

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 342882 **Hearing Number 0323**

REGISTERED TEACHER: **Yukihiro NAGASHIMA**

PANEL MEMBERS: Janet Sherry, Chairperson

 Terry Hayes, Registered Teacher

 Anne Farrelly, Panel Member

ATTENDANCE: Mr Nagashima attended the Formal Hearing and was self-represented.

 Ms Angela Barac appeared as Counsel Assisting the Formal Hearing Panel.

DATE OF HEARING: 4 May 2017

DATE OF DECISION: 21 August 2017

DETERMINATION UNDER SECTION 2.6.46(2) OF THE *EDUCATION AND TRAINING REFORM ACT 2006*:

On 21 August 2017, the Panel decided to suspend the registration of Yukihiro NAGASHIMA from 21 August 2017 to 21 February 2018 and impose the following conditions:

1. Mr Nagashima is to attend at least four sessions with a registered psychologist of his choice where the following is to be addressed:
 - an in-depth analysis of the Institute’s Codes of Ethics and Conduct clearly identifying the points at which his behaviour deviated and the potential/real consequences, both direct and indirect

- an analytical reflection on how and why the relationship progressed, concentrating on the role that he played personally, and noting the range of strategies he could have put into practice to prevent what evolved and eventuated
 - a clear understanding of the significance of professional behaviour in maintaining the reputation of the teaching profession and the trust that the community is entitled to place in teachers.
2. Following the four sessions, Mr Nagashima is to provide a report to the Institute, prepared by his registered psychologist, which addresses the above points and explains how he has satisfied each point.
 3. Mr Nagashima is to provide a report written by him, illustrating his insights into why his conduct, the subject of this decision, was inappropriate and setting out the strategies he has developed to ensure any further repetition.

The suspension of Mr Nagashima's registration will not be lifted until the Institute receives both reports and is satisfied they address the relevant issues set out above.

REASONS

BACKGROUND

Yukihiro NAGASHIMA has been a registered teacher with the Victorian Institute of Teaching ('the Institute') since 18 June 2008.

On 29 September 2015, Teacher 2, Principal of the School, notified the Institute that he had taken action in relation to alleged serious misconduct of Mr Yukihiro NAGASHIMA.

Mr NAGASHIMA resigned from the employer on 22 September 2015, during the School's investigation.

The matter was referred to the Professional Conduct Committee (the Committee) of the Institute on 30 March 2016 and the Committee decided to refer the matter to a Formal Hearing.

Mr Nagashima was first served with a Notice of Formal Hearing on 3 March 2017 by email and post.

An updated Notice of Formal Hearing (after hearing was rescheduled) was served on Mr Nagashima on 30 March 2017 by registered post.

THE ALLEGATIONS

The allegations of serious misconduct as set out in the Notice of Formal Hearing are:

Whilst employed as a registered teacher at the School it is alleged that you, Yukihiro NAGASHIMA engaged in serious misconduct by compromising and violating your professional relationship with the Student.

Particulars:

- a. On or about 12 September 2015, Mr Nagashima used a social media messaging service to engage the Student in a conversation of a personal and inappropriate nature, in an unprofessional manner and without a valid context;*
- b. During the course of the conversation Mr Nagashima:*
 - i. used sexual innuendo when he told the Student "I want to sleep with you";*
 - ii. told the Student "I'm feeling horny"; and*
 - iii. told the Student "Send me a photo of you masturbating –".*

THE EVIDENCE

Mr Nagashima confirmed, prior to the hearing that he did not intend calling any witnesses. He elected to represent himself, chose to take an oath, gave sworn evidence to the Panel and subjected himself to cross-examination.

In the course of the formal hearing the Institute did not call any witnesses and presented evidence by way of sworn affidavits from the Student, Teacher 1, Teacher 2, Witness 1 and Mr Williams. The evidence contained in these affidavits is summarised below.

The Student

The Student was born in 1998. She met Mr Nagashima, who accompanied students from the School when he visited in November 2014. Her first and only conversation with Mr Nagashima was during a daylong bus trip, on 24 November 2014, during which he joked with her about being short and told her about his family in Australia. During the remainder of his visit, she exchanged greetings with him but did not have any further conversations.

