

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 0049

REGISTERED TEACHER: Terrence James WESCOTT

PANEL MEMBERS:

Susan Halliday	Chairperson
Drew Hopkins	Registered Teacher
Polly Flanagan	Registered Teacher

ATTENDANCE: The teacher did not attend the Formal Hearing

MS GAIL HUBBLE Counsel Assisting with MS CLARE
SHERMAN instructing

DATE OF HEARING: 14 May 2007

DETERMINATION UNDER SECTION 42(2):

On 14 May 2007 the Panel decided to cancel the registration of the teacher from 14 May 2007.

REASONS

BACKGROUND

The teacher has been a registered teacher under the *Victorian Institute of Teaching Act 2001* (the Act) since December 2002 but has not paid his registration fee for 2007.

This inquiry is a result of notification from the school of action taken in relation to allegations of serious misconduct and/or lack of fitness to teach of the teacher.

At the Magistrate's Court in 2005, the teacher was convicted of possession of child pornography and sentenced to an imprisonment term of six months. With the sentence partially suspended under section 27 of the *Sentencing Act 1991*, the term to be served was two months. The teacher appealed the conviction. His Honour of the Victorian County Court overturned the teacher's conviction, upholding his appeal in 2005. The Judge stated that he could not be satisfied beyond reasonable doubt that the persons portrayed in the images were under the age of 16 years.

The matter was first referred to the Institute's Disciplinary Proceedings Committee on 15 December 2005, and the Committee referred the matter to investigation with a view to having a formal hearing.

Following an investigation, on 24 January 2007 the Disciplinary Proceedings Committee determined that the matter would proceed to a formal hearing.

A panel was constituted in accordance with section 39 of the Act and a Notice of Formal Hearing, dated 2 April 2007, was served upon the registered teacher by registered post.

Nature of allegations:

The allegations of possible serious misconduct and/or lack of fitness to teach set out in the Notice of Formal Hearing are:

1. The teacher accessed pornography at school or on school equipment or on his personal computer -
 - a) On or about Saturday 22 March 2003, the teacher accessed the web site on his personal computer. On this website, the teacher accessed pornographic images that included images of young people.
 - b) On 8 separate viewings on Sunday 14 March 2004, the teacher accessed 15 pornographic images that included images of young people using his school computer at or about 4:30pm.

In her opening statement, Counsel Assisting indicated that the Institute wished for several of the specific examples given under allegation 1, to be deleted. Counsel Assisting stated that specific example (a) should remain, and specific example (g) should be relabelled (b). The other specific examples should be deleted. It was noted

that some evidence relevant to the deleted examples had been collected by Victoria Police and presented to the County Court. However, Victoria Police did not release certain material to the Institute due to its graphic nature in accordance with its powers under Freedom of Information legislation. Hence, the Panel did not have sufficient evidence to be in a position to make findings with respect to specific examples originally labelled (b) (c) (d) (e) and (f).

THE LAW

Section 27 of the Act states:

27. Employer to notify Institute of action against teacher

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

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

According to the High Court in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 the purposes of disciplinary proceedings in relation to a profession are:

- to protect the public
- to maintain proper standards of conduct for the profession, and
- to protect the reputation of the profession.

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

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

And later:-

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

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

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

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

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

The **test** set out in the case law is conduct:

which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency. Allinson v General Medical Council [1891-4] All ER 768

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

The degree of remoteness of the conduct in question from professional practice must also be considered according to *A Solicitor v The Council of the Law Society of New South Wales* (2004) **HCA in** which it is stated at paragraph 34:

...the nature of the trust, and the circumstances of the breach, were so remote from anything to do with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous.

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

The term *fit and proper person* is intended to cover conduct other than dishonesty and include significant impropriety, lack of integrity or bad faith. Persistent failure to meet a teacher's obligations to the education community shows a disregard for these obligations and not just carelessness, incompetence or lack of organisation. A failure by the teacher to understand that the conduct complained of was serious misconduct will indicate the teacher's unfitness to teach (see *Cameron v Bar Association of NSW* [2002] NSWSC 191 and *Marten v Disciplinary Committee of the Royal College of Veterinary Surgeons* [1965] 1 All ER 949).

