NUMBER: 014

REGISTERED TEACHER: GS

PANEL MEMBERS

Mr Garry Salisbury Chairperson
Ms Patricia Ryan Registered Teacher
Ms Silvana Scibilia Panel Member

ATTENDANCE

the teacher was represented by Ms Alana Duffy
Counsel Assisting: Ms Anne Sheehan

DATE OF HEARING: 4 February 2005

DECISION OF THE PANEL:

On 11 February 2005 the Panel decided that the teacher was fit to remain registered as a teacher.

EFFECT OF THE DECISION

The effect of the decision is that the teacher retains his registration under the Victorian Institute of Teaching Act 2001 and is able to continue teaching in the State of Victoria.
BACKGROUND

On 31 December 2002 the Victorian Institute of Teaching Act 2001 (the Act) was proclaimed in full. On that date most teachers in Victorian schools were deemed registered as teachers. The teacher was deemed registered pursuant to section 91(1) of the Act because he was registered with the Registered Schools Board under section 37 of the Education Act 1958 immediately before the Act was proclaimed.

On 18 November 2003 the Principal of the school, met with the teacher regarding concerns the school had with his conduct. The Principal detailed those concerns, together with a final warning in writing, in a letter to the teacher dated 19 November 2003. The teacher responded, expressing surprise at the letter and undertook to provide a comprehensive response to the allegations.

A further meeting was held on 6 March 2004, as a result of concerns over the teacher’s continuing unacceptable behaviour. The Principal intended to end the teacher’s relationship with the school at the meeting. At this meeting the teacher asked that his resignation be considered, which was accepted and he tended his resignation. The Victorian Institute of Teaching (the Institute) was advised by the school that it had taken action against the teacher.

On 12 May 2004 the Disciplinary Proceedings Committee, a committee of the Institute Council, decided that this complaint should be referred to a formal hearing. The Institute sent the teacher a Notice of Formal Hearing with all relevant documents attached on 16 December 2004 advising him that the formal hearing was set down for 4 February 2005.

The evidence of possible serious misconduct or lack of fitness to teach as set out in the Notice of Formal Hearing was:

1. Inappropriate touching of students, such as
   • brushing/holding a student’s hand when passing a pen
   • tickling a student’s hand and rubbing and stroking her shoulders
   • performing unnecessary first aid on students, such as tending to blisters
2. Inappropriate conversations with students, including conversations perceived by students to be sexual in nature, such as
   • In reference to a red luminous glow stick ‘playing with the teacher’s glow stick’ and ‘if it starts to fade you shake it and it will come back to life’
   • Telling students that girls last year sang the teacher a song ‘I want pussy’
3. Inappropriate gift buying, described by students as bribery, such as sweets and other items
4. Unnecessarily lengthy stays in student accommodation
5. Persistent use of a ‘baby voice’ to attempt to modify students’ behavior
6. Unpredictable swings of mood between inappropriate affection, coupled with sudden outbursts of anger
7. Unwillingness to work as part of a pastoral team and report appropriately to managers of pastoral care
8. Favoritism
9. Inappropriate comments to students, such as
   • suggesting a student use another student’s hair to clean the white board
   • saying a student fitted in well with the cow manure
   • telling a student to find a road to play on and go chase a parked bus
   • saying certain students were evil and others were nice and his friends
   • saying ‘I don’t like you anymore because I think you like a fellow teacher
     better than me’
   • stating “no one likes me”, and students “are ignoring me”
   • saying that certain students are beautiful

The issues the Panel must address in this matter are:
   • Is there sufficient evidence to support any, some or all of the allegations
     made against the teacher?
   • If any, some or all the allegations were proven was this sufficient to amount
     to serious misconduct and/or lack of fitness to teach?
   • If the teacher was guilty of serious misconduct or if he was not fit to teach,
     what was the appropriate penalty?

THE LAW

The Disciplinary Proceedings are set out in Part 4 of the Act. Sections 26 and 27
provide:

26. Powers of inquiry
   (1) The Institute may in accordance with this Part inquire into any information it
       receives under section 27 or 28 or any complaint that provides evidence of the serious
       incompetence of a registered teacher, serious misconduct of a registered teacher or that
       a registered teacher is unfit to be a teacher.

