

**VICTORIAN INSTITUTE OF TEACHING**  
DECISION AND REASONS OF THE FORMAL HEARING

**NUMBER:** 004

**REGISTERED TEACHER:** SR

**PANEL MEMBERS:**

Garry Salisbury	Chairperson
Jenny Wajsenberg	Registered Teacher
Lynne Coulson Barr	Member

**Teacher Representation:** The teacher was represented by Mr Ian Hayden of Counsel

**Counsel Assisting the Panel:** Ms Gail Hubble

**DATE OF HEARING:** 25 August 2004

**DECISION OF THE PANEL:**

On 25 August 2004 the Panel by majority (Garry Salisbury and Jenny Wajsenberg, Lynne Coulson Barr dissenting) decided that the teacher was fit to remain registered as a teacher.

**EFFECT OF THE DECISION:**

The teacher retains his registration under the *Victorian Institute of Teaching Act 2001* and is able to continue teaching in the state of Victoria.

## REASONS OF MAJORITY

### BACKGROUND

On 31 December 2002 the *Victorian Institute of Teaching Act 2001* (the Act) was proclaimed in full. On that date most teachers in Victorian schools were deemed registered as teachers. The teacher was deemed registered pursuant to section 91(4) of the Act because he was engaged or employed as a casual relief teacher in a State school in the two years prior to the Act being proclaimed.

The teacher lodged an application to be registered as a teacher with the Victorian Institute of Teaching (the Institute) on 13 February 2004. The application form included a consent for the Institute to obtain a criminal record check which the teacher signed. The teacher also revealed that he had been convicted of an indictable offence and provided a statutory declaration explaining the circumstances of the offence. The Institute obtained a criminal record check on the teacher which revealed that he had been convicted of stalking another person on 25 May 2001 and found guilty of obtaining a social security benefit not payable on 3 May 2001.

Subsequently the Institute became aware that the teacher had been employed as a casual relief teacher in a State school in 2001. This meant that the teacher was entitled to be deemed registered as a teacher. The teacher took up the option to be deemed registered on 19 February 2004.

The Institute lodged a Freedom of Information request with the Victoria Police on 26 February 2004 to obtain copies of the police brief. A Copy of the police brief was obtained in April 2004 and on 31 May 2004 the Disciplinary Proceedings Committee decided to refer this matter to a formal hearing. The teacher was sent a Notice of Formal Hearing on 29 July 2004.

The information the Institute received as evidence of possible lack of fitness to teach is:

1. On 6 June 2001 the teacher rang the young person's home phone number. The young person's father answered the call and the teacher told him that his name was 'Andrew' and that he was a representative of Calvin Klein and Cosmopolitan magazine. He wanted to arrange a photo shoot with the young person. The young person's father said that the young person was not at home and gave the teacher the phone number where the young person was staying.
2. On the same night the teacher rang that phone number and spoke to the young person. The teacher said that his name was 'Andrew' and that he was from Calvin Klein and Cosmopolitan magazine and he would pay him \$2,000 for a photo shoot. The young person said that he was 16 years old. The teacher arranged to contact the young person the next day.
3. On 7 June 2001 the teacher telephoned the young person at his home and asked the young person to take the call in his bedroom so his parents could not hear the conversation. He asked the young person sexually explicit questions concerning the size of his penis and then asked the young person to meet him the next day. The young person did not attend the meeting.

4. The teacher telephoned the young person again on 7 June 2001 and queried why he did not attend the meeting. He arranged to meet the young person that evening at 7.00pm.
5. At 8.26 pm the teacher telephoned the young person again and made remarks about the size of his penis. He told the young person he would be paid \$300 to \$400 for the first half hour of a photo shoot. The teacher arranged to meet the young person in Footscray the next day. On 8 June 2001 the teacher met a person he thought to be the young person and had a short conversation with him.

The issue the Panel must address in this matter is whether the circumstances resulting in the teacher being convicted of the offence of stalking mean that the teacher is not fit to teach.

