

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 248239

Hearing Number 0339

REGISTERED TEACHER: Shane OSMOND

PANEL MEMBERS:

Janet Sherry, Chairperson

Leonie Sheehy, Registered Teacher

Alan Frees, Panel Member

ATTENDANCE:

Mr OSMOND did not attend the Formal Hearing.

Ms Jeeviya Mather (VIT SOLICITOR), Instructing Solicitor on behalf of the Victorian Institute of Teaching.

DATE OF HEARING:

13 September 2018

DATE OF DECISION:

19 October 2018

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

On 19 October 2018 the Panel decided to cancel the registration of Shane Osmond from 19 October 2018 and disqualify him for a period of five years, pursuant to sections 2.6.46(2)(j) and 2.6.46(2)(k) of the *Education and Training Act 2006 (Vic)*.

REASONS

BACKGROUND

The Teacher was first granted full teacher registration with the Victorian Institute of Teaching (the **Institute**) on 31 December 2002, under the *Victorian Institute of Teaching Act 2001* (Vic).

On 24 April 2017, the Manager of the Employee Conduct Branch at the Department of Education & Training ('the Department'), notified the Institute that they had taken action in relation to the alleged serious misconduct of the Teacher.

The Manager confirmed that an employment limitation was placed on the Teacher after he resigned from his employment as a teacher at the School while he was the subject of an employment investigation into allegations that he exceeded his professional boundaries with a student of the School.

On 23 June 2017, the Institute determined to exercise its interim suspension powers pursuant to section 2.6.28 of the *Education & Training Reform Act 2006* (Vic) (the **Act**) and suspended the Teacher's teacher registration.

The Teacher's registration remains suspended.

The matter was referred to the Professional Conduct Committee (the Committee) of the Institute on 15 November 2017 and the Committee decided to refer the matter to a formal hearing.

THE ALLEGATIONS

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

Between June 2015 and December 2016, whilst registered as a teacher employed at the School, it is alleged that:

Allegation 1

the Teacher failed to maintain a professional relationship with the Student, a student of the School, by:

Allegation 1.1 – Holding conversations of a personal nature with the Student, without a valid context.

Allegation 1.2 – Contacting the Student via written/electronic means, without a valid context.

Allegation 1.3 – Using sexual innuendo with the Student and sharing inappropriate material via Facebook and Facebook Messenger.

Allegation 1.4 – Touching the Student without a valid context.

Allegation 2

The Teacher failed to maintain objectivity in his relationship with the Student, a student of the School, by drawing the Student into his personal agenda.

Allegation 3

The Teacher failed to maintain a professional relationship with a parent of a learner of the School.

Allegation 4

The Teacher conducted himself in an improper manner that would have an impact on the standing of the profession as a whole.

THE EVIDENCE

The Teacher did not appear at the Formal Hearing. The Panel heard submissions from Counsel Assisting the Institute, Ms Jeeviya Mather, in respect of the Institute's actions in serving documents on the Teacher and ensuring he was aware of the proceedings and the allegations made against him. The Panel concluded that he was aware of the proceedings and the opportunities available to him to present evidence or submissions in his favour and had chosen not to avail himself of those opportunities.

Neither the Institute nor the Panel called witnesses. The Panel relied on evidence by way of sworn affidavits, and their attendant exhibits, from Witness 1, Principal of the School, Mr Stewart Williams, Manager, Investigations, Victorian Institute of Teaching, the Student and the mother of the Student.

Note: Orders made by the Formal Hearing Panel

Pursuant to section 2.4.65(e) and (g) of the Act the Panel ordered that, in respect to the hearing relating to the Teacher, any information that might enable the former student to be identified or cause the former student undue distress must not be published or broadcast, including:

- a. the name of the former student;
- b. the name of the witnesses; and
- c. the name of the school.

The Teacher was first employed at the School in 1987 as an emergency teacher. On 10 April 1989, he was given an offer of employment as a teacher at the School. He held continuous employment from that time until 18 April 2017 when he resigned amid an investigation that, between 2015 and 2016, he had breached professional boundaries with the student.

The Student was enrolled at the School from 2011 until 2016 when the Student graduated from Year 12. The School runs a mentoring program for all Year 12 students. The students elect a teacher as their mentor; teachers can also request to mentor particular students. In 2016, the Teacher was responsible for mentoring a number of students. At the Teacher's request, he was assigned as the Student's mentor.

The general responsibilities of the mentor include checking or meeting with their mentee at least once a month although a mentor might meet with their mentee once a fortnight if they felt it was needed. The mentor's role is to check on the wellbeing and welfare of their mentees and to make sure they were managing their Year 12 workload. Mentors are not assigned to tutor, review or assist students with their schoolwork.

The Student deposed that during the whole of the 2016 school year, using his mentor capacity, the Teacher took the Student out of class, on average, once a day. When this occurred, the Teacher did not generally talk about school related matters but rather about their 'friendship' or about arranging a catch up after school.

The Principal met with the Teacher on 28 January 2016 at which time she discussed concerns raised by two staff members about photos and comments on his personal Facebook account, which related to his friendship with the Student. At this time the Principal spoke with the Teacher about the risks of having students as friends on Facebook and having a Facebook account that was not private; but he assured her that he was friends with the Student's family including the Student's mother and that she was supportive of their friendship. The Principal met with the Teacher on 12 April 2016 to again raise concerns about his interactions with the Student and his refusal to take advice regarding having students as friends on Facebook. The Teacher reiterated that everything done was with the permission of the Student's family. The Principal then advised the Teacher that he must maintain professional boundaries with students at all times.