27. Employer to notify Institute of action against teacher
   (1) The employer of a registered teacher must inform the Institute if the employer has
       taken any action against the registered teacher in response to allegations of serious
       incompetence of the registered teacher, serious misconduct of the registered teacher or
       that the registered teacher is unfit to be a teacher or any other actions that may be
       relevant to the registered teacher’s fitness to teach.

The terms serious misconduct and unfit to be a teacher are not defined in the Act. The
Panel was referred to case law regarding disciplinary proceedings in other jurisdictions.

According to the High Court in Ziems v The Prothonotary of the Supreme Court of NSW
(1957) 97 CLR 279 the purposes of disciplinary proceedings in relation to a profession
are:
   • to protect the public
   • to maintain proper standards of conduct for the profession, and
   • to protect the reputation of the profession.

These procedures are not meant to punish the teacher although this may be an
unintended consequence (see New South Wales Bar Association v Evatt (1968) 117 CLR
177). The purpose of these proceedings is to protect students in Victorian schools by
ensuring that the Teacher is not guilty of serious misconduct and is fit to teach. A
decision to deregister a teacher is very serious and requires great care (see Victorian Lawyers RPA Ltd v Vodicka (2000) VSC 272).

The standard of proof that applies in disciplinary proceedings is the balance of probabilities. The appropriate standard of proof that applies in civil matters was considered in Briginshaw v Briginshaw (1938) 60 CLR 336 where the High Court said that the ordinary standard of proof applied subject only to the rule of prudence that any tribunal should act with much care and caution before finding that a serious allegation ... is established.

And later

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The observations of the High Court have been followed in numerous cases and in particular in relation to disciplinary proceedings (see Barwick v Law Society of New South Wales [2000] HCA 2, and Murphy v The Bar Association of NSW [2001] NSWSC 1191).

Whether misconduct is serious will depend upon the facts of each case. Conduct would not be serious if it was trivial or of momentary effect at the time. To be serious, conduct must be a substantial departure from the accepted standards for the teaching profession, and the departure must be the fault of the teacher (see Parr v Nurses Board of Victoria (decided VCAT 2 December 1998)).

If the act or omission that constitutes the misconduct is within the will, power or control of the teacher it is more likely to be serious misconduct. If the act was done wilfully or recklessly without regard for the consequences, then it is more likely to be serious misconduct (see Re: Christine Trigger and: The Australian Telecommunications Commission (1984) 4 FCR 242).

A failure by the teacher to understand that the conduct complained of was serious misconduct will indicate the teacher's unfitness to teach.

The test set out in the case law is conduct:

which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency.

Allinson v General Medical Council [1891-4] All ER 768

The conduct the subject of the inquiry may indicate a character defect incompatible with a self respecting profession. Or the conduct may illustrate that the teacher would not be able to work satisfactorily in a school environment. Whether conduct amounts to serious misconduct will depend on the minimum standards demanded by the teaching profession. Conduct that deserves disapproval may not be serious misconduct (see Ziems)

In Health Care Complaints Commission v Litchfield [1997] NSWCA the Full Court of the Supreme Court described serious misconduct as not to be measured against the worst
cases of misconduct, but by the extent the conduct departed from proper standards. Otherwise, the worst members of the profession will set the standard of professional conduct. If a teacher is to adequately perform their duties and act in the best interests of their students they should be able to command the respect and confidence of the education community. If a teacher loses that respect and confidence because of their conduct they should no longer be able to exercise the privileges, duties and responsibilities that come with being a teacher.

Misconduct may be personal misconduct. That is, the conduct is not necessarily connected to the teacher’s professional practice. This is because the teacher’s conduct brings disgrace upon the teaching profession (see NSW Bar Association v Cummins [2001] NSWCA 284).

A teacher’s position is one of power and influence in relation to the student - a position of trust. The misconduct must reflect in a significant way on the suitability of the person to work as a teacher. It must illustrate attitudes or characteristics inconsistent with the moral qualities required of a teacher (See Yelds v Nurses Tribunal & Ors (2000) NSWSC 755; New South Wales Bar association v Cummins (2001) NSWCA 284).