The Student operated a Facebook account in her name. On or about 12 September 2015 she received a message from a person identified on Facebook Messenger as Yuki Nagashima. The profile image appeared to be Mr Nagashima wearing a Japanese army uniform. She was surprised to receive the message as she had barely spoken to him when he was in her country and had not communicated with him since that time. She was not a Facebook friend with Mr Nagashima and did not know how he was able to contact her through Facebook Messenger.

Mr Nagashima's initial Facebook message to her was in relation to the flood damage following a typhoon. The messages he next sent offended her, made her feel embarrassed and scared her. All messages between her and Mr Nagashima were sent on Saturday 12 September 2015. There was no communication before or after this date.

The Student did not initiate the Facebook conversation with Mr Nagashima and did not give him any reason to think that she would sleep with him, have sex with him or send him photographs of herself masturbating.

On Monday 14 September 2015, she told Teacher 1 about the messages she received from Mr Nagashima and, at his request, provided him with a copy of the messages. She took screenshots of the messages, printed them and provided them to Teacher 1; a copy of the messages was attached to her affidavit. She reported the matter to Teacher 1 because she was afraid of what Mr Nagashima might have done to her or said to her if he came to the School in November 2015. She understood Teacher 1 would report the matter to the school.

After she provided Teacher 1 with a copy of the messages, she deleted the message conversation because she did not want "*to see the terrible content anymore*". She cancelled her Facebook account because she was afraid of further contact from Mr Nagashima and deleted the Facebook application from her mobile phone.

Teacher 1

On or about Monday 14 September 2015, the Student approached Teacher 1 after a morning lesson wishing to speak to him about some troubling text messages she had received from Mr Nagashima, a teacher at the school. He asked her to provide him with a copy of the relevant offending sections of the messages, which she did on or about Wednesday 16 November 2015. They consisted of printouts of two screenshots taken from her mobile phone. He did not see the actual messages on her phone just the printouts.

Teacher 1 personally translated the copies of the messages. He also prepared a letter on behalf of Teacher 3 to Teacher 2, the Principal of the school. The letter noted, among other things, that Teacher 1 had informed him that: the Student had received "*highly inappropriate sexually explicit messages through Facebook messenger*" from Mr Nagashima; and that the Student had received these during the evening of Monday 14 September as evidenced by the date on the page.

The Panel was unable to see a date on any of the printouts of screen shots provided as evidence. The email attached to Teacher 1's affidavit appears not to be the original but the one received and printed by Teacher 2 and attached to his affidavit.

Teacher 2

On Friday, 18 September 2015, Teacher 2 received an email, via Teacher 1, from Teacher 3 advising that the student had received highly inappropriate sexually explicit messages through her Facebook Messenger account from Mr Nagashima on or about 12 September 2015. Attached to the email was a copy of a two-page document, described as screenshots of the pertinent sections translated by Teacher 1.

On the same date, Teacher 2 had a conversation, in the presence of two other staff members, with Mr Nagashima to inform him of the allegations made against him. He showed him the screenshots supplied through Teacher 1. He indicated to Mr Nagashima that he had been informed that they were sexually explicit and asked him if he could read and understand them. Mr Nagashima read the messages, affirmed that he could understand them and said that "*he did not send them and maybe his account had been hacked*" and later, during the conversation, "*he believed his account was hacked*".

On Thursday, 24 September 2015, Teacher 2 again met with Mr Nagashima to allow him the opportunity to respond to the allegation that he had sent sexually explicit messages to a student via Facebook Messenger. Mr Nagashima's response was "*I had been drinking that night when I was talking to the student. I didn't mean it. What can I do to make it right?*" In light of this response, Teacher 2 advised he would be terminating Mr Nagashima's contract and that it might be appropriate to write a letter of apology, which he would forward to the school.

Mr Nagashima provided a letter of apology, dated 22 September 2015. The letter extended Mr Nagashima's "*deepest regrets and sincerest apologies for his misconduct*" and stated that "*it was not his intention to create such an awkward, embarrassing and uncomfortable situation*". He further stated that his "*behaviour was uncalled for and completely unprofessional*".

