.

[22] Wild and Anderson, *Little Children Are Sacred*, above n 2, 117.

[23] *Crimes Act 1958* (Vic) s 61(1)(b).

[24] Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) 16.102.

[25] *Evidence Act 1995* (Cth).

section 4(6): "Nothing in subsection (5) prevents a Judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice."[26]

There would appear to be no good reason to follow the Queensland example in abolishing the *Crofts* direction in the Northern Territory. The principles in relation to child witnesses are set out in s 21D of the *Evidence Act (1939)* (NT) and would appear to be sufficient, especially if supported by continuing education of legal professionals as to the nature of child sexual abuse. Indeed, following the passing of the Evidence of Children Amendment Bill 2007 (NT) on 21 August 2007, amendments to ss 21A(1), 21B and 21C of the *Evidence Act 1939* (NT) allows vulnerable witnesses to deliver their evidence through recording a statement, pre-recording evidence at a special hearing, or being shielded from the accused during a regular hearing.

This view on not abolishing the *Crofts* direction is supported by the Australian Law Reform Commission and Victorian Law Reform Commission:

> Although it is not considered appropriate to amend the uniform Evidence Acts in order to address the concerns raised by the *Crofts* warning, the Commissions consider that it is appropriate to recommend judicial and practitioner education on the nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault.[27]

IV NORTHERN TERRITORY SUPREME COURT

'Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.'[28]

In *Hales v Jamilmira*[29], an Aboriginal person was convicted of the offence of carnal knowledge where the victim was his promised wife under sixteen years of age and on

[26] *Sexual Offences (Evidence and Procedures) Act 1983* (NT).
[27] Australian Law Reform Commission, *Uniform Evidence Law*, ALRC 102 (205) 18.173.
[28] *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322, 335 (Lord Atkin).

appeal was sentenced to 12 months imprisonment suspended after one month. The *Criminal Code (1983)* (NT) was subsequently amended in 2004 to increase the maximum penalty from 7 to 16 years imprisonment.

In *The Queen v GJ*[30], the victim who was promised to the defendant was just 14 years old and was brutally assaulted prior to anal intercourse. Following a public outcry at the sentence again being suspended after one month, the DPP appealed the sentence as manifestly inadequate with one of the grounds being the sentence gave no weight to the 2004 legislative amendments which increased the penalties.

The NTCCA accepted that the head sentence was manifestly inadequate and referred to *R v Wurramara*:

> The courts have been concerned to send what has been described as 'the correct message' to all concerned, that is that Aboriginal women, children, and the weak will be protected against personal violence insofar as it is within the power of the court to do so.[31]

The opportunity for customary law being used by way of mitigation for sexual assault is of concern to Aboriginal women. Sharon Payne has described this distortion of customary law as 'bullshit law' which she defines as 'a distortion of traditional law used as a justification for assault and rape of women'.[32]

Hales v Jamilmira[33] raised questions about the role of courts in applying 'bullshit law' typified by the observation of McRae et al that 'courts must be extremely careful not to

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[29] [2003] NTCCA 9.
[30] [2005] NTCCA 20.
[31] (1999) 105 A Crim R 512, [26].
[32] Sharon Payne, 'Aboriginal Women and the Law' in PW Easteal and S McKillop (eds), Australian Institute of Criminology, *Women and the Law* (1993).
[33] [2003] NTCCA 9.

act upon inaccurate evidence about the extent to which indigenous law tolerates or mandates violence, especially in cases involving women'.[34]

Audrey Bolger has cogently maintained that the determination of what comprises Aboriginal custom is made difficult when derived from a male perspective.[35] Davis and McGlade have observed that 'any suggestion from the judiciary that indigenous women may be afforded lesser standards of protection on the basis of custom is a tacit sanction to the continuing problems of family violence and treatment of Aboriginal women'.[36]

Larissa Behrendt has noted that:

> Aboriginal women have constantly asked the judiciary not to accept evidence given by defendants that violence and sexual assault are acceptable within Aboriginal culture and have also asked those undertaking the judicial process not to weigh customary practices that violate human rights above the rights of the victim.[37]

The Australian Law Reform Commission recently recommended that, although federal sentencing legislation should contain general legislative endorsement of the practice of considering traditional or customary laws, the courts should not impose sentences which derogate from relevant international human rights principles.[38]

Human rights issues were brought to the fore in *The Queen v GJ* in which the Human Rights and Equal Opportunity Commission unsuccessfully attempted to intervene. However, the NT Court of Criminal Appeal is clearly well aware of the human rights principles recognised in international treaties to which Australia is a signatory:

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[34] McRae H et al, *Indigenous Legal Issues Commentary and Materials*, (3rd ed, 2003), 543.
[35] Audrey Bolger, 'Aboriginal Women and Violence', Australian National University, North Australia Research Unit, (1991) 4.
[36] Megan Davis and Hannah McGlade, Background Paper 10, *International human rights law and the recognition of Aboriginal customary law*, 403.
[37] Larissa Behrendt, 'Indigenous Policy: No quick fix' (2006), Australian Policy Online, http://www.apo.org.au/webboard/results.chtml?filename_num=80532 at 10 August 2007.
[38] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006) 18.173.