The relationship between the Student and the Teacher began in June or July of 2015 at the time of a Year 11 mid-year maths exam, which the Teacher was supervising. Towards the end of the exam, the Teacher approached the Student and made a joke using words to the effect of '*Do you actually know what you are doing?*'. The Student did not recall his response. A few days later the Teacher approached the Student and asked him if he would like to assist him by tutoring some maths students after school;

the Student agreed. This exchange marks the beginning of what the Teacher consistently describes as a friendship between himself and the Student.

The Student started tutoring not long after this in or about July 2015. The tutoring sessions took place on Tuesday's and Thursday's after school from 3:00 pm to 4:00 pm. A further session from 3:00 to 5:00 pm was later added when student numbers grew. The students were all students of the School and the sessions were held at the School. The Student was paid 'cash in hand' by the attendees. The only teacher involved was the Teacher.

A few weeks after the tutoring commenced, the Teacher offered to give the Student driving lessons following the tutoring sessions, which involved driving from the School to the Student's home. The Teacher sought and gained permission from the Student's mother to conduct the driving lessons after showing her a certificate he said enabled him to teach people to drive. The Teacher would not take payment for the driving lessons; and, when the Student's mother offered to pay, he refused and replied in words to the effect of '*I am doing this for a friend*'.

In or about July 2015, the Student commenced driving lessons with the Teacher. The lessons took place in the Teacher's private car. Initially these involved driving to the Student's home after the maths tutoring sessions but approximately two or three months later, the Teacher offered to give the Student driving lessons in the morning, before school. He picked the Student up at 8.00 am each morning and allowed the Student to drive both of them to the School. At the same time, he offered to give the Student driving lessons every afternoon after school so he could get the requisite hours to move from L plates to his P plates. The Student stated that '*he was not really given lessons but rather the Teacher just sat there and talked*'. This arrangement continued almost every day from Monday through to Thursday for the remainder of the 2015 school year, and extended into the 2016 school year, with the Student only occasionally catching the bus.

The Student's mother deposed that in December 2015 her family gave the Teacher a \$100 gift voucher as a thank you for providing the driving lessons. The Teacher acknowledges the gift in a message to the Student on 14 December 2015 in which he asks the Student to pass on his thanks.

On a date in or about late Term 4 December 2015, at the end of the school day, the Teacher directed the Student to drive to an unknown destination, refusing along the way to tell him where they were going. When they arrived, the Teacher revealed that it was his private residence. The Student was taken inside and given a tour of the house, which included being shown the Teacher's bedroom, his gym and his cats; he was also introduced to his mother. About thirty minutes to an hour was spent at the house after which the Student drove to his home with the Teacher. On 14 December 2015, the

Teacher wrote the following message to the Student using Facebook *'I was glad you came over to my place (not that you had much choice) lol'*.

During the driving lessons, the Teacher talked about personal matters and his private life. He discussed which teachers he did not like at the School and how much he wanted to leave his job. On one occasion, he told the Student of his former employment as a stripper. He also encouraged him to play a game where the Student could ask him any question and he would have to answer. The same rules would apply to the Teacher asking any question of the Student.

In or about September or October 2015, the Teacher had a conversation with the Student about what he wanted to do after he left school; the Student told him what he intends to do. The Student stated that the Teacher was really dismissive of this and shut it down straight away saying words to the effect of *'No that's not what you want to do. You would not fit in there'*.

The Student stated that the Teacher then started to talk about going to university, to which the Student responded that he was interested in going to an interstate university to which the Teacher said, words to the effect of, *'surely you can do the same things here that you can do there'*. The Student then told the Teacher that he was interested in applying for a university scholarship whereupon the Teacher offered to assist him with the application.

Around the same time that the Teacher offered to assist with the application for the scholarship, he also offered to assist the Student with an application for School Captain including writing a speech and/or offering to read or edit it. The Student did not allow the Teacher to write his speech.

During December 2015, the Teacher organised for himself and the Student to take part in the Salvation Army Christmas Door Knock Appeal; the volunteer work was to assist in his scholarship application. It involved the Student driving the Teacher, on a number of occasions, to the Melbourne CBD and meeting up with the group of people with whom to go door knocking. The Teacher did not seek permission from the Student's parents for him to engage in this work.

The Student stated that he felt a bit uncomfortable during the door knocking sessions with the Teacher telling jokes of a sexual nature including jokes about his penis and singing a crude version of 'Jingle Bells'. On one occasion, the Teacher told the Student he had a tattoo of Sylvester the cat next to his penis and that he had named his penis 'Champ'. The Teacher encouraged the Student to give his own penis a nickname.

The Teacher first messaged the Student over Facebook and/or Facebook Messenger in 2015 and continued to do so until the Student left for university in early 2017. Between 18 October 2015 and December 2016, the Teacher sent the Student

approximately 1650 messages on Facebook and Facebook Messenger the vast majority of which were personal in nature and contained explicit and inappropriate language.

Between 20 December 2015 and 10 January 2016, the Student went with his family for a holiday. During that time, the Teacher messaged him almost every day. The Student found this annoying, as he was on holiday, and strange as they were not at school. The Student did not want to respond but also did not want to make the Teacher angry or upset. He pretended that he did not have his phone on him or that he had no reception as an excuse as to why he was not responding. On approximately three occasions when the Student did not respond to the Teacher's messages, the Teacher called him on his mobile to ask why.

The following is a sample of the messages that the Teacher sent to the Student during that period:

On 22 December 2015, the Teacher wrote 'Hi Muscles... I feel like I'm pushing to stay in contact with you atm (sic) at a time when I should be backing off. You are in a place with family and friends that I'm not part of and you need your own space...Looking back on regular days, 90% of the time I contact you. I like to check in and see you are ok,. but this should go both ways and not sure it does....'