## **THE LAW**

The Disciplinary Proceedings are set out in Part 4 of the Act. Section 28 of the Act provides:

### ***28. Inquiry into criminal conduct***

If the Institute is informed that a registered teacher has been convicted or found guilty of an indictable offence other than a sexual offence, the Institute must conduct an inquiry under this Part into the registered teacher's fitness to teach.

The term *fitness to teach* is not defined in the Act. The Panel was referred to case law regarding disciplinary proceedings in other jurisdictions which are referred to in the Conclusion.

## **DOCUMENTS CONSIDERED**

- Witness statements by:
  - The young person's father
  - the young person
  - a Police Officer
- Letter dated 27 May 2004 to the Institute from Law Offices of Ellinghaus & Linder
- Report by the Psychologist, dated 26 May 2004
- Letter dated 12 May 2004 to the Institute from the Principal who had employed the teacher
- Letter received at the Institute on 28 May from the teacher
- Application for registration and statutory declaration
- Application deemed registration
- Police brief
  - Letter Victoria Police dated 18 June 2001

- Charge sequence and result of charge report
- Brief Head in the name of the teacher
- Undertaking of Bail
- Photos (2)
- Charge – VP Form 401
- Charges - VP Form 404
- Summary of Charges
- Witness list
- Exhibit list
- Leap Victoria Police – incident report and case progress
- Leap Victoria Police – criminal history report

## **THE EVIDENCE**

The Panel heard evidence under affirmation or oath from the following witnesses;

- The Principal who had employed the teacher
- The Psychologist
- The teacher

The Proceedings were taped.

Defendant's Counsel submitted that

- the case involved delicate matters
- that the parties involved would suffer undue publicity
- there was a risk of identification

and so the hearing should be closed. This was supported by Institute's Counsel and after a brief adjournment, the Panel agreed.

Although the teacher's solicitor had agreed before the hearing by letter dated 19 July 2004 that the facts of the case would not be contested although the circumstances and the interpretation of events would be discussed, it was clear to the Panel that the issue of the young person's age was clearly contested by the teacher.

The Principal's evidence was that he had known the teacher for over 20 years and had employed him for 8 years as a teacher. He attested to the teacher's qualities as a respected and valued member of the teaching profession; his qualities as a passionate teacher, his generous spirit and his active contribution to the school community; and that he had a faultless record in his period of employment where no complaints had been made against him (including no mention of sexual misbehaviour in school). He had assisted the teacher to complete his application for registration and discussed his conviction and the broad details surrounding it. The Principal was confident that the teacher's conviction did not indicate a lack of fitness to teach or that the Principal was failing to adequately protect students by employing the teacher. The Principal said that he was not aware of any misrepresentation in the teacher's statutory declaration in his application for teacher registration.

The teacher's evidence was that he was passionate about teaching and there had been no complaints against him at any other school where he had taught. He said that he had received a name and a phone number at a gay bar and was told that the

young person had common interests in sport. The teacher said that his memory of the events was hazy but he agreed that he had misrepresented himself as to the purpose of the phone call and his identity. He was unable to explain why he had acted in this way. The teacher agreed with all of the five points outlined in the Background notes above (page two) with the exception of his knowledge that the young person was sixteen years old at the time of the phone calls. The teacher said that he had assumed he (ie the young person) would have been older but after talking to him thought he was unsure of his age or that his memory of this particular issue was hazy. The teacher also agreed that he did not provide contact details as part of his misrepresentation and deception. He said that he had pleaded guilty to the charge on the advice of his solicitor; to reduce the impact on his family including his grandmother who was ill and had later died. The teacher had been convicted in the Sunshine Magistrates' Court on 25 September 2001 of stalking and sentenced to 42 months imprisonment wholly suspended for 12 months. The teacher suggested that his behaviour was out of character and he was trying to move on with his life. He did not agree that his statutory declaration contained in his application for registration was intended to mislead the Institute.

