

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 0047

REGISTERED TEACHER: Matthew Paul CONWAY

PANEL MEMBERS

Marilyn Mooney Chairperson

Kevin Moloney Registered Teacher

Graham Hoult Panel Member

ATTENDANCE: The teacher was represented by Mr Bill Stougiannos of Counsel, with instructing solicitor Mr Peter Antippa, Antippa Lawyers.

Counsel Assisting: Ms Anne Sheehan with Ms A Haslam solicitor instructing.

DATE OF HEARING: 3, 4, 10 and 12 April 2007

DETERMINATION UNDER SECTION 42(2) OF THE ACT:

On 30 April 2007 the Panel decided to cancel the registration of the teacher from the date of this decision.

REASONS

BACKGROUND

On 31 December 2002 the teacher was deemed registered pursuant to section 91(3) of the *Victorian Institute of Teaching Act 2001* (the Act) because he was a person who was employed as a teacher in a State school in an ongoing position within the period of two years before the commencement of the Act.

This inquiry is the result of a notification from the principal of the school of action taken against the teacher. The teacher's employment was terminated on 21 December 2005 on grounds of serious misconduct. He commenced unfair dismissal proceedings soon after but these were discontinued in April 2006 following an undisclosed and confidential settlement.

The principal made a number of misconduct allegations against the teacher regarding events in 2002, 2003 and 2005. However, only one set of these allegations has been referred to formal hearing. These allegations relate to the sending of inappropriate text messages to the student in 2005. The student's friend, student 1, reported the matter to the principal on 18 October 2005.

The matter was first referred to the Disciplinary Proceedings Committee on 5 July 2006 and the Committee referred the matter to investigation with a view to having a formal hearing.

On 3 August 2006, the Institute arranged for a consultant to investigate the allegations and interview witnesses. The consultant completed her investigation and supplied the Institute with her report and witness statements in September 2006. The teacher chose not to participate in an interview with the consultant.

On 18 October 2006, the Disciplinary Proceedings Committee determined that the inquiry proceed to a formal hearing.

A Panel was constituted in accordance with section 39 of the Act and a Notice of Formal Hearing dated 23 February 2007 was served upon the registered teacher's solicitor by registered post.

Nature of allegations:

The information the Institute has received as evidence of possible serious misconduct and/or lack of fitness to teach are:

1. Failure to maintain a professional relationship with a student, by using inappropriate language and sexual innuendo:

From about 30 September to about 18 October 2005, whilst a teacher at the school, the teacher sent inappropriate text messages to the student, including:
a. 'I want to bend you over my desk to bang you from behind'

- b. 'Gentle touches and subtle looks mean more to me than...'
 - c. 'I like you and I know you like me too'
 - d. 'Oh, I can't. What I want to do to you, it was too public to do there'
 - e. Receiving a nude photo of the student and replying 'Have you any more like these' or words to that effect.
2. Failure to maintain a professional relationship with a student, by initiating a sexual relationship.

In October 2005, whilst a teacher at the school, the teacher made inappropriate physical contact with the student, including:

- a. Kissing the student on the lips.
- b. Stroking the student's thigh.
- c. Slipping his fingers into the student's vagina and moving them.

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 11** 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:

- Witness statement of the principal dated 10 August 2006 (4 pages) **001-004** and attachments
 - 1A - Report prepared by the principal (8 pages) **005- 012**
 - A-E1 - Letter to the teacher from the principal dated 11 March 2003 (1 page) **013**
 - A-E1A - Summary Report signed by the teacher and the principal dated 24 March 2003 (2 pages) **014-015**
 - A-E2 - Email from the deputy principal to the principal dated 24 October 2005 (1 page) **016**
 - A-E3 - Transcript signed by student 2's parents of student 2's recollections of an incident involving the teacher dated 8/08/2005 (2 pages) **017-018**
 - A-E3A - Letter from the teacher to the principal dated 1 September 2005 (3 pages) **019-021**
 - A-E3B - Letter from the teacher to the principal dated 14 September 2005 (1 page) **022**
 - A-E4 - Record of the principal's meeting with student 1, student 3 and deputy principal, dated 18 October 2005 (1page) **023**
 - A-E4A - Record of the principal's meeting with the student on 18 October 2005 (1 page) **024**
 - A-E4B - Record of the principal's meeting with the teacher dated 19 October 2005 (1 page) **025**
 - A-E5 - Record of the principal's meeting with student 3 and the student (1 page) **026**
 - A-E5A - Record of the principal's meeting with student 1 (2 pages) **027-028**
 - A-E6 - Letter to the teacher from the principal dated 19 October 2005 (1 page) **029**
 - A-E7 - Notes of the principal's meeting with staff dated 20 October 2005 (1 page) **030**

- A-E8 - Notes of the principal's meeting with the student's parent (1 page) **031**
- A-E9 - Notes of the principal's conversation with person 1 (1 page) **032**
- A-E9A - Catholic Education Policy 2.20 (7 pages) **033-039**
- A-E13 - Letter to the teacher from the principal dated 15 December 2005 (1 page) **040**
- A-E15 - Letter to the teacher from the principal dated 21 December 2005 (1 page) **041**
- A-E18 - Letter to teacher 1 from student 1 (2 pages) **042-043**
- A-E18A- Letter to the teacher from student 1 (1 page) **044**
- A-E19 - Letter to teacher 1 from student 1, annotated with comments from student 1's parent (2 pages) **045-046**
- A-E19A - Notes of the principal's telephone conversation with student 1, dated 8 February 2006 (9 pages) **047-055**
- A-E19B - Letter to the teacher from the principal, dated 15 February 2006 (1 page) **056**
- Witness statement of the deputy principal dated 18 August 2006 (3 pages) **057-059**
- Witness statement of student 1 dated 24 August 2006 (5 pages) **060-064**
- Witness statement of the student dated 19 August 2006 (4 pages) **065-068**
- Supplementary Witness statement of the student dated 16 February 2007 (2 pages) **069-070**