(The Student deposed that during 2015 and 2016, the Teacher called him 'Muscles' as a nickname and would grab his arms and shoulders inappropriately, in a way that made him feel very uncomfortable.)

On 23 December 2015, the Teacher wrote 'I think I can pick up on how you are feeling but not sure you can do the same. I was going to say why I'm not feeling great but I will feel like an idiot'.

On 23 December 2015, the Teacher wrote 'I'm trying, I'm just questioning stuff at the moment. You mentioned 100% team the other day, I'm still on 98% and.'"... 'I miss you. And the other 2% will have to wait for ANOTHER TIME.'

On 23 December 2015, the Teacher wrote '...you are a very important person in my life. I hope you always will be'

On 30 December 2015, the Teacher wrote 'I know you don't use your phone much while away but if I message you and you don't reply my immediate thought is that you don't want to talk to me ... The more important someone is to me the more I get concerned because I feel I have much more to lose....'

On 2 January 2016, the Teacher wrote 'There are things you don't know about me. When we catch up I have one of those things to tell you, however something even more important will need to wait until this year is over. After you are 18, I have already thought about when I want to catch up and talk to you then (Yes I do plan the year in advance

lol). I will have something important to tell you and then I have an item I want you to have. You need to give me a year. I want to make this friendship indestructible in 2016 before I tell you.'

On 6 January 2016, the Teacher wrote '*... I'm sorry about yesterday, when I have not slept for a few nights things get strange. You and I are good mates and we can trust each other, it will all be fine. Have a great day. I would say "Have a good day Champ" but that would be like I was talking to my penis. Lol lol lol SOH in working order this morning.'*

On 6 January 2016, the Teacher wrote '*Lol. Because you are a dick and you make me laugh.'* and in a further message '*I should have taken one of us pissing in the laneway'* (referring to photos).

On 10 January 2016, the Teacher wrote, '*You have sex on the brain. Lol'* and in a separate message on the same date '*Theo needs to stay in your pants and champ is on a nude strike. Lol'*.

Contingent on the message of 2 January 2016, referred to above, the Teacher invited the Student to have lunch with him. On 21 January 2016, the Teacher picked up the Student at his home and drove with the Student to where they had lunch. After lunch, the Teacher took the Student to an isolated area in a large park, which made the Student feel worried and uncomfortable. While at the park, the Teacher told the Student, '*I have a secret that I have not told anyone in my entire life.'* The Teacher then disclosed that he was raped, by his Dad's best friend, from when he was about four years of age. He also told the Student that as a child he had caught his Dad and his Dad's friend having sex. The Student stated that he felt really awkward at the time, because the Teacher was emotional and kept crying for what seemed like ages. The Student also described feeling shocked and a bit weirded out by what he had just been told and kept thinking '*What the hell am I doing here!'*

The Student's recollection of this disclosure is supported by messages that the Teacher sent to him via Facebook Messenger on 21 January 2016 in which he said: '*I will never be able to fully express how much I value you, our friendship and how much I appreciate your support with what I told you today. You said there are no deal breakers in this relationship, I hope you always feel that way. Again thank you so much for your understanding, that was one of the hardest things I have ever had to do" and ...'Ok Mate, talk later, to be honest I feel exhausted. That really drained me today but I feel a great weight has been lifted from my shoulders, thank you so much.'*

On 25 January 2016, the Teacher wrote to the Student saying '*When I told you about my past last week, I thought you would have asked how things were a day, 2 days or whatever but there was nothing. You will never understand how difficult it was and how much it would have meant to me for you to have checked in to see how I was feeling ... I feel like I'm often just a second thought for you....'*

At the beginning of January 2016, the Teacher told the Student he wanted to take him out for his birthday and indicated that this would be during school hours. The Student refused, given it was a school day, but felt really pressured after making this decision. On 2 January 2016, the Teacher wrote to the Student saying *'I cancelled the Thursday lunch as apparently someone has to go to school but I re-booked something for Thursday night'*.

On 4 February 2016, the Teacher took the Student to Melbourne to celebrate his birthday. The Teacher arrived at the Student's home after school hours and refused to tell the Student or his mother where they were going saying words to the effect *'I cannot tell you, it is a surprise'*. The Student's mother stated she was *'shocked and felt sick to her stomach'* but trusted her son and felt, as the Teacher was a teacher, she could also trust him.

The Teacher and the Student drove to Melbourne where the Teacher attempted to gain entry for both of them to Crown Casino. They were refused entry because the Student was under 18 years of age. After failing to gain entry, the Teacher took the Student to dinner at a restaurant in Melbourne. During dinner, the Teacher gave the Student a number of presents – green tea, socks, a Captain America USB stick and a drone. Following dinner, the Teacher took the Student to a bar where the pair played pool. It was a licensed venue in the Melbourne CBD for persons aged 18 years and older.

The Teacher returned the Student home at approximately 11:30 pm. His mother was particularly concerned as it was late, the next day was a school day and she had no idea where they were.

In 2016, the Teacher messaged the Student saying *'...Hope you had a good time on Thursday night and were not too tired on Friday. Have a great week-end mate, talk soon.'*

During February 2016, the Teacher continued to send messages to the Student. In 2016, the Teacher wrote *'I have not had a friend like you in my life before and regardless of what happens in the future we will always be a team for life...'* and in 2016, *'This year is very different for you and I but I suppose I have shared so much with you about myself I also thought this would be a year for us to develop our friendship further and enjoy some times together...I feel more like your teacher and less like your friend every day and that is very hard for me having told you so much about myself and believing that you and I have a real connection. We rarely talk about anything but school now and the entire focus of our 'friendship' seems to only be about school...'*.