> [S]uch violence has an extremely deleterious effect on the mental and physical integrity and dignity of women. That it may well have the consequence, if women are not protected, of maintaining them in subordinate roles and preventing them from the equal enjoyment and exercise of their positive human rights and freedoms.[39]

The Inquiry into the Protection of Aboriginal Children from Sexual Abuse 2007 (supra), commented as follows:

> Although the Inquiry has been established to inquire into the sexual abuse of Aboriginal children, it is essential to recognise the nexus between child sexual abuse and domestic and family violence. This nexus is recognised by the courts: see *R v Wurramara* (1999) 105 A Crim R 512 and, more recently (and specifically in relation to the sexual abuse of Aboriginal chidren) *R v Riley* [2006] NTCCA 10 and *R v Inkamala* [2006] NTCCA 11.[40]

The mention of these three cases provides the opportunity to review the sentencing outcomes in the most recent cases of sexual abuse of young children against the Northern Territory Supreme Court's much vaunted 'correct message' statement.

R v Riley and R v Inkamala both concerned cases where the victim was an infant. In *R v Riley* the victim was aged two years and in *R v Inkamala* the victim was just seven months old. In *R v Riley*, Martin CJ commented in the following terms:

> There is no suggestion that the respondent's crimes are in any way related to traditional Aboriginal law or culture. Nothing in the material before the sentencing Judge or this Court suggests that a lenient view could reasonably be taken of the respondent's moral culpability. In addition, it must be recognised that the respondent's history and current circumstances mean that his prospects of rehabilitation are poor. Unless underlying problems are successfully addressed, and there is no material giving confidence in that regard, there is a significant risk that the respondent will re-offend.[41]

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[39] [2005] NTCCA 20, [69] (Southwood J).
[40] Wild and Anderson, *Little Children Are Sacred*, above n 2, 116.
[41] [2006] NTCCA 10, [15] (Martin CJ).

The Crown was appealing the sentence given to Riley as manifestly inadequate. The Chief Justice went on to look at authority where manifest inadequacy or inconsistency constituted an error in point of principle:

> In *R v Barbara* (NSW Court of Criminal Appeal, unreported judgment number 60638 delivered 24 February 1997), Hunt CJ at CL ... said:
>
> > It is usually overlooked by respondents that the High Court has at the same time also clearly indicated that sentences which are so inadequate as to indicate error or departure from principle, and sentences which depart from accepted sentencing standards, constitute error in point of principle which the Crown is entitled to have this Court correct.
>
> It is also appropriate to bear in mind the following remarks of King CJ in *R v Osenkowski* (1982) 30 SASR 212 at 213 which have been frequently cited with approval:
>
> > The proper role for prosecution appeals, in my view, is to enable the courts to establish and maintain adequate standards of punishment for crime, to enable idiosyncratic views of individual judges as to particular crimes or types of crime to be corrected, and occasionally to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience.
>
> In my opinion the individual sentences of three years imprisonment in respect of each crime of sexual intercourse without consent are so manifestly inadequate as to shock the public conscience and demonstrate error in point of principle.[42]

In *R v Inkamala*, the facts were as follows:

> On 21 November 2003, in breach of the suspension of the 2001 sentence, the respondent committed the crime of unlawful sexual intercourse without consent. He pleaded guilty on 1 April 2005 before the Judge who had sentenced him in 2001. On 10 October 2005 the Judge ordered partial restoration of the suspended sentence by directing that the respondent serve one year of the balance of two years and six months. His Honour then imposed a sentence of four years imprisonment for the crime of unlawful sexual intercourse without consent

[42] Ibid [19]-[21].

> committed in November 2003 and directed that it be served cumulatively upon the one year already restored. In respect of the total period liable to be served of five years imprisonment a non-parole period of four years was fixed.[43]

His Honour, having noted that the respondent had a dangerous propensity to commit crimes of a sexual nature and demonstrated a continuing attitude of disobedience of the law, continued:

> In my opinion there was no basis for arriving at an opinion that it would be unjust to restore the entire balance of the sentence. There were no circumstances that had arisen since the suspended sentence was imposed which could reasonably have led to such a conclusion. The timing and facts of the subsequent offence strongly militated against such a conclusion. I agree with Mildren and Thomas JJ that the entire balance of two years and six months should have been restored. In my view, restoring of only part of the balance was so manifestly inadequate as to demonstrate error in principle and this is one of those rare cases in which this Court should allow the Crown appeal to correct the error.[44]

Thus, the common theme in both these shocking cases was the manifest inadequacy of the sentences handed out by the trial judge, and the need for the NTCCA to correct those errors in point of principle as recently as 2006, some seven years after *R v Wurramara*.