The following exhibits were presented to the Panel:

- A** Telstra telephone records: the teacher to the student from 20/08/2005 to 01/11/2005
- B** Optus telephone records: the student to the teacher from 30/07/2005 to 18/11/2005
- C** Summary of Telephone Contact
- D** School Timetable of the student for Term 4, 2005
- E** School Timetable of student 4 for Term 4, 2005
- F** Photograph of Tattoo Parlour
- G** Pages of the student's school diary for 2005 for week ending 23/01/2005
- H** Pages of the student's school diary for 2005 for week ending 19/19/2005
- I** The student's drawing of the teacher's home group classroom
- J** The student's drawing of school hospitality room
- K** Mobile telephone of the student
- L** Original letters purportedly from student 1
- M** Statement of student 3 dated 27 August 2006
- N** Bundle of notes of the principal
- O** Original notebooks of the principal

- P** Statement of Reception Centre Manager
- Q** The teacher's drawing of his home group classroom
- R** Passport of the teacher
- S** Disco Booking Form
- T** List of items provided by the teacher
- U** Bundle of material supplied by the teacher's parent
- V** Letter from Antippa Lawyers to the Victorian Institute of Teaching dated 2 April 2007
- W** Statement of student 5
- X** Statement of student 3's parent
- Y** Statement of student 3
- Z** Statement of student 6
- AA** Letter (undated) to the principal from student 6
- BB** References x 10 for the teacher

THE EVIDENCE

Closure of Hearing

The Panel ordered that due to the intimate and personal nature of the evidence being given, the proceedings would be closed while the student and student 1 gave their evidence. Anything that may identify these witnesses, including their names and the name of the school, must not be published or broadcast. Although the hearing was closed, the teacher's consulting psychologist was permitted to remain to attend to the teacher if needed.

The Panel further ordered that any information that might enable the teacher to be identified prior to the making of the final determination must not be published.

The Panel heard evidence by oath or affirmation from the following witnesses:

The Student
Student 1
The Principal
The Deputy Principal
The Service Manager for Sony Ericsson
The Reception Centre Manager (by telephone)
The Teacher
Teacher 1
The Teacher's parent
Student 6

Exhibits A, B and C were obtained by summons and contained the details of the communication between the teacher's phone and the student's phone for the period 28th September and 18th October 2005. Over this twenty day period there were 566 SMS text messages and 1 voice call from the teacher's phone to the phone of the student. The phone records for the student's phone did not contain SMS details but indicated 5 phone calls.

The Student gave evidence under oath and affirmed her written statements of August 2006 and February 2007 as a true account of what happened. The second statement was to rectify minor errors in detail and terminology in the first. The student presented as a 19 year old currently studying. From 2000 to 2005 she attended the school. The teacher was her teacher for subject 1, Year 12. Her only contact with the teacher before that was with school productions. She indicated that subject 1 was a priority subject for her career aspirations and she affirmed that the teacher was a very good teacher for this subject.

The student told the Panel that she was an A+ student who studied hard and participated enthusiastically in school productions. She said that whilst a student she had a part time job at a Reception Centre. The Panel heard that early in Year 12 the student's boyfriend was person 2 and that on September 19 they attended student 7's birthday party with another friend, student 5. The student told the Panel that student 1 did not attend this party.

The Panel heard that while on a camping holiday with her family in the September 2005 term break, the student sent her first SMS text to the teacher on the evening of Wednesday 28th September. The student had never contacted him by SMS before this. She had obtained the teacher's mobile contact details at a Parent Teacher Interview earlier in the year, where the student's mother was present. The SMS was a question about subject 1 as it was the final break before Year 12 Exams and study was becoming intense. According to official phone records, the teacher responded at 8.56pm with the first message and continued until 4.00am, sending a total of 51 messages on this first evening. Although phone records presented for the student's mobile phone were not as comprehensive, she indicated that she probably responded with a similar number of messages. Initially the messages contained questions about subject 1, but the student told the Panel that the messages soon progressed to more personal matters, such as the student getting a tattoo, partying with friends, etc. The texting continued in a similar way, starting with subject 1 questions, then progressing to intimate content on subsequent days until returning home on Sunday 2nd October. When questioned about her study routine, the Panel heard that she usually stopped at around 10.30pm. The texting continued in bed and the messages became more flirtatious.

The Panel heard that on the Sunday, the student made a voice call late afternoon to the teacher, crying and looking for support following a break-up with her boyfriend during the holidays. The teacher returned a similar length call. The student knew the time taken for the two calls was substantial and the phone records indicated a total of 95 minutes.

School resumed on Monday 3rd October. The student told the Panel that on Monday evenings she and a friend, student 1, would have a study free night, attend after school lessons together and student 1 would stay at her house as it was more convenient than going home. They would watch TV, cook and talk. Student 1 slept in the same bed as the student. The student told the Panel that text messages on the evening of Monday 3rd October developed quickly into matters of intimacy and sex. The phone records indicated 24 SMS text messages from the teacher's phone from 10.29pm to 12.50am. She told the Panel that the relationship had changed rapidly. The Panel heard that on

Tuesday 4th October there was further texting between the teacher and the student from 9.34pm to 12.55am. The student said that she could not recall specifics but that the conversations had to do with sex. She told the Panel that she never studied that late. She said that when she was texting the teacher she was in bed.