A continuing lack of moral responsibility and an absence of insight and understanding of right and wrong in the context of ethical fitness would be a strong indication of unfitness (see *New South Wales Bar Association v Cummins* (2001) NSWCA 284 and *Siguenza v Secretary, Department of Infrastructure* [2002] VSC 46).

DOCUMENTS CONSIDERED

The Panel was provided with the following documentary evidence:

- Notice of Formal Hearing dated 2 April 2007

Victoria Police and Court documents: (1 Page) **004**

- Transcript of Victoria Police interview with the teacher, 27 September 2004 (18 pages) **005-022**
- Transcript of Victoria Police interview with the teacher, 5 October 2004 (23 pages) **023-045**
- Summary of charges, dated 5 October 2004 (3 pages) **046-048**
- Appendix A & B – the teacher’s VISA card details (6 pages) **049-054**
- Appendix C, F, G, H, I, J – Internet website details (120 pages) **055-174**
- Victoria Police Charge and Summons sheets – the teacher, dated 25 January 2005 (2 pages) **175-176**
- Victoria Police brief of evidence against the teacher re offence of possession of child pornography, dated 25 January 2005 (2 pages) **177-178**
- Victoria Police brief of evidence for Magistrates Court, dated 28 January 2005 (2 pages) **179-180**
- Victoria Police LEAP Report re charges, dated 29 January 2005 (1 page) **181**
- Victoria Police facsimile message proposing an amendment to charges, dated 26 April 2005 (3 pages) **182-184**
- Witness List (2 pages) **185-186**
- Exhibit List (3 pages) **187-189**
- Affidavit of Special Agent for CID of Internal Revenue Services, USA (49 pages) **190-238**

- Statements:
 - Witness 1 4 October 2004 (2 pages) **239-240**
 - Witness 2 20 January 2005 (2 pages) **241-242**
 - Witness 3 (1) 22 November 2004 (2 pages) **243-244**
 - Witness 3 (2) 7 February 2005 (2 pages) **245-246**
 - Witness 3 (3) 28 April 2005 (3 pages) **247-249**
 - Witness 4 11 March 2005 (2 pages) **250-251**
 - Witness 5 14 March 2005 (2 pages) **252-253**
 - Witness 6 24 January 2005 (6 pages) **254-259**
- Magistrates’ Court Status Report, dated 2005 (2 pages) **260-261**
- Transcript of County Court Proceedings, dated 2005 (55 pages) **262-316**

The following documents were tendered as exhibits to the Panel:

- A. Unsigned statement of the teacher dated October 2006
- B. Magistrates' Court Certificate
- C. Crimes Act 1958 – sections 67A and 70
- D. Letter from the teacher's lawyers to the Institute's legal officer dated 8 May 2007

THE EVIDENCE

The teacher, who was employed in the role of Principal when the conduct which is the subject of the allegations took place, chose not to attend the formal hearing. The Panel viewed correspondence received by the Institute dated 8 May 2007. The correspondence was from the teacher's legal representative. It stated that the teacher would not appear at the hearing either in person or through legal representation. Further, the correspondence stated that the teacher had instructed his legal representative to advise that the teacher denied all of the allegations set out in the Notice of Formal Hearing.

The Panel noted that the denial of allegations via correspondence dated 8 May 2007 conflicted with a range of detailed admissions previously made by the teacher in documentary evidence.

The Institute did not call any witnesses to give evidence at the formal hearing.

The evidence presented by the Institute showed that the teacher had accessed pornography that involved children and young teenagers on numerous occasions over a two year period. Further, the evidence led showed that pornography involving children and young teenagers had been accessed at school on school computer equipment, on the teacher's personal home computer and on the teacher's laptop.

This evidence viewed by the Panel included appendix A - a copy of the teacher's VISA credit card, and appendix B - a copy of the teacher's VISA credit card statement. The Panel also viewed appendix C - a list of websites accessed by the teacher via his home computer, and appendix F - a forensic internet history report. The Panel also viewed appendix G - a windows registry report detailing what had been accessed by the teacher on the school computer dating back to August 2002 and appendix H - a web reference report. Additional evidence viewed by the Panel included appendix I - a 'recycle bin' report and appendix J - a document detailing web searches undertaken by the teacher.