In or about late February 2016, the Teacher asked the Student to meet him outside school hours. The Student deposed that he felt that *'things were getting a bit weird'* and did not want to meet him but eventually did so. The Teacher arranged to meet with the Student after the Student had finished a shift at a restaurant.

The meeting took place in a car park opposite the restaurant. At that meeting, the Teacher gave the Student a 'soul mate' necklace. Before he presented the Student with the necklace, the Teacher said words to the effect of *'I have another secret I want to tell you, it's worse than the last one. I have never trusted anyone as much as I have trusted you. When I was in New York, I had a necklace made in case I ever found the one for me. I doubt you will use it the way it is intended but I want to give it to you because of the way I feel.'*

The necklace consisted of a pendant, which formed half of a whole pendant that connected together. The Teacher had the other half of the pendant. The Student said to the Teacher words to the effect that he did not feel the same way.

In March 2016, the Teacher wrote to the Student *'...the truth is I'm not strong enough at the moment to lose your friendship. Tonight the way you were talking to me in the car I almost told you what you want to know...If I tell you now I seriously would not be able to look you in the face again...I have a lump in my throat writing this, you know me better than anyone else in the world and I think I am very lucky to have found such an amazing connection and friendship with you. I could not cope at the moment thinking that you would hate me after what I tell you...'*

The Student deposed that he felt really uncomfortable after the carpark meeting and wanted to cut contact with the Teacher but was afraid of what he might do if he did this. The Student's main consideration was that he wanted his final year to go as smoothly as possible.

Approximately a week after the car park conversation, while the Student was driving the Teacher, the Teacher said words to the effect of *'I would never make a move on you unless you wanted me to.'* The Student described feeling shocked at this remark and did not say anything in reply.

The Student did not want to continue with driving lessons with the Teacher, after the carpark conversation, as he had begun to feel it was not safe to be with him alone; however, he continued because he was worried and scared about what might happen if he cancelled them. The Teacher did not threaten or physically hurt him but the Student *'...had a gut feeling that he could snap.'*

Throughout March, April and May 2016 the Teacher kept up a constant correspondence of a personal nature with the Student via Facebook and Facebook Messenger. Examples representing the nature and tenor of the messages follow.

On 6 April 2016, the Teacher accused the Student of not making him a 'priority. The message read *'That's an excuse ... we don't hang out at all and that has been your choice. I wanted you and I to take time out this year to really secure a friendship first but*

you haven't let me do that. I don't know what to say to you, I try so hard with you, you are a priority in my life but I feel that doesn't apply both ways. I planned out the year so we could talk in Feb, then you leave and things would not be awkward. You don't think this is hard for me?'

On 6 April 2016, the Teacher wrote attempting to make a time to see the Student saying '*...There is something not right with our friendship atm I know that and so do you. Find a time for us to talk alone and let's try and both be honest*'. The Student declined stating '*No I can't trust you at the moment I'm sorry, I don't feel comfortable.*'

On 7 April 2016, the Teacher responded with the following responses:

- '*You can't trust me. Are you serious after everything I have done for you...*' ;
- '*How can you say you don't trust me, how can you do that. You know along with my Mum you are the most important person in the world to me. 'Do you have any idea how much that hurts (sic) me?'*
- '*You have no idea how much it hurts me when you say you don't feel comfortable meeting up. It just cuts me to the bone to hear that*'.

Four further messages followed on 7 April 2016 with the Teacher writing:

'What I told you at Christmas this is 100 times worse, I won't be able to face you again. I'm sitting here bawling my eyes out again like a fucking idiot again. I can't sleep. I can't concentrate on anything. I just want to clear out and not come back'

'I know I am pushing you away, I just thought we were so connected that you would somehow just be able to understand me...'

'You have no idea how much it hurts me when you say you don't feel comfortable meeting up. It just cuts me to the bone to hear that'

You also need to give me your word that what is said stays between us whether you are ok with it or not...'

On 10 May 2016, the Teacher wrote '*Things have changed between us, I know you will want to dismiss this like when I have told you how I feel before but you should know more than anyone I go with how I feel and if I feel it then it is happening. From the the day we met at the park opposite the restaurant you have treated me differently...I wish I could take back what I said, it changed everything and I have to say how things are between us hurts me a lot...*'.

Aside from these personal messages, between 24 December 2015 and 26 April 2016, the Teacher used Facebook Messenger to send inappropriate imagery to the Student including imagery of a sexual nature and imagery containing sexual references. The following are examples of images sent by the Teacher:

- on 24 December 2015, the Teacher sent the Student a photographic image that appears to be a homemade Christmas card which has picture of Santa Claus carrying a sack. The sack has been replaced with what appears to be a pair of testicles;
- on 25 December 2015, the Teacher sent the Student a Christmas themed cartoon containing imagery of adult sex toys;
- on 4 January 2016, the Teacher sent the Student an article about ‘masturbation’ accompanied by the statements ‘*Read this and thought of you. lol*’ and ‘*Tag all chronic masturbators*’ ;
- on 15 March 2016, the Teacher sent the Student a picture of an advertising sign containing text that reads ‘*dip your balls in our seaman sauce, open fer (sic) lunch*’;
- on 17 March 2016, the Teacher sent the Student a picture containing an image of the fictional character ‘the Hulk’ with a large eggplant shape in the area of the character’s crotch. The caption on the picture reads ‘*Hulk in the morning*’. The image appears to portray nocturnal penile tumescence;
- on 6 April 2016, the Teacher sent the Student a picture of a product called ‘Kiwi Willy Wash’, and
- on 26 April 2016, the Teacher sent the Student an x-ray image of a male penis.