While precise dates and times were unclear owing to her state of mind at the time, the student told the Panel that the events outlined in the second set of allegations about physical contact between herself and the teacher had to have been in the week commencing Monday 10th October 2005. This was determined by working back through her timetable. The Panel heard that on Monday 10th October, towards the end of lunchtime, the student went with another student, student 4, to the Hospitality classroom. A teacher aide was present. The bell went and student 4 and the aide left, with the teacher and the student remaining in the room. The student told the Panel that, as they were leaving, the teacher turned around to give her a "peck". The student said she was surprised but did not back away. She went off to class. The other alleged incident of the digital penetration occurred on Tuesday 11th October. As it was nearing exams, a Study Group with the teacher and another subject 1 student, student 8, occurred regularly at lunchtimes. On the day of the alleged incident, the student told the Panel that student 8 had to leave early and she and the teacher were alone in the teacher's homeroom. She was sitting cross-legged on the desk, wearing a dress as part of the school uniform. The Panel heard that the teacher touched her thigh, moved his hand further up and then slowly inserted two fingers in her vagina. The teacher told her to "finish herself off" in the toilet nearby. She returned, grabbed her books and left for class.

After the alleged kissing incident, the student told the Panel that the SMS messages became more intimate and the content became more about what the teacher would like to do with her, including a request for a nude photo. The student told the Panel under cross examination that her attempts to send a centred photo did not work so she recorded one with a digital camera and saved it on a compact disc to give to the teacher. The student told the Panel that the photo was showing approximately neck to knee with the tattoo visible and that she was leaning against a wall.

On Tuesday 18th October, the Panel heard that the student was summoned to the principal's office and told by the principal about the text messages with the teacher. The principal asked to inspect her phone; it was not at school that day. The student told the Panel that the teacher texted her on this day after she had been to see the principal. The student deleted all messages from the phone when she went home that day. The student indicated that there were two more calls from the teacher: one 3 weeks later at after school lessons when he instructed her to delete all messages and told her how to conduct herself; the other one around Christmas time to update her on what was happening.

The Panel heard that the student denied the incidents for a considerable time after the events, not wanting others to know and worried about friendship groups post school. She also thought that a relationship may occur with the teacher when school finished. The Panel heard that upon much reflection and with the passage of time, she made the

statement in August 2006 to the consultant, an investigator for the Institute, because she was angry and upset and that she wanted something to happen.

When presented with two letters, Exhibit L, one addressed to the teacher and the second addressed to teacher 1, a close colleague of the teacher's, purported to be written by her friend, student 1, which had essentially claimed that student 1 made it all up, the student strongly refuted their authenticity. The Panel heard from the student that they were factually incorrect and not consistent with how she knew student 1 would handle the situation.

Under cross examination the student told the Panel that the "M" in her phone was the teacher not any other "M" from her part time employment, social contact or from school.

Student 1 gave evidence under oath. She presented as a 19 year old student who attended the school from 2000 to 2005. The Panel heard that student 1 had known the student since Year 10 and that she was a close friend, doing after school lessons every Monday night and spending the night at the student's place, treating it as their night off study. Student 1 also studied subject 1 but was in a different class and did not have the teacher as a teacher. She was not involved with the teacher in any extra-curricular activities either. The Panel heard that student 1 did not attend the 18th birthday party of student 7, an allegation contained in the letters allegedly written by her. Student 1 outlined to the Panel the regular Monday night arrangements with after school lessons and staying over at the student's place.

The Panel heard that on the evening of Monday 17th October while travelling to after school lessons in the car, student 1 observed that the student's youngest sister was playing with the student's phone and looking for the home screen photo of the dog. Student 1 was shocked to see what she realised was a nude photo of the student that the youngest sister had inadvertently come across while pushing all the buttons to find the dog picture. The Panel heard that student 1 quickly grabbed the phone and returned it to the home screen. Under cross examination student 1 informed the Panel that the photo was from the knees up and that she could see the face. That evening student 1 lay still in the large bed that they shared for the sleepover and pretended to be asleep while she could hear the student continually texting. The next morning, while the student was in the shower, student 1 told the Panel that she felt compelled to read the Inbox and Outbox messages on the student's phone as she was becoming concerned about the behaviour of her friend in recent times. Student 1 listed examples of this to the Panel: there was the lack of emotion around the break-up with her boyfriend; another friend, student 5, told student 1 that she had seen lots of messages to "M" that the student claimed was someone at work; there was also the nude photo. Student 1 told the Panel that one of the messages was "Can I have more photos like these?" She had about 20 minutes to read the messages on the student's mobile phone. It was then that she observed the sexually explicit text messages as outlined in the allegations against the teacher. Student 1 told the Panel she knew that they were from the teacher because there were references to school events and subject 1 and they were all from "M". She put the phone back and said nothing to the student.

The Panel heard that student 1 conferred with student 3, and they agreed to go to the principal. After lunch on Tuesday 18th October they went to the principal and told her about the situation; they also repeated the story to the deputy principal. Student 1 and student 3 were sent home to avoid contact with the student. The Panel heard that the student confided in student 1 about what was happening the next day, Wednesday 19th October, not knowing that student 1 was the informant.

The Panel heard that in early February, 2006, student 1 left for interstate, having been accepted for a course there. She was contacted there by the principal about the letters, Exhibit L, that student 1 was alleged to have written. In a phone conference with student 1, student 1's parent, the principal and the deputy principal, student 1 pointed out the inconsistencies when the letters were read to her. When presented with the letters in the hearing student 1 flatly denied being the author.

Until August 2006 when the Institute's investigator contacted her, student 1 informed the Panel that she had maintained written correspondence with the student and it was only at this time that the student let student 1 know that she knew she was the informant. The student informed her after making her statement that she was owning up to everything. The Panel was informed that there have been no conversations between student 1 and the student about their respective statements.