The Psychologist's evidence was that he had regular visits from the teacher during 2002-2004 for professional counselling and that the teacher had admitted his misrepresentation and that he had made inappropriate remarks to the young person. The Psychologist said that the events should be seen as one self contained episode, that they were an aberration and that on the basis of past behaviour he was confident that the teacher would not cause a problem in the future. The Psychologist stated that the teacher could not explain his behaviour because it had been out of character. The Psychologist said there was a clear distinction between private and professional behaviour and that private misbehaviour did not mean that a person's professional behaviour was affected.

## **DISCUSSION OF EVIDENCE**

The teacher's conviction for stalking cannot be questioned by this panel. Its task was to ascertain whether the teacher was fit to be teacher.

Both the agreed facts of the case and the teacher's own evidence showed that he had misrepresented himself as to his identity and purposes; and also that he asked inappropriate and sexually explicit questions of his victim about whose age his answers were evasive. The Panel unanimously agreed that this particular episode in his private life reflected no credit on him. The Panel found the teacher's statutory declaration and his answers to questions evasive and vague in a way that the passage of time cannot explain.

The Principal's evidence was crucial in establishing for the Panel that in the teacher's professional life he had been honest and trustworthy, passionate about teaching and without blemish in terms of complaints over eight years. The Principal was questioned at length and in great detail about his knowledge of the teacher's conviction and the events surrounding it. The Principal's role in the protection of the young people in his care and the potential damage an untrustworthy and predatory teacher could do to his school and its reputation made his strong support for the teacher very important.

The Psychologist for the teacher, provided the Panel with a report based on the teacher's version of events. The Panel accepted certain aspects of the Psychologist's written report and oral evidence. The majority of the panel accepted the Psychologist's view that

- The teacher's unblemished teaching record would continue if he was allowed to keep teaching
- The teacher's aberrant behaviour should be seen as one act (with a series of events) rather than as an ongoing pattern of behaviour
- The teacher saw his actions as stupid and he was remorseful
- The teacher's offences occurred in his private life and had no connection to his professional associations or activities.

## **FINDINGS OF FACT**

Based on the evidence before it, the Panel made the following findings:

- The teacher had misrepresented himself as a representative of various fashion magazines in various phone calls to the young person.
- He misrepresented himself as to his identity and purpose in the same phone calls.
- He used inappropriate language and made improper suggestions in the course of these phone calls.
- Each of the above matters had occurred in the course of the teacher's private life.
- The teacher's behaviour was an aberration and there was a low probability of him re-offending.
- The teacher's professional record had shown he was trustworthy, liked and respected, passionate about teaching, and a contributor to school life generally.

## **CONCLUSION**

The Panel was given a number of cases to consider. The Panel had the judgement contained of *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) HCA 46 that it was legitimate for the Panel to consider the circumstances of the conviction. The purpose of these proceedings was not to punish the teacher as this had already occurred at the Magistrates' Court where he had been convicted under the *Crimes Act* for stalking and given a suspended sentence. The panel had to determine if the teacher was a fit person to remain as a registered teacher and whether the public, and students in particular needed to be protected from him. Kitto J, in *Ziems* argued in his majority view that because the conviction in that case related to an isolated incident it did not warrant any conclusion as to the defendant's inherent qualities. Kitto J also noted that there are many kinds of conduct deserving of disapproval which are not sufficient to remove professional registration. He also warned "it cannot be that every proof which he (the defendant) may give of human frailty so disqualifies him". *Ziems* is authority for the view that there is a real distinction between professional misconduct and purely personal misconduct on the part of a professional.

The Panel was also provided with the judgement in *Frugnet v Board of Examiners* (2002) VSC 140, where it was argued that the applicant had not made a full and frank disclosure of all the circumstances surrounding his request for admission to practice as a barrister in Victoria. The Panel was invited to apply the view that the lack of a full and frank disclosure in the teacher's statutory declaration supplied with his application for registration, was sufficient to establish that the teacher was not a fit person to be a registered teacher. The majority of the Panel found that the teacher had not tried to hide his conviction and that his statutory declaration was brief and evasive but made no adverse conclusion in relation to the teacher's fitness to teach.