This then begs the question as to whether the Northern Territory should follow the example set in other jurisdictions, most noticeably New South Wales, as to the desirability of sentencing guidelines. With great respect to the judges of the Northern Territory Supreme Court, it is contended that such a development is long overdue.

The concept of guideline judgments has been described as a mechanism for structuring rather than restricting discretion. At the core of these guidelines is the notion of consistency and the need to reinforce public confidence in the administration of justice.

The Chief Justice of NSW has commented that:

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[43] [2006] NTCCA 11, [3] (Martin CJ).
[44] Ibid [25] (Martin CJ).

> One of the tasks that courts, and others responsible for the administration of the criminal justice system, must undertake is public education of what sentencing practices actually are..... This discrepancy between public perception and the reality of sentencing practice exists. The public interest would be served by minimising that discrepancy. The public response to the system of guideline judgments in New South Wales, suggests that such judgments may help to bring public perception into line with actual practice. … Another function performed by the promulgation of guidelines is that of deterrence. The public at large and potential offenders in particular, should know in advance that offences of a particular kind are likely to lead to a particular level of sentence.[45]

The Chief Justice went on to observe that the legislature in NSW in 1998 has embraced guideline judgments.

> [T]he New South Wales Parliament inserted a new Part 8 into the *Criminal Procedure Act 1986*. This part provides for the Attorney General to apply to the court to give a guideline judgment. Subsection s26(2) specifies that:
>
> > An application may be made with respect to sentencing of persons found guilty of a particular specified indictable offence or category of indictable offences and may include submissions with respect to the framing of the guideline.[46]

On 2 November 2002, Mr. Debus responded to a question in the NSW Parliament on sentencing guidelines.

> Today guideline judgments have been issued for dangerous driving occasioning death or grievous bodily harm; break enter and steal; armed robbery; and drug importation. Today the first survey of the effect of guideline judgments for dangerous driving has been completed. The Judicial Commission has provided me with some heartening statistics on the manner in which the courts are following through with the sentencing principles established in the first guideline decision. Put simply, the results are tougher and more consistent sentencing."[47] [emphasis added]

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[45] Spigelman CJ, 'Sentencing Guidelines Judgments', (Address to the National Conference of District and County Court Judges, 24 June 1999).
[46] Ibid.
[47] New South Wales, Mr Hunter question without notice to the Attorney-General Mr Debus on 2 November 2002, *New South Wales Legislative Assembly*, Hansard, 9669.

Clearly, the NSW Government was very satisfied with the outcome of the first sentencing guideline judged by the twin criteria of tougher and more consistent sentencing for dangerous driving causing death or grievous bodily harm.

There is no reason not to anticipate a similar outcome in the Northern Territory were the NT Government prepared to adopt similar legislation and make serious sexual offences the subject of the first application by the Attorney-General.

This is a necessary response to a process that the author has respectfully labeled the judicial and DPP quadrille as per *The Queen v GJ, R v Riley and R v Inkamala*.

Step 1:	A manifestly inadequate sentence by the trial judge.
Step 2:	Public outrage/political backlash.
Step 3:	DPP propelled into appeal.
Step 4:	NTCCA 'tiptoes through the tulips' of the trial judge's decision before declaring the original head sentence manifestly inadequate.

V CONCLUSION

This paper has sought to demonstrate that it has required a major inquiry into child sexual offences (and the attendant submissions) to produce the necessary legislative reforms in the Northern Territory in the areas of presumption against bail for alleged serious sexual offences and consideration of the protection and welfare of the child under criteria to be considered in bail applications.

Commonwealth intervention under s122 of the Constitution has led to the *Northern Territory National Emergency Response Act* (Cth) which *inter alia* precludes consideration of customary law from sentencing discretion and bail hearings as a reason

for excusing or lessening the seriousness of criminal behaviour. This is a welcome development despite the lack of support from either the Northern Territory Government or the Board of Inquiry itself.

The Inquiry's recommendation to abolish the *Crofts* direction is considered to be inappropriate both because it is inconsistent with the Uniform Evidence Acts and because of the recent amendments to the *Evidence Act* (NT) reinforcing special measures for the giving of evidence by vulnerable witnesses.

Finally, it is contended that although since the nadir of the token initial sentence in *The Queen v GJ*, there has been a noticeable reinforcement of the 'correct message' to women, children and the weak by the Northern Territory Court of Criminal Appeal, there remains sufficient concern as regards consistency and public confidence in the administration of justice to warrant the introduction of guideline sentencing in the Northern Territory for serious sexual offences.