been made of s.41 in cases where the defendant has raised *payback* as the *justification* (that word not here used as in the self-defence provisions of the Code - ss.27 & 28)? That is, an attempt has been made to argue compliance with Aboriginal customary law as a defence? It would appear that again the section has been overlooked and courts have relied on inadequate provisions such as duress and provocation to address the situation where homicide occurs as a result of a compelling customary law.

It was suggested by the trial judge in ***R v Warren Coombes and Tucker*** (3) that the defence of duress was unavailable due to the effect of Mason CJ's comments in ***Walker v NSW*** (4). The trial judge referred to the passage: *Australian criminal law does not accommodate an alternative body of law operating alongside it.* The South Australian Court of Criminal Appeal rejected this argument and held that while in this case the evidence to support the defence was not available, nevertheless *the trial judge was wrong in saying that the decision in* ***Walker*** *precludes acceptance of the defence.* The judges accepted the argument that if the evidence demonstrated that the applicants believed that they would be severely beaten or killed if they did not punish the victim, then they had acted under duress for the purpose of the general criminal law. Section 40 of the ***NT Criminal Code*** would not support such a defence because of sub-section (2)'s limitation of the duress defence to comparatively minor assaults.

The defence of duress will only cover a limited number of scenarios where death has occurred as a result of the application of customary law. It is not available for example where the accused carries out the act because she/he believes in the legitimacy of the law. Section 41 will more aptly apply as it allows the court to comprehensively consider the context in which the killing is committed – taking into account the mind of the accused further than simply posing whether or not threats of physical harm had overborne his/her will. Operating only as a partial excuse, it prevents the situation where an Aboriginal person may be completely exonerated for carrying out payback killings which are sanctioned by Aboriginal law. (An extreme example of this may be illustrated by a man who kills his wife when imposing traditionally accepted *discipline* for *marital misconduct* (5).

A detailed examination of the complex issues which arise when Aboriginal law collides with the accepted Australian law was conducted in 1986 by the Australian Law Reform Commission. The use of coercion (as provided for in s.41) as a defence, although not apparently raised in Territory Courts, would seem to achieve the recommendation of the ALRC's report (No 31, 1986). Paragraph 453 states:

It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belong required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.

Rex Wild, Director of Public Prosecutions.

We would be interested to hear the views of other readers of ***Balance*** in respect of these, to us, interesting concepts.

(1) Beth Wild is a final year Arts/Law student at NTU and the part-time librarian at N.T.L.A.C. Rex Wild is a local lawyer.
(2) R v Secretary (1996) 5 NTLR 96.
(3) Unreported decision of County Criminal Appeal of South Australia, SCCRM 95/529 judgment no. 5543, 19 February 1996.
(4) (1994) 69 ALJR 11.
(5) McRae H, Nettheim G & Beacroft L. Aboriginal Legal Issues. 1991 Law Book Company. NSW p.269.

Cross-vesting - no worries?

There is no doubt that the decision in Re Wakim striking down the Cross-vesting scheme in relation to corporations law (but of more general import) also prevents the NT from conferring jurisdiction on a federal court. But does it matter? The Solicitor General Tom Pauling QC is trying to find out if there is a real (rather than theoretical) problem to fix.

Would any practitioner having difficulty because of the Re Wakim decision inform Jenni Daniel-Yee on: 8999 5391.

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cross-examine will be a matter for the Court. That decision will depend upon what the Court considers is necessary for the purpose of doing justice.

It should be noted that there is no prohibition at common law or under the *Evidence Act* on the calling of evidence from subsequent witnesses that contradicts in part testimony given by an earlier witness for the party. This will occur in many cases where witnesses have different recollections of the order of events or the precise nature of what occurred. To do so is not to discredit the earlier witness in the relevant sense, *R v M.* (1980) 2 NSWLR 195 at 210.

The Advocacy articles are written by the Hon. Justice Trevor Riley of the Supreme Court of the Northern Territory.