The term fit and proper person is intended to cover conduct other than dishonesty and include significant impropriety, lack of integrity or bad faith. Persistent failure to meet a teacher’s obligations to the education community shows a disregard for these obligations and not just carelessness, incompetence or lack of organisation (see Cameron v Bar Association of NSW [2002] NSWSC 191, Marten v Disciplinary Committee of the Royal College of Veterinary Surgeons [1965] 1 All ER 949 and Australian Broadcasting Tribunal v Bond and Others [1990]HCA 33;(1990)170 CLR 321F.C.).

**DOCUMENTS CONSIDERED**

4. The Panel was provided with the following documents:
   - Witness statement of the Principal dated 23 August 2004 and attachments
     1. letter from the Principal to the teacher dated 19 November 2003
     2. letter from the teacher to the Principal dated 25 November 2003
     3. Notes from meeting 17 November 2003
     4. Document headed ‘Observations: Training Hike 2nd, 3rd April’
     5. letter from the teacher to the Principal dated 6 March 2004
     6. letter from the Principal to the teacher dated 10 March 2004
   - Witness statement of Colleague 1 dated 8 September 2004 and attachments
     1. Document headed ‘12th October’
     2. Document headed ‘24th March 2003’
     3. Document headed ‘requested time to see me’ (4 pages in all)
     4. Document headed ‘23rd March 2003’
     5. Document headed ‘the teacher and School’
     6. Document headed ‘29th August’
     7. Document headed 16th October 2002’
     8. Document headed ‘13 October’
   - Witness Statement of Colleague 2 dated 8 September 2004 and attachments
     1. Document (2 pages in all)
2. Document headed ‘the teacher’
3. Document headed ‘insecure & making 2 girls cry’
4. Document headed ‘the teacher and School’
5. Document headed ‘STUDENT NOTES 2003’
6. Document headed ‘STUDENT NOTES’

- Witness Statement of Colleague 1 dated 10 September 2004 and attachments
  1. Document headed ‘the teacher’
  2. Document headed ‘original Notes’
  3. Document headed ‘third party 1’

- Witness Statement of third party 2 dated 14 September 2004 and attachments
  1. Document headed ‘STUDENT NOTES’ time 5pm
  2. Document headed ‘STUDENT NOTES’ time 5.10pm
  3. Document headed ‘STUDENT NOTES’ time 5.15pm
  4. Document headed ‘STUDENT NOTES’ time 8pm

The following statements were tabled at the Formal Hearing on 4 February 2005:
- Statement of the teacher dated 3 February 2005 and attachments
  1. Document headed ‘GS1 Summary of Teaching Activities…”
  2. Document headed ‘GS2 1/3/03. third party 3 around 9.45pm.”
  3. Document headed ‘GS3 STUDENT NOTES date15/7/03 time 6.50pm”
  4. Document headed ‘GS4 email2”
- Statement of the Principal of School 3 dated 3 February 2004.

THE EVIDENCE

5. The Panel heard evidence under affirmation or oath from the following witnesses:
- Principal of the School
- Colleague 1
- Colleague 2
- Colleague 3
- Colleague 4
- Principal School 2

The teacher also gave evidence.

The proceedings were taped.

The written statements of all witnesses were put to them and all witnesses agreed that these statements were correct except for a correction of the year date from 2004 to 2005 in the witness statements of Colleague 4 and the Principal of School 2.

The following facts are not in dispute and supported by the evidence:
- That gifts of sweets were bought for students;
- That a student was told to find a road to play on and go chase a parked bus
• That students were told that girls in the previous year sang the song ‘I want pussy’

Allegation One  Inappropriate touching of students
Colleague 3 gave evidence that he had taught in other remote schools location prior to his appointment at the School. Colleague 3 explained that on all hikes students brought their own first aid pack which contained appropriate supplies to dress blisters as they were a common complaint. Students were also given training on the prevention and care of blisters. He had seen countless students dress their own blisters.

Colleague 2 supported this view and stated that the school nurse would provide advice on more serious matters.

In his evidence the teacher stated that he had never performed unnecessary first aid on students. He described his role as first aid officer on hikes, as he did not have any outdoor training to be a leader. He said he carried additional first aid supplies as there had been an occasion when students were evacuated because of blisters.