The Panel noted the enormity of evidence contained in the computer logs and registry printouts that originated from the teacher's home computer, the teacher's school computer and the teacher's laptop. There was evidence to show that the teacher had utilised all three computers to access pornography via the internet, including internet sites that housed child pornography.

The Panel reviewed the definition of child pornography as stated under the *Crimes Act 1958* – section 67A, noting that “child pornography” means a film, photograph,

publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.

The Panel reviewed section 70 of the *Crimes Act 1958* noting that a person who knowingly possesses child pornography is guilty of an indictable offence. Additionally the Panel viewed the range and nature of possible prosecution defence, including that it was believed on reasonable grounds that the minors involved were not under age.

Evidence presented by the Institute also included transcripts from two separate Victoria Police interviews conducted with the teacher, a copy of the Summary of Charges dated 5 October 2004, and the Victoria Police Charge & Summons Sheet dated 21 January 2005 accompanied by the Victoria Police brief of evidence relating to the offence of the possession of child pornography.

The Panel viewed written information relating to a 'representative sample' of pornographic material involving children and under aged teenagers compiled by Victoria Police in order to press criminal charges against the teacher. It was the view of Victoria Police that the 'representative sample' amounted to 54 child pornography images from the school computer, 104 child pornography images from the teacher's laptop and a number of email sites and child pornography websites that were retrieved from the teacher's home computer. Victoria Police viewed the pictures associated with the 'representative sample' and the evidence records that they considered the persons involved to be minors. Due to Freedom of Information restrictions, the actual pictures retrieved and viewed by Victoria Police were not available to the Panel, however the associated written material prepared by Victoria Police, was available to the Panel.

The computer logs and registry printouts retrieved from the teacher's school and home computers showed that the teacher had accessed and opened many internet sites that housed child pornography. Amongst the examples available to the Panel were websites that explicitly identified in their web address and webpage title, that young people and children were key to the content of the website. Examples of phrases found in web addresses and website titles accessed by the teacher included – *kinderlolitas, young school girl, preteen lolitas, naked preteens, nude preteens, underage girls, very young lolitas, under 16 lolitas, free illegal nude child lolitas*.

Further the same computer logs and registry printouts often depicted the nature of the activity that the children and young teenagers were involved in, by using a word or phrase to accompany the terminology used for the underage persons involved. Examples of such phrases found in web addresses and website titles accessed by the teacher included *incest, rape, masturbation, extreme group sex* and a range of heterosexual and homosexual activity.

The Panel viewed evidence that showed that on Saturday 22 March 2003 the teacher accessed the website on his personal computer and further, that on this website he accessed pornographic images that included images of young people. There is also evidence that the teacher provided a personal hotmail email address as a contact address, having accessed the website, and paid to gain access to images on the website

for a month. The evidence showed that the teacher agreed that the contact telephone number listed with the hotmail email address, belonged to the primary school where he was employed in the role of Principal. The evidence also showed that the purchase of access to the website was made via the teacher's personal VISA credit card.

The Panel viewed evidence that the teacher had on 8 separate viewings on Sunday 14 March 2004 accessed 15 pornographic images that included images of young people using his school computer at, or about 4:30pm.

Transcripts of Victoria Police interviews with the teacher were examined in depth by the Panel. This material showed that the teacher denied he had accessed child pornography via the internet during his first police interview on 27 September 2004. The transcript also showed that teacher lied about providing the hotmail email address, and lied about using his VISA credit card to purchase access to the website.

In his second interview with Victoria Police on 5 October 2004 the teacher admitted to purposefully accessing and viewing a range of pornography sites, including sites that depicted under age persons. At one point in the police interview the teacher specifically stated that girls he viewed were underage and gave an example of them being aged in his view, between 10 and 14.

The transcript of the police interview recorded a police officer showing the teacher pictures from a *Lolita teen girls* website and the teacher agreeing he had accessed the site. Further the teacher indicated that he recalled the pictures shown to him.

The police interviews evidenced that the teacher acknowledged viewing free pornographic material of underage persons, as well as purchasing access to such material using his personal VISA credit card. The Panel viewed evidence that these credit card transactions took place and noted the corresponding details on the teacher's personal VISA credit card statement.