Witness 1

On 21 January 2016, the Institute engaged Witness 1, an appropriately qualified translator, to translate a two-page document of screenshots of a Facebook message conversation, between a person identified in that document as Yuki Nagashima and a person referred to as the Student.

The written transcript was as follows:

Teacher: 'I hear that the floods were bad. Was everything OK where you are?'

Student: 'Long time no see! Yes! It was really bad, almost like a tsunami.'

Teacher: 'Oh OK. That's good to know! By the way, I'll be there again in November this year.'

Student: 'I'm looking forward to November [laughter symbol].'

Teacher: 'Student, now that you're a second-year student, you can't be a host anymore, right?'

Student: 'Yes I can! Apparently, it's allowed as long as you don't mind being busy before the trip.'

Teacher: 'Really? I thought it was only for first- years?'

Student: 'Last year two second-years hosted too.'

Teacher: 'Serious? Well then, host me as well.'

Student: 'Teachers are out of the question [laughter symbol].'

Teacher: 'I want to sleep with you Student

I feel horny

Student –?

Send me a photo of you masturbating

Are you asleep–?

This transcript matched that provided to Teacher 2 by Teacher 1.

Mr Stewart Campbell Williams ('Mr Williams')

On 11 January 2016, Mr Williams, Investigations Manager, Conduct and Compliance Unit of the Institute, conducted a digitally recorded record of interview with Mr Nagashima. A written transcript of this interview was provided to the Panel.

Mr Nagashima signed an agreed statement of facts, as set out below, on 16 March 2015.

The Teacher was a registered teacher in Victoria, at all relevant times

The Teacher was employed to undertake the duties of a teacher at the school from 2009 to the date of his resignation on 22 September 2015.

The Teacher was employed at the school as a classroom teacher.

In November 2014, the Teacher accompanied students from the College, where the School hosted the College's cohort for approximately two weeks.

Students from the School hosted students from the College in their homes. One of the host students was the Student.

On or about 24 November 2014, the Teacher and the Student were both participants in a joint school excursion. On the bus trip, the Teacher and the Student had a conversation about Australia among other general conversation topics.

On or about Saturday 12 September 2015, the Teacher sent the Student a message using Facebook and initiated a message conversation.

The conversation through messages over Facebook was held in Japanese. The following is a translation of the message that took place on 12 September 2015 –

Teacher: 'I hear that the floods were bad. Was everything OK where you are?'

Student: 'Long time no see! Yes! It was really bad, almost like a tsunami.'

Teacher: 'Oh OK. That's good to know! By the way, I'll be there again in November this year.'

Student: 'I'm looking forward to November [laughter symbol].'

Teacher: 'Now that you're a second-year student, you can't be a host anymore, right?'

Student: 'Yes I can! Apparently, it's allowed as long as you don't mind being busy before the trip.'

Teacher: 'Really? I thought it was only for first- years?'

Student: 'Last year two second-years hosted too.'

Teacher: 'Serious? Well then, host me as well.'

Student: 'Teachers are out of the question [laughter symbol].'

Mr Nagashima

The Panel considered evidence from Mr Nagashima, as provided by the transcript of the record of interview held 11 January 2017, sworn evidence given during the hearing, further submissions made prior to and during the hearing and his closing submission.

In his evidence, Mr Nagashima stated that there were discrepancies in the statements of Teacher 2, and the Student. He confirmed that while he was pointing out discrepancies he was not trying to lighten his wrongdoing, stating *“I fully accept those wrongdoings, and messaging her regarding sleeping in her bed and talking about staying in her house, which is totally inappropriate, I apologise for these and the stress and discomfort I have caused to the Student and everyone else involved.”* Mr Nagashima admitted he took full responsibility of communicating inappropriately with the Student.

He also challenged Teacher 1’s credibility by stating he remembered judging a speech contest at the School and during that time Teacher 1 requested that Mr Nagashima mark the Student higher because he (Teacher 1) was tutoring her privately.