Colleague 3 explained that on the occasion referred to by the teacher the circumstances of the hike were very different in length and terrain from the hikes referred to in the allegations against the teacher. In the latter case, students would be capable of tending to their own first aid.

Allegation Two  Inappropriate conversations with students
Colleague 3 states that he observed the teacher playing with a glowstick during the hike. The teacher activated the glow stick and encouraged students with innuendo about playing with his glowstick, using a coy voice. He stated that if it fades “you shake it and it will bring it back to life and start to glow red again”.

The teacher said he took the glowstick, which he describes as a safety device, on the hike. He suggested that students use the glowstick in a game. He does not recall making comments about it being shaken to re-activate it.

In relation to allegation 2 (b), the teacher agreed that he had told students that his favourite song was “I want pussy.”

Allegation Three  Inappropriate gift buying of sweets
There is no dispute about gifts of sweets being purchased for students. The teacher denied knowledge that this action contravened School policy. He stated that the policy had not been explained to him at the time he bought the sweets.

The Principal stated that the food policy at the school was stringent and well published. She said that students and parents are clearly informed that ‘junk’ food is not allowed other than a pre-determined allowance of ‘tuck’. The policy extends to birthday cakes and other food treats that may be posted to the student by the family. Any such food gifts are confiscated.
Colleague 2 was of the view that all teachers would be aware of the food policy because, with an emphasis on outdoor activities to the School Program, nutrition is a central issue.

Allegation Four Unnecessarily lengthy stays in student accommodation
In her role of pastoral care, Colleague 1 was concerned that the teacher visited the student accommodation too late at night and stayed too long. On one occasion, while on night duty, she found the teacher in the rooms distracting students from going to bed. She reminded him that it was too late to be in student’s rooms and told the girls to go to bed. She said that the behaviour repeated itself.

Colleague 1 described the lay-out of the student accommodation as fairly open.

Colleague 2 gave evidence that usually teachers’ visits to student accommodation in the morning and evening lasted about ten to fifteen minutes. She spoke to the teacher about the length of his visits and discussed suitable topics he could discuss with the students.

The teacher denied he had had the conversation described by Colleague 1. The only conversation with her he recalls relates to a request that more frequent visits to the student accommodation was in response to requests by students. He visited to play cards after an invitation from some students and was perplexed that his behaviour was then questioned.

Allegation Five Persistent use of a baby voice
Colleague 2 states that she witnessed the teacher use a baby voice on a daily basis. He varied his voice depending on whether he spoke to staff or students. Initially the baby voice was used only with students but became more common when staff was present. In August 2003 Colleague 3 attended a disciplinary meeting with the head of campus and the teacher. At the meeting the head of campus told the teacher that the baby voice was not appropriate to use with 14 year old students. However, the teacher continued to use the baby voice.

Colleague 3 gave evidence that he occasionally observed the teacher using his baby voice with students and that the teacher’s use of a baby voice was frequently commented on by teachers.

The Principal stated that the use of a baby voice was one of the issues raised with the teacher and was one of the behaviours he was asked to cease at the formal meeting of November 2003. She subsequently confirmed this in writing in the letter dated 19 November 2003.

The teacher stated that he did not understand this allegation and that he has never used a baby voice. He denied using the baby voice and said that he might have used a gentle caring voice with students when they were distressed, but did not understand this allegation. He stated that he understood he had good rapport with the students.
He commented that he did not understand what Counsel was talking about when questioned about the baby voice and that it had never been raised with him by the school. He believed that it had been given as a label to him.

He stated that until he received the Notice of a Formal Hearing from the Institute, he was totally unaware of the majority of allegations against him. He sees the allegations as labels or a collection of items.

Allegation Six Unpredictable swings of mood
Colleague 2 stated that she witnessed behavioural change by the teacher. She said that he would speak in a normal tone of voice, change to his baby voice and then switch to an aggressive tone. Colleague 2 also witnessed mood changes toward staff in the staff room.

Colleague 1 stated that she had difficulty communicating with the teacher and that she felt uncomfortable with his mood changes from being nice one moment and closed the next.

The teacher denied that he has mood changes and stated that he is calm and even tempered.