The Principal of the school gave evidence under oath. She has been principal of the school since 2001 having been an acting principal and deputy principal in previous years. She described the school to the Panel as a school for Years 7-12 with over 1000 students and 120 staff of whom 85 are teachers.

The Panel initially heard from the principal about an incident in August 2005 involving the teacher and another student, student 2 and how he handled the situation. The principal documented the teacher's behaviour and informed him that the student 2 matter was the second serious incident to be placed on his file. The Panel heard that the teacher was cautioned about dealing with students when alone with them. The principal told the Panel that she emphasised to the teacher that you "are a teacher always". She said that the Faculty head was mentoring the teacher particularly in relation to boundaries between teacher and student.

The Panel then heard from the principal about how student 1 came to her and reported her concerns about the student, consistent with student 1's version of events. She had no warning about why student 1 and student 3 were coming to see her. She confirmed the events in a follow up interview with student 1 on Thursday 20th October.

In relation to the letters given to her by teacher 1 and allegedly written by student 1, the principal organised the phone conference in February 2006 as outlined in student 1's testimony where student 1 denied writing the letters. The principal told the Panel that as she read the letter out student 1 disputed aspects all the way through. The principal informed the Panel that the teacher had contacted her looking for the letters. The principal informed the Panel that she was puzzled as to how the teacher knew about the letters. She sent him the letters and indicated to the teacher she did not believe that they were genuine.

The Panel heard that at the time of interviewing the teacher on the afternoon of Tuesday 18th October, the principal indicated that he was very agitated and upset and waited for the deputy principal to come to the place of interview. She indicated that the teacher insisted on knowing who was making the allegations but she felt that inappropriate. She asked to see his phone and the Inbox and Outbox were empty. The address book of the phone contained the names of the student, student 8 and one other student. The principal indicated to the teacher she had no option but to stand him down while the matter was investigated.

The principal told the Panel she believed that 566 text messages over a 20 day period from teacher to a student was inappropriate and unprofessional.

When asked if she had discussed this case with the deputy principal, the principal informed the Panel that she had not.

The Deputy Principal of the school at the time of the allegations being made gave evidence under oath and confirmed her statement as true and accurate. The deputy principal informed the Panel that she had been a teacher for over 28 years and is now the principal of school 1, being appointed in July 2006. The Panel was also informed that she taught the teacher as a student at school 2.

The deputy principal confirmed the principal's version of events to the Panel and indicated that she did not keep notes as she saw it as the principal's role to conduct the investigation. She confirmed her presence at the phone conference with student 1 about the letters. She outlined her role of following up the earlier student 2 matter with the teacher and the students involved and had indicated to him at the time of the student 2 matter that any further incidents would affect his ongoing employment. The deputy principal told the Panel that the student and student 3 were not part of the group of girls who were disciplined for spreading rumours about the teacher. She could not recall if student 1 was part of the group but did not think so. The Panel heard that she was confident that the teacher told her and the principal that the reason for his distress was because a friend had committed suicide. The Panel heard that the deputy principal arranged for all of the teacher's belongings to be couriered to him after he was stood down.

The Service Manager for Sony Ericsson was called to give specialist technical evidence about the model of phone that the student had and its capabilities in relation to the taking of photos. He gave evidence under oath. The Panel was informed that this K300 model, exhibit K, takes photos which may not be altered once taken, that there is a self timer and that the photo is automatically saved on the phone: deleting it from the Draft/Outbox/Sent Items means it can still be on the phone stored in a file and needs to be separately deleted using the file manager. The photo can only be in one of Draft or Outbox or Sent at any one time.

The Reception Centre Manager gave evidence by phone under affirmation. The Panel was aware that the student had worked there on a casual basis since 2004, setting up tables and serving. The Reception Centre Manager confirmed her written statement, Exhibit P, as true and accurate. The Panel was informed that the Reception Centre

Manager recollected that she was contacted by a “person 3 from the VIT” on a Thursday late in March 2007 enquiring about anyone employed by the name of “M”. The Reception Centre Manager confirmed to the caller that the student worked there and thought the call unusual. The caller made another call on the Saturday two days later and the Reception Centre Manager indicated to the caller that there was a kitchen hand by the name of “M” who worked there from April 2006 to July 2006 but she refused to give personal details to the caller as she thought it inappropriate. The Reception Centre Manager was adamant that the caller making enquiries identified herself as “person 3 from the VIT” and that there was a “review” being conducted. As the student still works there, the Reception Centre Manager confirmed to the Panel that she informed the student about the caller and the enquiries.

The Teacher, a registered teacher, gave evidence under oath. The teacher informed the Panel that he is currently employed as a public servant and lives with his parents and a sibling as he did in 2005. The teacher came to teaching after initially commencing undergraduate study in another discipline. He graduated in 2000. He had a variety of short term and extended replacement positions at school 3 and school 4. The deputy principal encouraged the teacher to apply for a teaching position at the school. In 2005 he taught Year 11 and 12 subject 1, Year 12 subject 2 and middle and junior secondary subject 3. He was also a Home Group teacher. The Panel also heard that the teacher contributed significantly and extensively to the extra curricular program of the school, particularly with sport and dramatic and musical productions

The teacher strenuously denied to the Panel all of the allegations as they were individually read to him. The teacher also indicated that the use of the student timetable in evidence given by the student witness earlier in proceedings to identify the date and time of the alleged kissing and touching incidents, were erroneously based on the ten day cycle commencing on Day One on the first day of term. The teacher asserted to the Panel that, in 2005, the first Monday of term (3rd October) was in fact Day Six.

The Panel heard that the teacher believed that he had a strained relationship with the principal, based on earlier events, particularly two incidents being documented and placed on his file with his knowledge. He felt he was being closely watched. The teacher acknowledged that the March 2003 incident had a sexual element and that he had work to do following that incident. With regard to the student 2 incident in August 2005, the teacher indicated that he was angry about rumours being spread about him being on his “last chance”. He took it upon himself to speak to student 2. The teacher acknowledged that he could have handled the exchange better but denied being unduly threatening.

