

# The Centenary of the Supreme Court of the Northern Territory

By Bill Rowlings, CEO of CLA

The Chief Justice of the Northern Territory, Trevor Riley, has publicly stated that Aboriginal Australians do not enjoy the same rights as other Australians when appearing before the NT Supreme Court: that is, Commonwealth law discriminates against Aborigines.

His comments directly contradict the advice which the Australian Government has just given to the Human Rights Council of the UN in response to criticisms of Australia under the Universal Periodic Review process. Australia has just told the UN:

***Recommendation 48 (of the UPR of the HRC of the UN):***

***Accepted:*** *The Australian Government considers that its current laws, policies and programs do not discriminate on the basis of race.*

Delivering the address at the ceremonial opening of the NT court on its 100th anniversary late in May 2011, Riley CJ said:

***"Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community."***

He also said that his judges were forced to sentence Aborigines in a "partial factual vacuum".

Chief Justice Riley made his statement in a carefully-reasoned document which reflects a well thought out status report on how Aborigines fare before the NT's top court. His statement is a reflection of widespread official dissatisfaction in the Territory with the deleterious effects of the "NT Intervention", begun by the Coalition without consulting Aborigines or the NT Government, continued by Labor in nearly identical fashion.

Chief Justice Riley said:

"One area of concern is the manner in which the courts are required to deal with the issue of customary law and cultural practices. Over the period to 2007 this Court developed an approach to the sensitive area of conflict between the law of the Northern Territory and the customary law and cultural practices of some Aboriginal communities. The courts accepted and asserted the primacy of the law of the Northern Territory. Subject to that law issues of customary law and cultural practice were given appropriate weight in determining the culpability of an offender in all of the circumstances of the offence.

"In 2007 the Northern Territory experienced what has been called "the intervention". Legislation passed in support of that process included s91 of the *Northern Territory National Emergency Response Act (Cth)* which provided that a court in determining sentence 'must not take into account any form of customary law or cultural practice as a reason for ... lessening the seriousness of the criminal behaviour to which the offence relates'.

"The effect of that provision, whether intended or unintended, has been held to be that customary law and cultural practice must not be taken into account in determining the gravity or objective seriousness of an offence. This, of course, means that the court must sentence in a partial factual vacuum," the NT Chief Justice said.

"Although the level of moral culpability of an offender may have been substantially reduced because he or she acted in accordance with, and under pressure to perform, a cultural practice, the court is barred from taking those matters into account. The effect is that the court is not entitled to consider why an offender has offended and pass an appropriate sentence. The Court is required to ignore the actual circumstances of the offending. The artificiality involved is obvious.

"The following observations of Brennan J are pertinent:

*The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.*

"Aboriginal offenders do not enjoy the same rights as offenders from other sections of the community. It seems to me this is a backwards step," Chief Justice Riley said.