Allegation Seven Unwillingness to work as part of a pastoral team
Both Colleague 3 and Colleague 2 described incidences as examples of The teacher’s unwillingness to work as part of a pastoral team. In each case the incident involved them personally. Other incidents were recorded but the Panel received no direct evidence of these events.

Colleague 2 outlined an incident relating to the teacher and the students of one place of accommodation. After discussion with her about the incident, the teacher refused to return to the student accommodation to perform his responsibilities unless Colleague 2 forced him to go. This continued for 24 hours and was resolved only after the head of campus became involved.

Colleague 3 gave evidence over two incidents. Firstly the standards of cleanliness the teacher imposed on students during weekly student accommodation inspections went beyond what could be reasonably expected of them. This resulted in returns to the students accommodation a few times in the day to ensure his standards were being met.

As a tutor the teacher was required to write comments on students and provide them to Colleague 3 as a senior co-ordinator to assist in her preparation of formal reports. The teacher did not follow standard procedure in providing reports on how the girls fitted into the group, but rather reported, in a derogatory manner, on how students related to him.

The teacher agrees that he ceased normal interaction with students at their place of accommodation, but believed it was justified as either Colleague 3 or Colleague 2 advised him to stay away from the student accommodation as two of the students were
angry with him after he asked them to write an essay. It was because of this that he
decided to go only if it were absolutely necessary. He denied that he had made
derogatory remarks about students.

Allegation Eight: Favoritism
Colleague 3 said that some of the teacher’s actions, such as buying sweets for certain
students, showed favouritism.

Allegation Nine: Inappropriate comments to students
Three examples were given in relation to inappropriate comments made to students.
There is no dispute that the teacher made an inappropriate comment when he told a
student “to find a road to play on and go chase a parked bus”.

The teacher denied that he made the other alleged comments to students.

Character evidence
The Principal of School 2 has a long professional association with the teacher. He taught
with him in 1991 and employed him in 1999 to run in-service programs for teachers.
The Principal of School 2 occasionally saw him interact with students. He considers him
to be an excellent teacher.

The Principal of School 3, has known the teacher since Term 2, 2004, when he
commenced in the position of Leading Teacher/ Cluster Co-ordinator for a northern
region. He has no concerns with the teacher’s role or interactions with the local school
communities.

DISCUSSION OF EVIDENCE

Allegation One: Inappropriate touching of students
Three examples of inappropriate touching of students were referred to in the evidence.
The evidence of Colleague 1, Colleague 2 and Colleague 3 regarding allegation 1 above
were based on reports they received from students.

The students were not called as witnesses and the Panel noted that events described in
part of allegation were hearsay. The Panel was not able to accept that these events had
occurred. Colleague 4 and Colleague 3 had directly observed the teacher performing
unnecessary first aid on students, such as tending to blisters and the Panel accepted
their evidence that this occurred.

The Panel preferred the evidence of Colleague 3 and Colleague 4. Colleague 3, as
Acting Head and Head of Pastoral Care and Director of Outdoor education at a
particular campus showed a thorough understanding of the school’s first aid policy and
procedures. Colleague 4’s evidence is preferred on the basis of his greater experience
in, and knowledge of, remote educational facilities and his detailed knowledge
regarding students’ first aid requirements in such locations, and in particular at the
Campus.

Allegation Two: Inappropriate conversations with students
The Panel came to the view that these inappropriate conversations did occur and that in relation to the first part of allegation 2, the teacher’s behaviour in using a voice marked by innuendo and coyness and in isolation from other staff was not appropriate or sensible. The Panel preferred the evidence of Colleague 4.

Allegation Three: Inappropriate gift buying of sweets
Based on the information provided by the Principal and Colleague 3 about the emphasis on outdoor education and the importance of nutrition at the Campus, the Panel’s view is that buying sweets for a group of girls was inappropriate. Considering the camp setting and the accompanying importance of the nutrition issue, the Panel took the view that as a professional teacher, the teacher had a responsibility to make himself aware of all of the Campus policies and protocols.

Allegation Four: Unnecessarily lengthy stays in student accommodation
The Panel found Colleague 3’s and Colleague 2’s evidence persuasive.

Allegation Five: Persistent use of a baby voice
The Panel had before it documentary and oral evidence that the teacher did use a baby voice when talking to students and that he had been advised that it was unacceptable and that it should cease.