The Panel heard that the teacher considered the student a top student in subject 1 and her high marks reflected this. The teacher indicated that he allowed Year 12 students open access, hence the study groups and revision classes. The teacher said that another student, student 8, obtained his mobile contact details at a Parent/Teacher interview earlier in the year and at the same evening the student and student 8 agreed to form the study group and the student obtained the teacher’s mobile number. The teacher denied that Study groups held at lunchtimes were ever one to one. The teacher

contradicted the student's description of the room where the alleged touching incident occurred, claiming the room had many windows and viewing from outside was too public for the alleged incident and that the adjoining toilet spoken of was only used by staff.

The Panel heard that the teacher was adamant that all the text messages and phone calls were about subject 1 and believed that they were appropriate. The teacher told the Panel that the student was highly anxious about doing well, hence all the enquiries. He denied any sexual content and told the Panel that he never received a nude photo either by phone or on a CD. When asked if he had knowledge of the tattoo or that the student was on a camping holiday, the teacher denied this.

The teacher told the Panel that the student caught up with him after class to talk with him about personal issues. He said he told her to take it up with her home room teacher or the school counsellor. The Panel heard that it was school policy for the home room teacher to have responsibility for pastoral issues. The teacher suggested to the Panel that the student may have had another agenda in trying to organise a meeting with him. He said that her behaviour was flirtatious in the classroom.

The Panel heard that the teacher was angry and upset when summoned by the principal on Tuesday 18th October to meet with the principal and the deputy principal. He had texted the student to find out what happened prior to this. He sat with the deputy principal while the principal retrieved the teacher's phone to examine the contents. He was in a highly emotional state and he stated that he thought his career was over. The teacher claims he had no further contact with the student.

When asked how he knew about the alleged letters, the teacher informed the Panel that he got a call late on 13th February from an anonymous female caller indicating that teacher 1 had two letters – one addressed to teacher 1 and the other addressed to him but that the principal would not send them on. He informed his parents and solicitors about the phone call and then contacted teacher 1's home and was informed by teacher 1's spouse that the principal had them. The principal forwarded them on.

The teacher acknowledged to the Panel that his mother had assisted with enquiries about "M" at the student's workplace.

Under cross examination, the teacher was asked what he had learned about positions of power and trust and establishing professional boundaries. He indicated to the Panel that he understood the issues involved. Following the 2003 incident, the teacher signed a letter admitting a serious breach of professional boundaries and agreeing to do some work with his Faculty Head to discuss these ethical issues. This only happened on one occasion. The teacher did not accept that he needed to work on gaining a better understanding of these issues but rather he felt he needed to adjust his teaching style and become more formal in dealings with students. In relation to the student 2 incident in August 2005, the teacher agreed he was wrong to speak to her one on one but he indicated a lack of faith in the Administration. When asked if his conduct was appropriate the teacher indicated that he could have been more circumspect in language but yes, the exchange was appropriate and disagreed that he was threatening

or violating the teacher student relationship. The teacher sought assistance from the deputy principal who may have suggested an apology. The teacher was asked by Counsel Assisting if he could understand the situation from the student's perspective to which he told the Panel "the student chose to behave in adult ways and needed to be shown the consequences and held accountable."

The Panel heard that no other student received SMS help with study in subject 1 and that email contact with student 8 was only minimal. The teacher thought the student did not have email facilities at home so was prepared to help via SMS. He learned of the breakup with the student's boyfriend early in Term 4. The teacher could not recall the specific content of the first SMS contact at 8.56pm on 28th September. On this first night the teacher agreed that there were 51 messages from his phone to that of the student finishing at 4am in the morning and that they were all appropriate and about help with his subject, subject 1. The teacher indicated he did not have a problem with being accessible. The teacher did not agree that, at best, this could be construed as spoon feeding. Asked to recall the content of the two phone calls on Sunday 2nd October, the teacher indicated that the student was highly anxious and he was trying to calm her down. The teacher did not agree that the amount and frequency of messaging was extraordinary. Nor did the teacher agree that email would have been a more preferable mode of communication out of hours for the volume of assistance being given. When asked to consider how a parent might feel about SMS with a teacher in the early hours of the morning, the teacher said he could not respond as he was not a parent. The teacher did not seek assistance from colleagues when school resumed on the first Monday back about the amount of communication he was getting from one student and the nature of the phone call in which the student was upset. The teacher insisted that all the SMS texting was question and response about subject 1. The teacher denied any content about school events in the SMS messages nor any sexual content. The teacher denied that it was inappropriate to text a student about being summoned to go the principal's office and denied that he deleted it to cover up. The teacher did not have an explanation for the actions of student 1 and the student, only that he felt student 1 could have been covering up for the student.

Teacher 1 was called to give evidence under oath. She has been a teacher since 1971 and at the school since 1985, initially as a replacement teacher but more recently as a teacher of subject 1 and PE. The Panel heard that she worked closely with the teacher and attested to his diligence, collaboration and innovation. She indicated no knowledge of any inappropriate relationships or of any specific rumours around the school about the teacher.

Teacher 1 told the Panel that the principal called a meeting of whole staff where she outlined that a friend of the teacher's had committed suicide and that he was very distressed. She also informed the staff that he had been stood down or on leave while allegations of unprofessional conduct were investigated.