The evidence shows that there were several interactions to and from the hotmail email address provided by the teacher, and further the Summary of Charges drafted by Victoria Police showed that the police investigation turned up *"approximately 50,000 hits on Lolita websites, most of which contain child pornography"* and *"these references were located in the Unallocated Clusters compartment of the computer hard drive"* of the teacher's computer.

The evidence showed that when asked during his second police interview about the possibility of his personal activity amounting to *"something like 50,000 hits"* by police, the teacher responded *"I have to accept – if that's what they say, I have to accept that. It sounds extraordinary but I have to accept that."*

During the second police interview the teacher stated that he regretted what he had done and that he had no justifiable reason for doing what he had done. The teacher also stated that what he had done *"doesn't impact on the work that I do – I guess it says more about my personality being a bit depressed."* The teacher told police that his behaviour could be put down to stupidity, inquisitiveness and getting *"a bit of a kick"*

given he had “*relationship struggles*”. He told police that “*obviously it’s the wrong place to go, and the wrong thing to do.*”

The County Court Judge in upholding the teacher’s appeal against his criminal conviction stated that visiting websites, downloading material and viewing the images separately, did not amount to ‘possession’ of child pornography as the material had not been recorded or stored. The Judge stated that for a person to knowingly be in ‘possession’ of such pornographic material they had to “*be in possession of a recording or an image or something physical or something from which an image could be produced and the children have got to be apparently under the age of 16.*” In relation to images that had been stored by the teacher, that were presented during the appeal, the Judge said “*And it seems to me that I can’t say those children were apparently under the age of 16, they might well be but my experience is that I can’t pick the age of children, whether they are 16 or over.*”

During the presentation of evidence the Panel noted that in the County Court appeal only a small number of pictures that had been accessed by the teacher, were considered. These were the pictures/documents found to have been stored by the teacher, and therefore examples of what could be argued under criminal law, to amount to possession. The Panel noted that it was not limited in the same way when it came to looking at all the available evidence, and when considering the nature of the material accessed. The Panel also noted that the issues considered during criminal proceedings, and the standard of proof required during such proceedings, were different from the issues and the standard of proof to be considered, by the Panel.

DISCUSSION OF EVIDENCE

The Panel noted that despite full and timely advice about the formal hearing, the teacher chose not to attend proceedings. The Panel noted that the teacher did not take the opportunity availed to himself to contest the evidence. The Panel acknowledged that prior to the formal hearing, the teacher was supplied with a full set of materials that were to be examined by the Panel.

In choosing not to attend proceedings, the Panel noted that the teacher did not take up the opportunity provided to him to address the Panel about any personal insight gained, or to detail any remorse felt. Further, it is noted that the teacher did not utilise the proceedings to make an apology to the school, the school community, or others working within the field of education.

The Panel noted that the purpose of disciplinary procedures was to protect students and the public, to maintain proper standards of conduct for the teaching profession and to protect the reputation of the profession.

The Panel reflected on the fact that determining whether or not misconduct was serious, was dependent upon the available evidence. Based on the balance of probabilities and all of the available evidence, the Panel concluded that the alleged serious misconduct did occur. Further, the Panel considered that the proven facts

amounted to both a substantial and deplorable departure from the accepted standards for the teaching profession. Additionally, the departure from expected standards was at the initiative of the teacher and hence was the fault of the teacher.

Police interviews, admissions to accessing child pornography made by the teacher and the computer logs and registry printouts, provided in the considered view of the Panel, conclusive evidence of inappropriate behaviour amounting to serious misconduct. The Panel believes that it was within the power and control of the teacher to behave appropriately, and that given there was evidence of regular inappropriate activity spanning a lengthy period the behaviour was inexcusable, wilful and reckless.

The evidence showed that the teacher was involved in purposeful and repeated searches for sexual material involving children and young teenagers. The Panel noted that the choice made by the teacher to visit internet sites that indicated verbally at an entry point that they housed images of children or young teenagers involved in explicit sexual activity, illegal activity and at times violent activity, was on-going and only came to light because the teacher was caught by police.