In 2016, whilst the Student was unwell and at home over a period of four or five days, the Teacher visited the Student at his house without invitation or permission from the Student or his parents and, unsolicited, brought cold and flu medication and cough lollies. He stayed for approximately half an hour and did not leave until the Student asked him to do so. The Student’s mother felt that the level of concern the Teacher was displaying for the Student ‘*was bizarre for a teacher...and that it was almost like you would expect from a close friend or partner...*’

On another occasion, unannounced, the Teacher went to the Student’s house to congratulate him as he received an invitation to interview for the university scholarship. The Teacher stayed for approximately half an hour on this occasion until the Student asked him to leave.

Subsequently, on 8 July 2016, the Student was at Melbourne Airport preparing to fly interstate for his scholarship interview when he received a series of messages from the Teacher pressing him for his flight details. The Student relayed to the Teacher that he was already at the airport preparing to board; approximately ten minutes later the Teacher appeared to see the Student off.

In or about June or July 2016, the Student told the Teacher that he did not want to do the driving lessons anymore and that he wanted to just be a normal school kid for a while and catch the bus.

In or about May or June 2016, the Student disclosed a number of matters pertaining to his relationship with the Teacher to his mother. These included, inter alia:

- showing her the necklace that had been given to him by the Teacher and relating the conversation which had taken place at the time;
- that the Teacher had taken him to his private residence to meet his mother;
- that the Teacher had told him that when he was a little boy he had seen his father having sex with another man and that this same man later raped him; and
- that the Teacher would communicate with him via text message and Facebook and would also call him on his mobile number, outside school hours.

Following this disclosure, the Student's mother spoke to him about reporting the Teacher's behaviour to the School but the Student was concerned about gossip and the possible negative impact it might have on his Year 12 studies if the School was to take action against the Teacher. They agreed that they would wait until the end of Year 12 and then report the matter.

In 2016, after the Student graduated, the Teacher came to the Student's house. The Student's mother asked him to remain outside with the Teacher as she felt uncomfortable about the whole situation. She observed that the Teacher appeared distraught and kept stepping towards the Student while he kept stepping back. The Teacher then gave the Student a gift and left.

The gift was a personalised photo album, which contained numerous photos of the Teacher and the Student when they had been out together including at the Salvation Army Christmas Door Knock Appeal, the birthday dinner and the bar they went to following the dinner, and at the airport when the Student was on his way to his scholarship interview.

Around the Student's birthday in 2017, the Teacher dropped off balloons and a birthday present for the Student at the Student's house.

Part of the evidence provided to the Panel included two letters from the Teacher dated 30 June 2017 and 28 August 2017 respectively. The letter of 30 June 2017, contained information, which challenged aspects of the evidence supplied by way of sworn affidavit. The Panel chose to accept the sworn evidence in preference to that contained in that letter.

However, the Panel did note a number of comments made by the Teacher, in the letter referred to above, including: he had formed a friendship bond with the Student; he did not teach the Student so he said they were friends; and, he felt a responsibility to the Student, wanted to maintain the friendship, and honestly cared about him like family.

The Panel also noted the following extract from the same letter: *'I'm not just a good teacher, I'm an exceptional teacher, not because of my qualifications but because of the way that I have cared for, helped and supported kids, especially those who are different, lost, alone or abused, all my life. I will continue to do this, it may not be in the classroom but no-one can stop me supporting kids who have been abused. There are a number of caring organisations I have worked with in the past who I will offer time to again. A classroom is simply one way of teaching. I will always be an educator or mentor in some way and I will always support kids in need.'*

DISCUSSION OF THE EVIDENCE

From mid-year 2015 until early February 2017, the Teacher exhibited a set of behaviours, in relation to the Student, which were characterised by a pattern of growing familiarity to the point of obsession, a loss of objectivity and a desire to create what he himself described as 'an indestructible friendship'.

His singling out of the Student in mid-year 2015, which included setting up a paid tutoring position within the School, providing driving lessons, giving him gifts and ensuring the Student was in his mentor group for 2016, goes well beyond the boundaries one would expect any teacher to adhere to let alone one who did not teach the particular Student.

The Teacher failed to maintain a professional relationship with the Student from several perspectives. The evidence clearly shows that he held conversations of a personal nature with the Student, without a valid context. There are instances cited where the matters he disclosed to the Student were intensely personal including:

- on a date in or about January 2016, the Teacher told the Student that he wanted to tell him a secret that he had not told anyone before. The Teacher then disclosed to the Student that as a child he had been sexually abused and raped by a family friend;
- on a date in or about January 2016, the Teacher told the Student that when the Teacher was a child, he caught his Dad and his Dad's friend having sex;
- on a date in or about February 2016, the Teacher told the Student that when he was in New York he had a 'soul mate' necklace made in case he ever found 'the one'. The necklace was subsequently given to the Student;
- on 1 March 2016, the Teacher wrote to the Student via Facebook Messenger and said that he was 'lucky to have found such an amazing connection and friendship' with the Student;
- on 7 April 2016, the Teacher told the Student via Facebook Messenger that he was the most 'important person in the world' along with his mother.

There is evidence that the Teacher breached professional boundaries in his contact with the Student via written/electronic means. Between 18 October 2015 and December 2016, the Teacher sent the Student approximately 1650 messages on Facebook and Facebook Messenger despite the fact that he did not teach the Student and had limited responsibilities as his mentor in 2016. The messages were sent on a regular basis including during school holidays. The volume of messages is excessive and the vast majority had nothing to do with the mentoring relationship or any other matter one would expect in a communication between a registered teacher and a student. Of concern is the informal nature of the messages, which not only contain profanity and sexually explicit material, but also encourage the Student to engage with the Teacher as a friend and confidant.