The Panel heard that teacher 1 was shocked to receive the two letters alleged to be written by student 1 on 8th February 2006. She remembers the date clearly as she had a major event to organise but had to go home as she felt ill when getting the letters via her pigeon-hole. She did not read the whole letter. When she realised their content she

quickly passed them on to the principal. When she saw the reference to a meeting between herself and student 1 and student 3 at the shops she thought they were authentic; when she saw the name of the author she went straight to the principal. The principal rang her later at home and asked to see her the next day. The principal intimated the letters were fake and that she had contacted student 1 who had denied writing the letters. Teacher 1 told the Panel that her husband took a call from the teacher about a week later asking for the letters.

The Teacher's Mother gave evidence under oath. The Panel heard that the teacher was living at home in 2005, working late hours owing to extensive extra-curricular commitments. She did not notice any unusual behaviour by the teacher around September/October 2005. The teacher's mother gave evidence that the teacher told her that he received an anonymous phone call advising of the letters on 13th February 2006 late in the evening.

The Panel heard that the teacher's mother denied representing herself as being from the VIT when making enquiries about the student's work details and that of other workers at the Reception Centre in pursuit of anyone with the name "M" working there. The teacher's mother told the Panel that these enquiries raised the possibility that more than one "M" worked at the Reception Centre. Counsel assisting the Institute asked the teacher's mother if she had spoken to anyone else. The Panel heard that student 5 and student 4 were contacted by the daughter-in-law of the teacher's mother and that notes were kept. The teacher's mother was unaware that the Institute had received complaints about her and her daughter-in-law approaching student 3, student 3's mother and student 5. She also had no knowledge that her daughter-in-law may have used a false name, person 3. The teacher's mother strongly denied that she claimed that she was from the VIT.

Student 6 gave evidence under oath. The Panel heard that student 6 was a student at the school, a contemporary of the student. Student 6 was a House Captain and had known the teacher since 2002. The teacher was her teacher of subject 2 in Year 12. Student 6 spoke in support of the teacher, attesting to his excellent teaching and her disbelief at the events that unfolded. The Panel heard that student 6 spoke of the popularity of the teacher and numerous gifts that he had received from students. She indicated to the Panel that she was not part of the friendship group of the students involved but she saw nothing untoward or unprofessional in the teacher's behaviour with any student.

DISCUSSION OF EVIDENCE

The Panel was required to make a number of decisions around conflicting evidence as presented to it.

In considering the evidence, the Panel noted a number of inconsistencies in the evidence given by the key witnesses and the teacher. Generally, the Panel found the evidence of the student and student 1 to be clear, frank and generally consistent, as was the evidence of the principal and the deputy principal.

Clearly the process requires that the evidence substantiate the allegations. There is no expectation that the teacher disprove the allegations. Despite this, the teacher needed to explain his behaviour in relation to facts that were not in dispute. In this regard, the Panel found the teacher to be unconvincing.

Allegation 1

The Panel found that the quantum and timing of SMS conversations between the teacher and the student were unprofessional, inappropriate and liable to develop an unacceptable relationship. The Panel was clear in their finding that this situation was entirely within the teacher's control and one that it was his professional duty to address.

Evidence was given and accepted that the teacher has established in his short career a reputation of good classroom teaching, strong dedication to his students and his school, and a dedication to his job through involvement in many extra-curricula activities.

No dispute occurs in the evidence that the teacher had the permission of the student's mother to communicate with her by text message. This reflected his willingness to be flexible and available to his year 12 students. He also operated within a school environment that was flexible in its discipline code with year 12 students, allowing for example, for students to address teachers by their Christian name. Thus when the student first contacted the teacher by SMS on September 28 it was perfectly correct and reasonable for him to reply. The message was sent at a reasonable hour. Although some six months had passed since permission had been sought and gained for this communication, the teacher quite reasonably acted by responding. No dispute exists with this evidence.

What followed was, on the evidence, extremely problematic. The teacher consistently stuck to his evidence that the entire exchange of SMSs was an innocent conversation, entirely consisting of question (by the student) and response (by himself). The evidence of the quantum and timing is not in dispute. There is no dispute that the teacher had been counselled and admonished by the school leadership around his need to more clearly identify the appropriate boundaries of his relationships with students. Whilst there is some disagreement about whether the teacher had acted inappropriately in the past, there was no dispute that he was, and needed to be, "on his guard".

In this context, the Panel found the teacher's evidence unconvincing and his demeanour lacking in crucial aspects of emotional intelligence, such as self awareness and self-reflection, collaboration with his principal and key colleagues and empathy with those responsible for maintaining the standards of the profession.

The Panel found on the evidence that the teacher should have, but did not:

1. Set time limits on the lateness of SMS messages by, for example, not responding until the next day,
2. Report the sudden and extreme behaviour of the student (the number and timing of her first evening of SMS communication) to her parents and a senior staff member at the school,

3. Report the sudden and extreme behaviour of the student to her home room teacher and/or the student counsellor, and
4. Discuss with at least one appropriate colleague his claimed dilemma of needing to be available to his students whilst “being on his guard”.

The Panel also found that the teacher was a teacher with a good, relaxed and generally suitable relationship with students that involved discussion of the various interests of students without breaching accepted boundaries. The Panel found it inconceivable that the 51 text messages from 8:56pm on 28th September 2005 until 4am the next day were only about schoolwork. The student was on holidays, camping with her family. The teacher was on holidays. Evidence was given by student 6 that the teacher always made doing school work interesting by interspersing it with lighter matters. To persist with the claim that these text messages were simply about schoolwork was found by the Panel not to be believable evidence.

Much evidence was given attempting to throw doubt on the question as to who sent sexually explicit or otherwise provocative text messages to the student’s mobile. The attempts were, in the Panel’s view, an elaborate diversion from the fundamental issue. For the first time in six months since the student’s parent granted approval, the student and the teacher were exchanging SMSs every evening for hours, often until extremely late. The Panel found that for three consecutive Monday evenings these conversations were extensive and typically until about midnight. There was corroborated evidence that on each of these Monday evenings the student was in fact in bed in the dark with student 1 in her room with her. Thus, to an extent, the existence of any other person with whom the student’s text messaging may have been confused by student 1 is irrelevant. She was looking at the phone after an evening of documented 33 IN messages from the teacher plus a roughly equivalent number sent to him. The teacher’s evidence of total denial and distraction thus undermined the extensive evidence of his good character.