Allegation Six: Unpredictable swings of mood
The Panel found evidence to support the view that the teacher experienced unpredictable mood swings.

Allegation Seven: Unwillingness to work as part of a pastoral team
The Panel found evidence to support this allegation.

Allegation Eight: Favoritism
Little evidence provided to the Panel to enable them to substantiate this allegation.

Allegation Nine: Inappropriate comments to students
The Panel finds that the teacher’s evidence confirms that he made inappropriate comments to a student.

**FINDINGS OF FACT**
After considering all the evidence before it, the Panel made the following findings:

1. That the teacher touched students inappropriately by performing unnecessary first aid, such as tending to blisters

2. That the teacher had inappropriate conversations with students, including conversations perceived by students to be sexual in nature:
   (i) In reference to a red luminous glow stick ‘playing with the teacher’s glow stick’ and ‘if it starts to fade you shake it and it will come back to life’; and
   (ii) Telling students that students last year sang the song ‘I want pussy’.
3 That the teacher bought inappropriate gifts of sweets and other items for students.

4 That the teacher stayed for longer than necessary in student accommodation.

5 That the teacher persistently used a baby voice to attempt to modify students’ behavior.

6 That the teacher demonstrated unpredictable mood swings between inappropriate affection and sudden outbursts of anger.

7 That the teacher was unwilling to work as part of a pastoral team and report appropriately to managers of pastoral care.

8 That the allegation of favoritism was not substantiated.

9 That the teacher made inappropriate comments to students including telling a student ‘to find a road to play on’ and ‘go chase a parked bus’.

CONCLUSION

When making its decision the Panel considered that the primary purpose of disciplinary proceedings is to protect students, the teaching profession and the public, by ensuring maintenance of proper standards of teacher conduct.

The Panel had to consider whether the teacher had engaged in serious misconduct and/or was unfit to teach. The allegations that would form the basis for a finding that the teacher was guilty of serious misconduct and/or was unfit to teach were that he:

- Inappropriately touched students
- Had inappropriate conversations with students, including conversations perceived by students to be sexual in nature.
- He inappropriately bought gifts.
- He stayed for longer than necessary in student accommodation
- Persistently used a baby voice to attempt to modify students’ behavior
- Displayed unpredictable swings of mood between inappropriate affection and sudden outbursts of anger
- Was unwilling to work as part of a pastoral team and report appropriately to managers of pastoral care.
- Showed favoritism.
- Made inappropriate comments to students

The Panel found there is sufficient evidence to support eight of the nine allegations made against the teacher.

The term serious misconduct is not defined in the Act and so the Panel applied the principles from case law outlined previously. Noting that serious misconduct is not measured against the worst cases of misconduct, rather by the extent of departure from proper standards, the Panel is of the view that in relation to most of the matters raised
about the teacher, and the evidence provided, the teacher’s behaviour was incompatible with the duties and responsibilities of a teacher.

While the Panel substantiated eight of the nine allegations, it is satisfied that these behaviours did not represent serious misconduct. In the Panel’s view, the teacher’s behaviour amounted to misconduct and was deserving of disapproval.

The Panel was concerned however that the teacher displayed little insight both into his own behaviour or the effects of his behaviour on students and other staff. He continued to protest his innocence and his evidence at the Formal Hearing indicated that he was less than willing to reflect on the appropriateness of his behaviour and to modify his actions, either at the time he was employed by the School or at the time of the Hearing. His responses were unconvincing, sometimes evasive and disingenuous. He did not show a clear understanding of appropriate boundaries between students and teachers or of his responsibilities as a professional teacher.

The question of the teacher’s competence as a teacher was never raised as an issue and the Panel heard oral and documentary evidence that he had a good reputation amongst his professional peers. The Panel accepted that he is a competent teacher.

In the Panel’s view the teacher’s acts did not amount to serious misconduct as required under the Act and in the principles expressed in case law. Therefore under section 42(2) of the Act, the Panel makes the following determination.

**DETERMINATION**

The panel decided that the teacher is fit to remain registered as a teacher.

_Garry Salisbury_ CHAIRPERSON

Per:
Patricia Ryan REGISTERED TEACHER
Per
Silvana Scibilia PANEL MEMBER