In the absence of legal representation, Mr Nagashima was not aware of the principles of natural justice. However, his conduct under oath invoked a common law rule in *Browne v Dunne* (1893) 6 R 67 (HL). The rule requires that unless notice has been clearly given, *“it is necessary to put to an opponent’s witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his/her evidence, especially where the case relies upon inferences to be drawn from other evidence in the proceedings”*. The underlying principle is one of fairness, that being, it is unfair to the witness and the party calling the witness, to deny an opportunity for an explanation if the opposing party, at a later point, intends to invite disbelief or criticise the witness.

Counsel Assisting the Institute submitted to the Panel that if Mr Nagashima intended to challenge the witnesses’ evidence and give evidence that was different, then he ought to call that witness and put any matter that is inconsistent with his own evidence, to that witness first, before giving his own evidence.

Mr Nagashima declined the opportunity to call witnesses. Counsel Assisting explained that the hearing could be adjourned in order to arrange for any witnesses to be called to give evidence and to be available to be cross-examined. The implications of any such decision, and the risks of proceeding in such circumstances, were also put to Mr Nagashima on a number of occasions by both the Panel and Counsel Assisting. The Panel assured itself that Mr Nagashima understood the implications of any decision to not call and/or cross-examine witnesses and, after due consideration and further affirmation from Mr Nagashima of his decision, the Panel determined to proceed with the hearing.

Mr Nagashima gave evidence at the hearing that he was home alone on Saturday 12 September 2017, his wife and children having departed for a holiday in Japan and that he had a series of

exchanges with friends and other students. He admitted to sending messages to students, who were affected by the flooding, but stated it wasn't hours upon hours of conversations.

He challenged Teacher 2's evidence that he said in a meeting on 24 September 2015 that he had been drinking that night. He gave evidence that Teacher 2 asked him whether he had been drinking and his response was, "No". He also gave evidence that Teacher 2 asked whether he had been under the influence of other drugs and he said, "No". He gave further evidence that he never mentioned to Teacher 2 that his phone had been hacked but rather the message content had been altered and some parts deleted.

Mr Nagashima gave evidence in relation to his meeting with Teacher 2 on 24 September 2016. He stated that Teacher 2 asked him to unfriend or cancel any Facebook contacts he might have with students, former or present, that he had in his list of friends, asked if he had deleted any such contacts/messages, and suggested that it would be a good idea to do so. Mr Nagashima stated that he deleted all contacts with these students after Teacher 2 said it was a good idea.

Mr Nagashima challenged the Student's evidence that he initiated contact with her on Facebook Messenger. In his record of interview, he said that the Student had sent him a friend request on Facebook but that he was uncertain of the timing of that request but that it may have been a few weeks prior to the conversation from which the allegations arose.

During the hearing, Mr Nagashima confirmed that the contact through Facebook messenger was the first conversation between him and the Student. However, he questioned, contrary to the agreed facts, that he initiated the conversation saying he could not fully recall who first said 'hello' but, in respect of the screenshots and the English translation of the screenshots, conceded that the first message was from him.

In his record of interview Mr Nagashima admitted that: the the image of the Facebook profile photo was of himself; this was the first conversation on Facebook messenger with the Student; and that nobody else was invited into their conversation. However, he maintained that the screenshots, provided to the Institute, appeared to have been altered or deleted and were a highly truncated, edited version of a much longer conversation. A conversation which was broadly about the flooding, hosting and billeting arrangements for a forthcoming trip to the School, which then turned flirtatious in respect to where he might stay and where he could sleep. He claimed there was a lot more conversation between him and the Student about hosting but but was unable to say who could have had access, other than the Student, or motivation to change the exchange between them.

Mr Nagashima gave evidence that the screenshots provided by the Student were, in part, exchanges of that nature, but they were different, the layout was different from what he usually received on Facebook messenger. He challenged that the image of the profile picture, previously provided to him, was his, drawing attention to a difference in the icon attached to the picture. To support this contention, he tendered a copy of a Facebook messenger screenshot taken from an unknown device at an unknown time.