Student 1’s evidence of the circumstances surrounding her finding the text messages was totally convincing. With the number of messages that had been exchanged between the student and the teacher during the evening there can be little doubt these were the ones student 1 was observing. There was no evidence that the student and student 1 were unreliable; on the contrary. Suggestions by the teacher’s counsel that student 1 would have been confused, apprehensive and nervous when looking at the messages, was convincingly rebutted by her.

The student’s behaviour when first challenged by the principal about the accusations was found to be understandable by the Panel. She was extremely embarrassed and clearly not in any way wishing to see the teacher caught out by what had happened. Her explanation for her denials, to her principal and her parents was found by the Panel to be entirely believable. Suggestions that her changed position over time was a reflection of the students deciding on the ‘Schoolies Week’ trip to take their revenge on the teacher were found by the Panel to be unbelievable, given the long time lapse before she did in fact confess.

The teacher would have the Panel believe that he was in some way set up with these accusations because the school principal did not like him because of his political allegiances and other tensions in their relationship. The Panel found there was little corroborated evidence that supported such a claim and was certainly persuaded against it by the deputy principal's strong, clear and concise recollection of events.

Nor could the Panel find any clarification of the truth of the situation from the letters allegedly sent by student 1. The Panel found that there were too many inconsistencies and factual errors in them for student 1 or the student to have been the author. The Panel therefore found that the letters existence did not assist in establishing the truth of the allegations.

The Panel found that the teacher could neither identify nor articulate the exact nature of his principal's concerns, or his conduct that had caused concern. Further the Panel found that the teacher had no clear understanding of why others believed that he had put students at risk or how he might behave more appropriately in future. The value of his extensive list of character witnesses was greatly diminished when he revealed that he never discussed these issues with any of them, either at a professional or personal level. It was of grave concern to the Panel that teacher 1 had not discussed any of these matters with him. The Panel was impressed with her as a close and concerned colleague, sitting next to him in their staffroom and developing a positive and supportive work friendship. Despite his constant claims of his being sick of the rumours about him and the school's lack of action in relation to them, teacher 1 told the Panel that she knew of no such rumours.

In summary, the teacher did not provide evidence that he had pursued any remedial action, sought any independent professional opinion or advice, or done any training to demonstrate that he had come to terms with why his behaviour was deemed unprofessional and inappropriate by others. The teacher rather seemed to blame this lack of responsiveness on a former Head of the PE department who apparently had been unresponsive to his one request to discuss the matter. The Panel found a lack of self-awareness and self-reflection in the teacher that raised concerns about him as a professional teacher. The Panel found the teacher sought to blame any problems on others. The evidence of his dependence in the past on the deputy principal to tell him what to do if he got into difficulty led the Panel to struggle to comprehend why the teacher did not seek her counsel in relation to the student's situation.

The Panel found the teacher lacked the personal insight necessary to understand, and hence make decisions in relation to employing the appropriate modus operandi of a teacher at all times. The teacher evidenced that he considered it his right and responsibility to have after hours interaction with students supporting them in a range of ways as part of his duties as a year 12 teacher. Had he chosen to engage in professional conversations with, for example, the deputy principal on this matter, he would have been given strong counsel to the contrary. He did not.

On the weight of evidence presented, the Panel finds that this allegation is substantiated. The Panel finds the allegation substantiated, regardless of who initiated the messages. The Panel finds on the weight of the evidence that the general nature of

many of the text messages to be familiar and sexual. Without making a finding on any of the specific messages alleged to have been sent, the Panel finds the general allegation substantiated.

Allegation 2

The teacher denies this allegation and there is no evidence to corroborate the student's story.

The Panel finds that the alleged behaviour, from all the evidence presented, including by the student herself, would be entirely out of character with the teacher's record.

The Panel also finds the student to be a credible, sincere young woman. There is no apparent reason why she would fabricate such allegations. To have done so, again on all the evidence presented, including by the teacher, would be entirely out of character with her record.

The Panel also finds that the seriousness of the allegations is such that it would require a very high onus of proof to substantiate them. In the circumstances it could not do that.

The allegation was found not to be substantiated.

CONCLUSION

In response to questions that required the teacher to demonstrate an appropriate level of understanding of his special duty of care as a teacher, he failed to mention the fundamental principle of 'in locus parentis'. The Panel deemed 'in locus parentis' in lay terms to mean - *to act as a parent would, doing anything and everything reasonably possible to protect a young person, in the place of a parent.* The Panel found that the teacher had not acted in this way. The Panel found that had the teacher done everything reasonably possible to protect the student he would have on September 28th 2005 been pro-active around the whole situation to avoid any adverse ramifications for her.

The test as to whether a person is a fit and proper person to teach relies on an assessment of whether or not the person has the qualities that would accredit them to the public as a person who could be trusted to carry out all the duties of a teacher. These qualities include sound understanding and application of the duties and responsibilities of a teacher as well as the moral integrity and character to be a teacher. Prior to the student incidents there had been some concerns about the teacher in this regard. They were drawn to his attention. On the basis of the evidence accepted the Panel finds the teacher falls short of possessing such qualities.