The Panel was provided with the judgement of *A Solicitor v The Council of the Law Society of New South Wales* (2004) HCA 1 in a case where a solicitor was put on a good behaviour bond after inappropriately touching his de facto partner's two children. The defendant's professional registration then became an issue. The Court decided that along with the distinction outlined in *Ziems* between personal and professional misconduct the question of the remoteness of the personal misconduct from the professional misconduct needed to be considered. A majority of the Panel found that the teacher's personal misconduct was reasonably remote from his professional conduct. *A Solicitor* is also authority for the view that the person's fitness is to be decided at the time of the hearing. A majority of the Panel decided that the teacher regrets his actions and is certainly aware of the stupidity of his behaviour and gave verbal guarantees that it would not happen again. His demeanour supported this.

The Panel was thus led to a majority view that the teacher's misconduct in his private life had not been followed in his professional life.

The teacher was convicted of an indictable offence under the *Crimes Act* and punished with a 42 month period of imprisonment wholly suspended for 12 months. The Panel decided that

- The teacher's personal misconduct was not connected to his professional conduct
- The public did not require protection through the cancellation of his registration
- He is a fit person to be a teacher.

## DETERMINATION

The teacher retains his registration as a teacher in the state of Victoria under the *Victorian Institute of Teaching Act 2001*.



Garry Salisbury



for Jenny Wajsenberg

## **DISSENTING DECISION AND REASONS**

The minority Panel decided that:

- The teacher's personal misconduct was not remote from his professional role because his actions were directed to a young person of school-age, involved deceptive conduct and sexually explicit language and improper suggestions, and failed to consider issues of informed consent and potential harm to the young person
- The behaviour related to his conviction cannot be discounted as an aberration
- The public require protection through the cancellation of his registration
- He is a not fit person to be a teacher.

The key reasons for this dissenting decision were as follows:

- The Panel member was satisfied that the teacher knew that the young person was 16 years old at the time of the incidents which led to the teacher's conviction. The witness statements and police reports contain several references to the young person's age being asked about or mentioned in the teacher's telephone conversations with the young person and his father. Prior to the hearing the teacher had given the undertaking that he would not be disputing the facts related to the conviction. His evidence at the hearing on his inability to clearly recall the young person's age was not persuasive. In any event the teacher did not communicate any shock felt at the fact that the young person was 16 years old. The evidence indicates that the teacher's intention was to arrange a 'date' with the possibility of a sexual encounter, and at the very least he had not taken any precautions to ensure that the young person was not a student and was over the age of consent.
- The Panel member had serious concerns regarding the teacher's misrepresentation of the purpose of the phone calls in the incidents in question, and in his account of the circumstances of his conviction in his statutory declaration to the Institute. He failed to give full and frank disclosure of these circumstances in this statutory declaration (as required in the instructions in the registration form), or to the Principal when requesting his support for his application for registration.
- The teacher displayed little or no insight as to the underlying causes for the deception, serious lack of judgement, and potential harm associated with his behaviour and has not sought professional assistance in this regard. The Panel member was not persuaded by The Psychologist's assessment of the teacher, noting that his assessment was based primarily on the lack of other known instances of personal or professional misconduct, and that



the Psychologist had not conducted any psychological testing, considered issues of insight or provided counselling to the teacher in this respect.

- The Panel member was very concerned that the Principal was unaware of the full circumstances leading to the teacher's conviction when he re-employed the teacher and when he gave his support to his application for registration. The Panel member took the view that the Principal's evidence and the lack of known complaints in the teacher's professional life were not sufficient to establish, on the balance of probabilities, the teacher's honesty and trustworthiness as a teacher.
- The Panel member notes that the teaching requires that parents must feel confident that the teacher will care for their child appropriately, and the right to practice as a teacher involves high levels of trustworthiness. The teacher's expressed and observed passion for teaching is not in dispute and was evident from his preparedness to go through the hearing process. On the basis of the evidence before the Panel, the Panel member was however not satisfied that the teacher's passion for teaching and his teaching record to date were sufficient to offset the serious questions regarding his character and trustworthiness.

Lynne Coulson Barr