The evidence showed that the teacher accessed child pornography via the internet from his home computer, his laptop, and while at school on week days and weekends, using the school equipment, on a regular basis. The evidence also showed that the material accessed by the teacher sometimes involved illegal sexual activity with children of primary school age. The Panel noted that the teacher was a Principal of a primary school and that his comment to police that his behaviour "*doesn't impact on the work that I do*" was ludicrous, falling well short of deserving any valid consideration, irrespective of the context, given the teacher's profession and employment status as a primary school principal.

The evidence showed that the teacher was dishonest about his involvement in the accessing of child pornography when originally interviewed by police. The evidence also showed that the teacher lied to police on several occasions when presented with information that had come to police attention. These circumstances highlight issues of grave concern in relation to the teacher's professional credibility and conduct, integrity, ethics and character.

The Panel believed it important to emphasise that teachers are placed in privileged positions of trust and responsibility when permitted to work and engage with young people. The nature of their duties demands acknowledgement of, and commands adherence to, the rights of children being protected, as detailed in law. The teacher's serious misconduct, which the Panel viewed as marauding and disgraceful, is deemed highly offensive to all credible practitioners within the education community who work to ensure that the rights of children are upheld.

Teachers, and in particular principals, are well aware that they have mandated responsibilities in relation to the protection of children's legal rights, and note mandatory reporting as a specific example. It is in this context that the Panel noted that it is most often a sexual assault against children to produce images of child pornography and that a teacher or principal should be mindful of, and highly sensitive

to, such circumstances. It is well known across the broader community that to view and to purchase child pornography fosters the on-going sexual exploitation and abuse of children. Given the nature of the teacher's professional role, and the fact that he had been a principal for well over a decade, it is the Panel's view that the teacher engaged not only in serious misconduct as alleged, but that he engaged in behaviour that supported an industry that abused and exploited young people. The Panel is of the view that it would be inconceivable that as a long term principal that the teacher could be unaware of such circumstances.

The Panel concludes that the teacher is not fit to teach. The proven behaviour dictates the unsuitability of the teacher to work as a teacher or principal. Additionally, based on the available evidence the Panel considers that the conduct of the teacher has highlighted a character defect, incompatible with the character of a valued and self respecting member of the profession. The teacher's conduct is directly relevant to, and in direct conflict with, the professional duties and responsibilities automatically embedded into the role of teacher and principal. Significant impropriety, licentiousness and a demonstration of a severe lack of moral responsibility factor into the Panel's decision that the teacher is not fit to teach.

Further in finding that the teacher is not fit to teach, the Panel considers that it is highly relevant that the behaviour was on-going and persistent in nature. In deciding that the teacher is not fit to teach the Panel noted that by not attending proceedings, the teacher has not taken the opportunity to present information that demonstrates that the behaviour of grave concern has actually ceased. Nor did the teacher take the opportunity to show why any alternative view in relation to lack of fitness to teach should be considered.

Adamant that the teacher should not be in a position of authority and trust with children due to proven behaviour which was viewed by the Panel as profoundly and irretrievably flawed, the Panel firmly believes that students, the public interest, the education community and the community at large, are best served and appropriately protected by the cancellation of the teacher's registration.

FINDINGS UNDER SECTION 42(2) OF THE ACT

Based on the balance of probabilities and all the available evidence, the Panel concluded that the registered teacher did access pornography at school on school equipment and on his personal computer and laptop, on numerous occasions, including specific incidents

- (a) On or about Saturday 22 March 2003, the teacher accessed the web site on his personal computer. On this website, the teacher accessed pornographic images that included images of young people, and
- (b) On 8 separate viewings on Sunday 14 March 2004, the teacher accessed 15 pornographic images that included images of young people using his school computer at or about 4:30pm.

The Panel concluded that, based on the balance of probabilities and all the available evidence, the registered teacher is guilty of serious misconduct and is unfit to teach.

DETERMINATION UNDER SECTION 42(2) OF THE ACT

The Panel decided to cancel the registration of the teacher from 14 May 2007.



SUSAN HALLIDAY, CHAIRPERSON



per:
DREW HOPKINS, REGISTERED TEACHER



per:
POLLY FLANAGAN, REGISTERED TEACHER