In the record of interview, Mr Nagashima admitted that he told the Student that he wanted to sleep with her and that he was getting horny. He expressed his preferred translation of the word 'horny' was 'aroused or excited'. He contended that the exchange around sleeping arrangements arose from the fact that her parents did not have the accommodation to host him and began with banter from her about him sleeping on the bed and her on the floor through to him saying he wanted to sleep with her. His opinion of the exchange was that the Student was a willing participant and he thought she was "*being silly and sort of teasing*" and his response was in the context of her being flirty. He was unable to produce any evidence of the banter or point to anything in the screenshots indicating flirtatiousness on her part. He stated that he would never put himself in a position where he would be home stayed with a parent. He agreed that as a teacher his conversation with the Student was inappropriate and contained sexual innuendo.

During the hearing, Mr Nagashima elaborated on these admissions. He stated that the use of Facebook was an inappropriate medium through which to communicate with students and it was inappropriate to engage in speaking about sleeping and sleeping arrangements with the student in a flirty manner. He reiterated that the comment was flirtatious but was not intended to refer explicitly to sexual intercourse but conceded, that in the the stand alone context in which it was presented, it could be interpreted as such. He also admitted that he wrote the characters translated as 'feeling horny', or words to that effect, but reiterated that he considered they meant excited or aroused and that they were written in the same context as the longer conversation about sleeping arrangements.

In response to questions about the section of the translation, provided by Witness 1, which read as:

Teacher: I want to sleep with you Student
I feel horny
'Student -?'
Send me a photo of you masturbating
Are you asleep-?

Mr Nagashima stated that he could not recall just typing 'Student -?' but conceded that he may have done so. He denied having asked the Student for a photo of herself masturbating but agreed it was a closed private conversation and that the profile picture on the screenshot did resemble him. He was not able to provide any evidence as to how this request appeared in the screenshot.

The Panel noted that Mr Nagashima was inferring that somebody had altered the conversation and whilst the conversation was closed, the inference was that somebody privy to the conversation could only have doctored it. The only other person privy to the conversation was the Student.

He agreed he wrote 'Are you asleep-?' but claimed that there was a big gap before this occurred. Mr Nagashima was unable to state where this gap had occurred in the conversation. He went on to state *"I don't remember what the conversation was about, the last sentence. Whether it was her reply and that's it. There was a gap, don't know how long. I do not recall what the conversation was but definitely not masturbating"*.

In response to a question from the Panel Mr Nagashima agreed the inference of a comment like *"I want to sleep with you"* made to a 17-year-old female student, is that he is thinking about the idea of having sex with her. Mr Nagashima also agreed that it did not mean that he would in fact have sex with her. Mr Nagashima denied he was aroused at the time he sent the follow up message 'I'm feeling horny'.

The Panel pointed out the logical progression of the conversation whereby Mr Nagashima said to the Student *"I want to sleep with you"*, then *"I am horny"*, and if indeed he was aroused, then it was possible that Mr Nagashima could have said words to the effect of *"Send me a photo of you masturbating"*. Mr Nagashima conceded it was possible, yet described the conversation as flirtatious in nature and, ultimately, a sexual fantasy and there being nothing more to it.

In response to a question from the Panel about what led to the conversation with this student, and whether the conversation was based on any interaction or feelings he had, he said *"No, not at all, it was all on that Saturday night"*. Mr Nagashima stated that despite his fantasised text messages he did not make any realistic arrangements that anything would happen.

Contrary to the evidence given by the Student, that all of the conversation took place on Saturday 12 September 2015, Mr Nagashima stated in his record of interview that she contacted him on Facebook messenger on the morning of Sunday 13 September 2015 saying *"Good morning, sorry I fell asleep"*, and asking him what he was doing. He gave evidence that he continued to message her saying that he was judging a speech contest that day in Carlton, and she messaged in return saying that she was studying that day. He stated there was no further contact with her that day. He reiterated this version of events at the hearing.

Furthermore, contrary to the evidence provided by the Student, Mr Nagashima told the Panel that he remembered receiving a further message from the Student on either Tuesday 15 September or Wednesday 16 September 2015 saying that she had finished school. He responded by asking her what she meant by this, or words to that effect, and asked her if she was okay. Later that day he went back to the message to find that he had been blocked.