Having discussed the teacher's lack of personal insight as well as the insight deemed necessary to fulfil the role of a teacher, the Panel found the teacher also lacks the foresight a teacher requires. While at the school, and during the hearing, the teacher did not demonstrate that he was astute to the potential risk, nor the future problems that he had posed for the student. The fact that the student clearly had become

infatuated with the teacher was significantly contributed to by his behaviour, or lack of professional awareness and action. He did not demonstrate an ability or willingness to envisage future problems his behaviour and beliefs posed for the school, his peers, and the school community.

At no time has the teacher's reputation, ability or competence as a classroom teacher been questioned. A 'good' teacher can however simultaneously place students at risk. A teacher's good character extends to moral standards, attitudes and qualities, not merely reputation. The notion of good character covers the need for appropriate good personal conduct and ethical fitness. If a teacher showed a continued absence of insight and understanding of right and wrong, it is a strong indicator of unfitness. The Panel found the teacher showed a continued absence of insight. There were many examples including:

- In the student 2 situation his lack of awareness of his behaviour or reflection on it, the incident itself, his behaviour when admonished about it, his subsequent views of it, his belief that he acted appropriately.
- His agitation that it was only because his principal did not like him that issues had arisen despite his close confidant the deputy principal not sharing this view.
- His attending the staff function when directed not to.
- The quantum and hours at which he would send SMSs to a student without any sense of the inappropriateness and danger involved in such 1:1 conversations that can neither be monitored or documented.

Serious misconduct is not measured against the worst-case scenario, but by the extent of departure from proper standards. If a teacher adequately performs their duties and acts in the best interests of students they should be able to command the respect and confidence of the teaching community. When a teacher loses that respect and confidence because of their conduct they should no longer be able to exercise the privileges, duties and responsibilities that come with being a teacher. The Panel finds that teachers aware of the actions of the teacher could not give him that respect or confidence.

A person who is fit to teach is a person who can show knowledge of what he or she ought duly to do, and then to do it. A person who does not have such knowledge and/or a person who shows a careless disregard for a teacher's established professional obligations and duty of care, is a person who falls short of being designated fit to teach. The Panel finds the teacher to be in this position.

The teaching profession must maintain high standards, in order that parents can feel confident that the teacher will care for their child appropriately. Other teachers must be able to trust the teacher to behave appropriately with all students no matter what their circumstances. The education community and the public must have confidence that those engaged as teachers are trustworthy in relation to how they care for students

After considering all the evidence, the Panel made the following findings:

- The teacher is a registered teacher
- An inappropriate relationship developed between the teacher and a student at his school, the student, in September 2005

- Such relationship involved out of school contact through SMS messages, the quantum and hours of which were entirely inappropriate and constituted unsupervised or unobserved 1:1 conversation
- The general nature of many of the text messages were familiar and sexual. Without making a finding on the wording of the specific messages alleged to have been sent, the Panel finds the general nature of the messages to be entirely inappropriate
- The teacher disregarded advice and direction from his principal and deputy principal
- The teacher demonstrated a serious lack of professional judgement, both in actions outlined above and in failing to seriously address issues and seek advice

FINDINGS UNDER SECTION 42(2) OF THE ACT

The teacher indicated little, if any, remorse and failed to demonstrate to the Panel that he had seriously reflected on his lack of judgement. Nor did he show any significant understanding of how his behaviour not only adversely affected the student, but also was injurious to the profession's reputation. The Panel found that the teacher did not heed the directions or counselling of the Principal. The Panel found he was dismissive of advice or direction, even from his respected colleague and deputy principal.

The Panel commends student 1 for her strong care and concern for her friend by reporting the situation to the principal in the way she did.

In terms of serious misconduct, the Panel found that:

1. The teacher was responsible for the inappropriate relationship that developed between him and the student. As a registered teacher, the teacher had a responsibility to manage the relationship, especially after his principal had counselled him on the broader issue of professional boundaries.
2. The teacher engaged in inappropriate text messaging with a student. The Panel found that, other than in exceptional circumstances, such communication with a student at all hours of the night and in such quantities, to be inappropriate.
3. The teacher sent text messages of a familiar and sexual nature that were entirely inappropriate. The teacher has an inadequate understanding of appropriate professional boundaries.

The Panel found that the combination of these matters clearly constituted serious misconduct by the teacher.

In relation to his fitness to teach, the Panel found that

1. The teacher had failed to demonstrate a serious level of remorse that could demonstrate to the Panel, the profession, future students, parents and colleagues that he well understood the impact on the student and/or the profession of his serious misconduct.
2. The teacher failed to demonstrate an understanding of his responsibility to care for students throughout the incidents involved in the allegations, or subsequently or at the Hearing. Under questioning the teacher could only offer

- a very superficial understanding of this crucial concept and his professional obligation.
3. The teacher failed to demonstrate that he has learnt from his inappropriate behaviour, his lack of judgement or the subsequent repercussions. In fact the teacher sought to often shift the blame for the situation on to anyone but himself. His record and his response to questioning indicates a poor understanding of the significance of the trust and power relationship that exists between teacher and student and his abuse of it.
 4. The teacher has clearly demonstrated a serious lack of professional judgement through the relationship that developed between him and the student, irrespective of whether he sought such a relationship. If in fact, as may have been the case, it was the student who became infatuated with him he fuelled it by continuing to respond to and instigate text messages with her.
 5. The teacher demonstrated a serious lack of professional action to seek guidance and support to deal with the situation. His inability to discuss his concerns with valued colleagues, or his principal, does not demonstrate an understanding of his responsibilities in this matter.

Collectively these findings compelled the Panel to find that the teacher is not fit to teach.

DETERMINATION UNDER SECTION 42(2) OF THE ACT

On 30 April 2007 the Panel decided to cancel the registration of the teacher from the date of this decision.



Marilyn Mooney, CHAIRPERSON



per
Kevin Moloney, REGISTERED TEACHER

Marilyn Mooney

**per
Graham Hout, PANEL MEMBER**