The evidence shows that the Teacher failed to maintain a professional relationship with the Student in that he used sexual innuendo in conversation and shared inappropriate material with him via Facebook and Facebook Messenger. The evidence provides a range of examples, including:

- in December 2015, while driving the Student to volunteer for the Salvation Army's Christmas Door Knock appeal, the Teacher told the Student jokes about his penis and sang a sexually explicit version of the Christmas carol Jingle Bells;
- on 4 January 2016, the Teacher sent the Student an article via Facebook about 'masturbation' accompanied by the statements '*Read this and thought of you. lol*' and '*Tag all chronic masturbators*';
- On 6 and 10 January 2016, the Teacher made sexualised comments to the Student via Facebook Messenger by referring to his and the Student's penises as 'Champ' and 'Theo' and also told the Student that he had 'sex on the brain';
- Between 24 December 2015 and 26 April 2016, the Teacher sent the Student inappropriate imagery via Facebook Messenger including pictures of male genitalia and cartoons with sexual references;
- on an unknown date in 2016, the Teacher told the Student, '*I would never make a move on you unless you wanted me to*'; and
- on an unknown date, the Teacher told the Student that he had a tattoo of Sylvester the cat beside his penis.

Taken in total the evidence paints a picture of a systematic attempt to engage in sexualised commentary and correspondence with the Student.

There is direct evidence that on more than one occasion in 2015 and 2016, the Teacher grabbed the Student on his upper arms and shoulders while commenting on his muscles; the Student deposed that the nature of the physical contact was inappropriate and made him feel '*very uncomfortable*'. The Student had been nicknamed 'Muscles' by the Teacher. There is no evidence to show that there was a valid context for touching the Student.

A failure to maintain a professional relationship with the Student is further supported by evidence of the Teacher socialising with the Student, taking him to his home and giving him gifts. Examples include:

- in relation to the driving lessons, the Student deposed that *'he was not really given lessons but rather the Teacher just sat there and talked'*;
- in or about December 2015, the Teacher took the Student to his home and gave him a tour of the house;
- in December 2015, the Teacher gave the Student Christmas gifts and accepted a \$100 gift voucher from the Student and his family;
- in or about January 2016, the Teacher took the Student out for lunch to a restaurant;
- in February 2016, the Teacher gave the Student an assortment of gifts for his birthday;
- in February 2016, the Teacher took the Student to Crown Casino to celebrate the Student's birthday. After they were denied entry to the casino, the Teacher took the Student to a restaurant and bar;
- in or about May and June 2016, the Teacher visited the Student at his home without invitation or permission from the Student's parents;
- on 8 July 2016, the Teacher attended Melbourne airport uninvited, when the Student was embarking on a flight for Canberra; and
- on an unknown date in 2016, after the Student graduated from Year 12, the Teacher gave him a personalised photo album that contained numerous photos of the Teacher with the Student, including photos of them socialising outside of school hours.

That the Teacher actively sought opportunities to socialise with the Student outside school hours and encouraged the Student to engage in activities is palpable. His persistent attempts indicate an intention to shift the the professional relationship between himself and the Student to a personal one.

The Teacher failed to maintain objectivity in his relationship; the evidence shows he did this by drawing the Student into his personal agenda. Examples include:

- between 15 October 2015 and December 2016, the Teacher sent the Student multiple messages via Facebook and Facebook Messenger in which he frequently referred to the Student as his 'friend', 'mate' 'best mate' and 'good mate';
- on 2 January 2016, the Teacher sent the Student a message on Facebook in which he says that he needs to tell the Student something but it will have to be once the Student turns 18;

- on 6 April 2016, the Teacher sent the Student a message on Facebook in which he accuses the Student of not making him a 'priority';
- on 7 April 2016, the Teacher attempted to arrange a time to meet up with the Student outside of school hours to which the Student replied that he didn't feel comfortable meeting up. The Teacher replied stating, '*You have no idea how much it hurts me when you say you don't feel comfortable meeting up. It just cuts me to the bone to hear that.*'; and
- on 7 April 2016, during a conversation on Facebook, the Teacher asked the Student to keep their conversations private. The Teacher states, '*...You also need to give me your word that what is said stays between us whether you are ok with it or not...*'

The evidence demonstrates the Teacher's unhealthy attachment to the Student and his studied attempts to coerce the Student into engaging with him on a personal level. At times, where the Student was unresponsive or displayed hesitation in further communication, the Teacher continued to persistently contact the Student. The evidence suggests that the Teacher emotionally manipulated the Student on multiple occasions and in doing so drew the Student into his own personal agenda.

Centred on the nature of the messages sent by the Teacher it is reasonable to hold concerns that the Teacher developed romantic feelings towards the Student, which interfered with his ability to maintain objectivity in his relationship with the Student. These concerns are supported by the Teacher repeatedly telling the Student how important their relationship is, giving the Student personal gifts, contacting the Student on an excessive basis, and telling the Student that he had something important to say, but only once the Student turned 18. This conduct considerably deviates from that which can reasonably be expected of person in the Teacher's position.

There is evidence the Teacher failed to maintain a professional relationship with the Student's mother; there are a number of instances where this occurred including:

- in or around December 2015, the Teacher failed to communicate or consult with her in respect of extracurricular activities in which he wanted the Student to be involved, including volunteer work;
- in 2016, the Teacher took the Student to an adult venue to celebrate his birthday without her permission and denied her request to tell her where they were going stating '*It's a surprise*' causing the Student's mother distress and anxiety; and
- in or about May or June 2016, the Teacher attended the Student's home on two separate occasions, unannounced and uninvited, to give him cold and flu medication and cough lollies without her invitation or permission. She expresses feeling concerned about the level of interest the Teacher had in the Student especially as he appeared to be acting like the Student's partner rather than a teacher.