Mr Nagashima stated that after he found he was blocked he did attempt to send a message asking if something was wrong and asking if he had done something to upset her.

In response to a question from the Panel, Mr Nagashima conceded that the Student stopped the conversation by blocking him on Facebook Messenger but he continued to claim that the conversation with the Student was held over a two or three-day period.

He also told the Panel that on the day he discovered he had been blocked he deleted the original thread of the message. He also stated that he did not keep a copy or download the exchange between him and the Student, was unable to retrieve it and not sought help to do so. He stated he deleted the conversation because he felt sorry and embarrassed for the actions he had taken and for not contemplating the subsequent events.

In responding to a further question from the Panel about what he thought or felt when the Student blocked him from further communication, he admitted he knew he was engaging in an inappropriate conversation. Upon reflection, Mr Nagashima admitted he felt he had upset the Student, overstepped the boundaries of his profession, felt guilt for what he had done and had come to the realisation that he had caused her discomfort and distress.

Mr Nagashima provided a written submission to the Institute on 27 April 2017. In these submission he acknowledged, inter alia, that he did not engage in respectful language with the Student, did not respect her privacy in sensitive matters and deviated from Principle 1.5 of the Institute's Code of Conduct by communicating with her via social media and using sexual innuendo. He also stated that he did have good intentions to find out whether the disaster had affected the community but he should have sought other means to receive this information. Mr Nagashima further stated that the conversation shifted to other topics but he needed to be responsible enough to cease the communication and that he had since deleted all social media accounts, including Facebook, so he could better manage his actions.

The submission of 27 April 2017 contained evidence of professional learning activities undertaken over the past two years including certificates of completion of a number of child protection training courses.

At the conclusion of the evidence on 4 May 2017, the Panel ordered the Institute to file any closing submissions by 10 May 2017. The Panel further directed Mr Nagashima to file any closing submissions by 24 May 2017. Both parties filed closing submissions by the due dates.

Mr Nagashima engaged legal representation in preparing his closing submission. In this submission, he appeared to contradict the sworn evidence he gave at the formal hearing on 4 May 2017. In particular, he denied telling the Student "I'm feeling horny" and additionally claimed "he could not remember saying that he was horny". The remainder of the submission, as it relates to the allegations, canvasses matters already covered in the evidence presented above.

The Panel noted that as part of his closing submission it was open to Mr Nagashima to request that the hearing be reopened for presenting further evidence.

DISCUSSION OF THE EVIDENCE

The Student has deposed that she was not a Facebook friend with Mr Nagashima and she did not know how he contacted her through Facebook messenger. Mr Nagashima gave contrary evidence in his record of interview stating that the Student initiated the contact with him at some time prior to the conversation in question asking him to friend her. There is no corroborating evidence to support either proposition.

Mr Nagashima has agreed that he engaged the Student in a conversation of a personal and inappropriate nature on Saturday 12 September 2015 via Facebook messenger. No one except the parties concerned saw the original content of that conversation. The Student deposed that she provided Teacher 1 with screenshots of the conversation. Teacher 1 has deposed that he received these screenshots in response to his request of the Student that she provide him with the relevant offending sections of the messages.

The conversation between Mr Nagashima and the Student had an impact on the Student, causing her offence, embarrassment and fear; fear to the extent that she reported the conversation to her teacher.

Mr Nagashima agreed that the screenshots were an accurate translation. He also agreed that, in the context of these screenshots, he initiated the conversation. However, he consistently maintained that they were a highly truncated, edited version of a much longer conversation, which spanned three to four days; there is some support for this proposition. The evidence shows that: Teacher 1 only asked the Student to provide the relevant offending sections; she did not provide them to him until Wednesday 16 September 2015; and, both parties deleted their copies of the original thread of the conversation. However, given the voluntary admissions Mr Nagashima has made, this does not abrogate his professional responsibilities.

Mr Nagashima voluntarily admitted in his record of interview and at the hearing, that he messaged the Student saying *"I want to sleep with you"*. However, he denied telling her he wanted to sleep with her in the context of sexual intercourse despite his previous admissions in his record of interview, and in his submissions placed before the formal hearing Panel, in which he admitted he used sexual innuendo.

