

# Backpats and Faceslaps

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As the first President of CLANT writing from the Far Side (of the Berrimah Line), I approach this column both diffidently, and differently. I can't emulate the inimitable rogueish brogue of my immediate predecessor, Johnny Lawrence SC, but I do pay tribute to him and his outgoing team (especially the indefatigable Jodi Truman) for all their hard work, the bulk of which went unnoticed and unsung. To remedy the mischief of insufficient self-congratulation, the incoming CLANT committee has already commenced the pleasant duty of organising CLANT's Silver Jubilee Dinner, which will be held (thanks to an extension of time we have generously granted ourselves of 12 months) on 25<sup>th</sup> August 2012, 26 years to the approximate day since our first and founding dinner. Mark your diary, please, and watch this space.

The ABC serialisation of Christos Tsiolkas's page-turner *The Slap* has made for compelling viewing, and not just because of its terrific performances, shrewd script and excellent production. In writing a novel which turns on a backyard barbie moment of minor (so to speak) violence, Tsiolkas tapped straight into our current zeitgeist, and touched a very raw nerve.

Down here on the Far Side, this is more than just a touchy topic. Allegations of child abuse in Central Australia have become seemingly ubiquitous ever since the publication of *Little Children are Sacred* and her children, the host of reports she has spawned.

In particular, over the last two years there has been a spike in prosecutions of parents for assaulting their children. The investigating officers in these cases are almost invariably members of the interagency Child Abuse Task Force set up by NT Police and the Australian Crime Commission under the Federal Intervention. The rise in prosecutions may also be attributed to the commencement on 1 September 2009 of section 26 of the *Care and Protection of Children Act* (NT), which criminalised the failure to report 'as soon as possible' a reasonable belief that a child has suffered or is likely to suffer 'harm' (which is defined as any significant detrimental effect on the child's physical, psychological or emotional wellbeing or development).

The defence often arises in these cases of parental discipline, control and management under s 27(p) of the *Criminal Code* (NT). Section 27 provides that such force may be justified provided it is not 'unnecessary force', which is defined as:

...force that the user of such force knows is unnecessary for and disproportionate to the occasion or that an ordinary person, similarly circumstanced to the person using such force, would regard as unnecessary for and disproportionate to the occasion.

Surprisingly, until the decision of Riley CJ in *RDP v Westphal* [2010] NTSC 50 ('RDP'), there was no judicial authority on the elements

of this defence in the NT. RDP establishes that it is the state of mind of the defendant at the time of the application of the force, and not how he or she regarded it at some later time, which counts.

RDP also establishes that the ordinary person test is **not** the same as its counterpart in all other Australian jurisdictions, namely that the force used be 'reasonable'. Territory parents are not required to be reasonable, merely to behave as ordinary parents think is not unacceptable (which, especially when they're at the end of their tether, may well be unreasonable).

However, some questions remain open:

- How does the burden of proof apply? To rebut the defence, does the prosecution have to prove beyond reasonable doubt that a similarly circumstanced ordinary person would not regard the force as unnecessary and disproportionate? In RBT, Riley CJ held that the Crown must 'establish' this. This suggests that the answer to this question is 'yes'.
- Can the expression 'similarly circumstanced' include the circumstance of being angry at one's child's misbehaviour?

*The Slap* prosecutions are apparently still on the rise. Questions like these may well arise for further judicial consideration before too long. Not to mention at many a backyard barbie. ●