The Teacher made a number of decisions regarding the Student that were not respectful of, or courteous towards the Student's parent. Despite being asked, the Teacher intentionally kept information from the Student's mother and it is considered that his motivation for concealing information was self-serving. The Teacher had a professional obligation to remain in a professional relationship with the Student's parent and failed to do so on more than one occasion.

There is evidence that the Teacher conducted himself in a manner that would have an impact on the profession as a whole in that he failed to respect the rule of law and provide a positive example in the community. The Student deposed to the fact that in 2016, the Teacher attempted to take him to Crown Casino where they were denied entry because the Student was under 18 years old. Following this, they went to another restaurant and then to a bar. The Student noted that neither he nor the Teacher consumed any alcohol.

In taking the Student to adult venues, is behaviour that is clearly a departure from the standards expected of a teacher. It is reasonable to expect that a teacher would not condone a student under the age of 18 attempting to enter an adult venue, let alone be the one to instigate the behaviour.

Although the Teacher did not attend the Hearing and did not make a Submission, despite ample opportunity to do so, the Panel noted from the letter he submitted to the Institute dated 30 June 2017 that he showed no insight into why his interactions with the Student and the Student's parent were inappropriate and no remorse for his actions. It is of concern to the Panel that his letter concludes with the following *"There are a number of caring organisations I have worked with in the past who I will offer time to again. A classroom is simply one way of teaching. I will always be an educator or mentor in some way and I will always support kids in need."*

FINDINGS

Based on evidence by way of sworn affidavits, and their attendant exhibits, the Panel found that between June 2015 and December 2016, whilst registered as a teacher, employed at the School, the Teacher:

1. Failed to maintain a professional relationship with the Student in that he:
 - wilfully and repeatedly engaged the Student in conversations of a personal nature without a valid context.;
 - persistently contacted the Student via electronic means without a valid context;
 - used sexual innuendo with the Student and shared inappropriate material with him via Facebook and Facebook Messenger
 - touched a Student without a valid context
 - socialised with the Student, taking him to his home and giving him gifts.
2. Failed to maintain objectivity in his relationship with the Student by drawing him into his personal agenda.
3. Failed to maintain a professional relationship with a parent of a Student of the School.
4. Conducted himself in an improper manner that would have an impact on the standing of the profession as a whole.

In relation to these findings 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 all of the allegations were substantiated.

The Panel then turned its mind as to whether these findings constituted serious misconduct.

Although the phrase is used in section 2.6.46 of the Act, ‘serious misconduct’ is not expressly defined in the Act.¹ The meaning thereof must be derived from the statutory context in which the inquiry was established as well as any relevant case law.

The statutory context in which the inquiry was established is that contained in the Act, the purpose of which, by section 1.1.1 is to reform the law relating to education and training in Victoria by providing for a high standard of education and training for all Victorians. By section 1.1.1(2), the Act makes provision for the recognition and regulation of the teaching profession.

One of the principles underlying the enactment of the Act is that all Victorians should have access to high quality education. The Act makes education for persons under a particular age compulsory. In order to achieve a high quality of education a number of steps were taken including the establishment of the Government Teaching Service, the Victorian Curriculum and Assessment Authority and by Part 2.6, the Institute. The functions of the Institute are contained in section 2.6.3 and they are in part, to recognise and regulate members of the teaching profession. Further, the Institute was to develop and establish and maintain standards of professional practice for entry into and for continuing membership of the teaching profession and is to develop, maintain and promote a code of conduct for the teaching profession.

In line with this, the Institute has also published ‘The Victorian Teaching Profession Code of Conduct and The Victorian Teaching Profession Code of Ethics’ (‘the Code of Conduct and the Code of Ethics’ respectively). These documents recognise that teachers hold a unique position of trust and influence. The Code of Ethics requires the demonstration of integrity by behaving in ways that respect and advance the profession. The Code of Conduct requires that teachers will respect the rule of law, not exploit their position for personal gain and ensure that their personal interests do not interfere with the performance of their duties.

The purpose of the Codes are: to promote adherence to the values teachers see as underpinning their profession; to provide a set of principles to guide teachers in their everyday conduct and assist them to solve ethical dilemmas; to affirm the public accountability of the teaching profession; and to promote public confidence in the teaching profession. As such, misconduct, in the context of the Act is to be seen in the light of teachers adhering to the Codes of Conduct and Ethics respectively.

Part of the professional conduct expected of teachers is the requisite professional relationship with learners, whether at the education setting where the teacher teaches or not. Principle 1.5 of the Code of Conduct provides that teachers hold a unique position of influence and trust that should not be violated or compromised. Further, teachers should exercise their responsibilities in ways that recognise there are limits or

¹ Although ‘misconduct’ *simpliciter* is at section 2.6.1 of the Act.

boundaries to their relationships with learners and that this professional relationship will be violated if a teacher:

- uses sexual innuendo or inappropriate language and/or material with learners;
- touches a learner without a valid reason;
- holds conversations of a personal nature or has contact with a learner via written/electronic means without a valid context.

Another aspect of the professional conduct expected of teachers is the requisite objectivity in their relationship with learners, which is outlined in Principle 1.4 of the Code of Conduct. The Code of Conduct notes that teachers must not behave as a friend or parent/carer, and teachers must maintain objectivity in their relationships with learners by not drawing them into their personal agendas.

Principle 1.6 of the Code of Conduct outlines the expectation that teachers will maintain a professional relationship with parents/carers by communicating and consulting with parents/ in a timely, understandable and sensitive manner.