Mr Nagashima voluntarily admitted in his record of interview and at the hearing, that he messaged the Student saying *"I'm feeling horny"* or words to that effect. However, in his closing submission he withdrew this admission providing no reasons as to why this might be the case.

Mr Nagashima also stated his behaviour was *"uncalled for, completely unprofessional and he was sorry and embarrassed for his actions"*; furthermore, he agreed that his conversation with the Student was *"inappropriate and contained sexual innuendo"*.

Mr Nagashima consistently denied asking the Student to send him a photo of her masturbating. He insisted that the insertion of this request occurred after the conclusion of their 'closed'

conversation. There is no evidence to support who might have done this given he and the Student were the only parties to the conversation or why this might be a possibility.

The Panel noted that, in response to questioning as to how Mr Nagashima now reflected on his actions, he stated that he had *“overstepped the boundaries of his profession, felt guilt for what he had done and had come to the realisation that he had caused the Student discomfort and distress”*.

The Panel noted that Mr Nagashima wrote a letter of apology, dated 22 September 2015, to the School, at the suggestion of Teacher 2, expressing his *“deepest regrets and sincerest apologies for his misconduct”* and stating *“it was not his intention to create such an awkward, embarrassing and uncomfortable situation”*. The act of writing of the letter supports the view that the allegation, that he sent sexually explicit messages to the Student, has merit.

The Panel also noted a number of points made by Mr Nagashima in his written submissions to the Institute on 27 April 2017. Namely that:

- he did not engage in respectful language with the Student, did not respect her privacy in sensitive matters and deviated from Principle 1.5 of the Institute’s Code of Conduct by communicating with the Student via social media and using sexual innuendo;
- he did have good intentions to find out whether the disaster had affected the community but he should have sought other means to receive this information;
- the conversation shifted to other topics but he needed to be responsible enough to cease the communication and that he had since deleted all social media accounts, including Facebook, so he could better manage his actions.

FINDINGS

The Panel found Mr Nagashima, on his own admission compromised and violated his professional relationship with the Student. He did so by using a social media messaging service to engage her in a conversation of a personal and inappropriate nature, in an unprofessional manner and without a valid context; and, during the course of the conversation used sexual innuendo when he told the Student: *“I want to sleep with you”*; and *“I’m feeling horny”*.

It should be noted that, in the context of the evidence previously given by Mr Nagashima, the Panel chose to disregard the contention provided by him in his closing submission that he did not tell the Student *“I’m feeling horny”*.

The Panel found Mr Nagashima to be an unreliable witness especially on the key question as to whether he actually wrote ‘Send me a photo of you masturbating’. He was initially adamant that that he had not written these words but, under questioning from the Panel, he was willing to entertain the fact that given the context of the conversation, his state of mind, and the emotional logic of his immediate previous statements that it was plausible that he may have made that remark. The Panel did not draw the conclusion that he was deliberately obfuscating. It was more a matter of blocking it from his memory given the extreme seriousness of the consequences of admitting to such.

In relation to this particular allegation the Panel weighed the evidence on the basis of the burden of proof as outlined in *Briginshaw v Briginshaw* (1938) 60 CLR 336 where Dixon J. said:

“When the law requires the proof of any fact the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.”

In the absence of evidence, and any plausible explanation to the contrary, the Panel found on the balance of probabilities, that Mr Nagashima wrote the words ‘Send me a photo of you masturbating’.

Consequently, the Panel found all of the allegations substantiated.

The Panel then turned its mind to the question of whether Mr Nagashima’s actions amounted to serious misconduct.

In making this assessment the Panel referred to the decision of *Parr v Nurses Board of Victoria* unreported, VCAT, 2 December 1998, in which Kellan J held that in order for a person to have been found to have engaged in unprofessional conduct of a serious nature – which the Panel equates to serious misconduct – the conduct *“would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. So it must be a departure, in a substantial manner, from the standards which, must be reasonably expected of a registered nurse (in this case a registered teacher).* This formulation

has been adopted and approved by Ashley J in *Domburg v Nurses Board of Victoria* [2000] VSC 369 at [59].