Also expected of teachers is the requirement to ensure that their personal conduct does not have a negative impact on their professional standing and on the profession as a whole. Principle 2.1 of the Code of Conduct provides that, insofar as their personal conduct is involved, teachers are required to respect the rule of law and act as a professional example in the performance of civil obligations.

The misconduct must be in relation to the profession of teaching, rather than directed to any personal aspect of the teacher's life. See Priestly JA in *Quidwai v Brown* [1984] 1 NSWLR 100 at 105 where he held that the test for whether a practitioner had committed "*misconduct in a professional respect*" was whether "*the practitioner was in such breach of the written or unwritten rules of the profession as would reasonably incur the strong reprobation of professional brethren of good repute and competence*".

See also Dean J in *Re A Solicitor* [1960] VR 617 at 622 in which he held that misconduct in a professional capacity bore the same meaning as the House of Lords espoused in *Myers v Elman* in which The Viscount Maugham, when speaking of "*professional misconduct*" said they were words which "*have been properly defined as conduct which would reasonably regarded as disgraceful or dishonourable by solicitors of good repute and competency*". Gillard J in *Mullany v Psychologists' Registration Board* unreported, Victorian Supreme Court 22 December 1997 at page 9 in which he said in respect of "*professional misconduct*" that whilst it was not defined in the *Psychologists Registration Act 1987* (Vic) it had a well-accepted meaning and adopted Dean J in *Re A Solicitor*. See also Mandie J in *Campbell v The Dental Board of Victoria* [1999] VSC 113 at [23-24] in which he said as follows:

“The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.”

As to whether or not conduct is “serious misconduct” see Kellam J in *Parr v Nurses Board of Victoria* unreported, VCAT, 2 December 1998 in which he held that in order for a person to have been found to have engaged in unprofessional conduct of serious nature the conduct “would not be serious if it was trivial, or a momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure”. This formulation has been adopted and approved by Ashley J in *Domburg v Nurses Board of Victoria* [2000] VSC 369 at [59].

Caution as to the level of expected perfection was canvassed by Morris J in *Vissenga v Medical Practitioners Board of Victoria* [2004] VCAT 1044 at [33] in which he said as follows:

“I wish to repeat the words of paragraphs (a) and (b) of the definition of unprofessional conduct. In both of these paragraphs attention is directed at professional conduct which is of a lesser standard than that which might “reasonably” be expected of a registered medical practitioner by the public or by peers of the practitioner. In my opinion, neither the public nor the peers of a medical practitioner expect perfection at all times. Human frailty visits every person, including those who are medical practitioners. Reasonable members of the public, and the reasonable peers of medical practitioners, understand this. Reasonable people are tolerant of occasional lapses, particularly if these lapses do not form a consistent course of conduct or, if taken separately, are insufficiently serious to warrant intervention by those charged with acting on behalf of the State.”

In *Davidson v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 920 (30 May 2007), the VCAT at paragraph 165 stated:

“So what is serious misconduct? We must look to the ways this phrase is defined in relation to other professions, as there is no definition in the Act. In our view the words must be given their ordinary dictionary meaning, informed by the practice of the teaching profession, and considered in the light of all the circumstances surrounding each of the allegations found approved.”

In *Parr v Nurses Board of Victoria* VCAT (2 December 1998) Kellam J observed:

“In my view the question of whether or not a nurse has engaged in unprofessional conduct of a serious nature must depend on the facts of each case. Clearly such 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. It must

be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure.””

If the act or omission that constitutes the misconduct is within the 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. If the conduct was caused by ill health, then it will not be misconduct (see *Trigger v Australian Telecommunications Commission* (1984) 4 FCR 242).

It should be noted that the purpose of the registration provisions is protective of the public rather than punitive of the individual registrant. See *NSW Bar Association v Evatt* (1968) 117 CLR 177 at 183-4; *Glynn v Denman & Monk* [1978] VR 349 at 357; *Siguenza v Secretary, Department of Infrastructure* [2000] VSC 46 (6 March 2002) *Balmford J*; *Director of Consumer Affairs v Jay Jacq Pty Ltd* (unreported) 4 May 1998; *Medical Practitioners Board of Victoria v McGoldrick* unreported, Court of Appeal, (Tadgell, Phillips and Buchanan JJA) 7476 from 1998, (17 December 1999).

The Panel is satisfied that the acts alleged against the Teacher, and found to be substantiated, constitute a substantial departure from the expectations of a member of the teaching profession and therefore, amount to serious misconduct. The Panel does not consider the Respondent’s conduct to be a single lapse of judgement but rather demonstrates a series of wilful acts resulting in numerous boundary transgressions, which ultimately violated his professional relationship with the Student. The Panel was also mindful of its purpose to protect the public.

In considering the appropriate sanction for the serious misconduct, the Panel noted the persistent nature of the conduct, the absence of any evidence of insight or remorse and the impact on the Student at a critical stage of his education. The Panel concluded that a cancellation of the Respondent’s registration, for a period, is required as a matter of general deterrence, sending a strong message to the profession as to the gravity of such conduct and emphasising that such behaviour will not be tolerated.

DETERMINATION

The Panel finds the Teacher guilty of serious misconduct and has determined to cancel his registration and impose a period of disqualification for a period of five years, pursuant to sections 2.6.46(2)(j) and 2.6.46(2)(k) of the Act.


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JANET SHERRY, CHAIRPERSON

Leonie Sheehy

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per:
LEONIE SHEEHY, REGISTERED TEACHER

Janet MCK Sheehy

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per:
ALAN FREES, PANEL MEMBER