The Panel found that Mr Nagashima's conduct was neither trivial nor of momentary effect in terms of its impact on the Student. It accepts the Student's evidence that she was offended by Mr Nagashima's conduct and that he made her feel embarrassed and scared. It also accepts that she felt afraid of what he might do or say to her if he came to her country of residence.

The Panel found that Mr Nagashima's conduct was a substantial departure from the accepted standards of the profession. In support of this, the Panel looked to Code of Conduct ('the Code'), which was developed by the profession and published by the Institute.

Principle 1.5 of the Code provides that teachers are always in a professional relationship with their learners, whether at the education setting where they teach or not. It states that teachers hold a unique position of influence and trust that should not be violated or compromised and that they exercise their responsibilities in ways that recognise there are limits or boundaries to their relationships with learners. The Code further provides that a professional relationship will be violated if a teacher: uses sexual innuendo or inappropriate language and/or material with learners; and/or holds conversations of a personal nature or has contact with a learner via written/electronic means without a valid context. Mr Nagashima has acknowledged he violated Principle 1.5.

In further considering whether Mr Nagashima's conduct constituted serious misconduct the Panel agreed that it was always within his power and control to direct the nature and flow of the conversation; he has admitted this was the case and expressed remorse for his failure to do so.

Accordingly, the Panel found Mr Nagashima guilty of serious misconduct.

DETERMINATION

On 21 August 2017, the Panel decided to suspend the registration of Yukihiro NAGASHIMA from 21 August 2017 to 21 February 2018 and impose the following conditions:

1. Mr Nagashima is to attend at least four sessions with a registered psychologist of his choice where the following is to be addressed:
 - an in-depth analysis of the Institute's Codes of Ethics and Conduct clearly identifying the points at which his behaviour deviated and the potential/real consequences, both direct and indirect
 - an analytical reflection on how and why the relationship progressed, concentrating on the role that he played personally, and noting the range of strategies he could have put into practice to prevent what evolved and eventuated

- a clear understanding of the significance of professional behaviour in maintaining the reputation of the teaching profession and the trust that the community is entitled to place in teachers.
2. Following the four sessions, Mr Nagashima is to provide a report to the Institute, prepared by his registered psychologist, which addresses the above points and explains how he has satisfied each point.
 3. Mr Nagashima is to provide a report written by him, illustrating his insights into why his conduct, the subject of this decision, was inappropriate and setting out the strategies he has developed to ensure any further repetition.

The suspension of Mr Nagashima's registration will not be lifted until the Institute receives both reports and is satisfied they address the relevant issues set out above.

The Panel found Mr Nagashima remorseful, prior to and during the hearing, for those aspects of his behaviour he admitted and noted the proactive stance he voluntarily undertook, via professional development and counselling, to address the failings in his professional conduct. Taking these factors into consideration, the Panel concluded that Mr Nagashima is unlikely to reoffend.

However, the Panel concluded that a six-month period of suspension was warranted to serve not only as a specific deterrent but also as a general deterrent to counsel others against similar conduct. The Panel's role is to protect the public and the reputation of the profession. The period of suspension it has fixed and the conditions attached reflect the gravity of Mr Nagashima's serious misconduct.

VIT submitted that:

".....a cancellation of the Respondent's registration, for a period of time, is required as a matter of general deterrence, sending a message to the profession as to the gravity of such conduct in order to uphold the reputation of the profession within the community, sending a strong message that such conduct will not be tolerated.

While acknowledging the VIT's submission the Panel concluded that Mr Nagashima has shown some insight and remorse. Suspension for a period of time is a significant sanction. It sends a powerful message to the profession. It serves as a strong deterrent.

In addition the conditions imposed by the panel provide a mechanism for the VIT to monitor Mr Nagashima's understanding of his obligations as a teacher.

Janet M. Sherry

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JANET SHERRY, CHAIRPERSON

Terry Hayes

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per:
TERRY HAYES, REGISTERED TEACHER

Farrelly

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per:
ANNE FARRELLY, PANEL MEMBER