

**VICTORIAN INSTITUTE OF TEACHING**

DECISION AND REASONS OF THE FORMAL HEARING

**NUMBER:** 053

**REGISTERED TEACHER:** Kenneth MILLS

**PANEL MEMBERS**

Marilyn Mooney, Chairperson

Kathleen Bragge, Registered Teacher

Graham Hoult, Panel Member

**ATTENDANCE:** The teacher attended the hearing and was represented by Mr Eugene White

Counsel Assisting: Ms A Sheehan, with Ms A Haslam solicitor instructing

**DATE OF HEARING:** 17 September 2007

**DETERMINATION UNDER SECTION 2.6.46(2):**

On 17 September 2007 the Panel decided that the teacher remain registered as a teacher in Victoria.

The following conditions are imposed on the teacher's registration as a teacher:

1. That the teacher attend on-going counselling with the Specialist Psychology Counsellor between 17 September 2007 and 31 March 2008.
2. That by April 7 2008 the teacher submit to the Institute a detailed report from the Specialist Psychology Counsellor, addressing the teacher's further progress in the following areas:
  - insight into, and ability to determine and implement, the professional boundaries of a teacher
  - identifying and expressing his feelings in a way that is appropriate to the occasion
  - ability to recognise and deal appropriately with personal stressors

## REASONS

### BACKGROUND

The teacher has been a registered teacher with the Victorian Institute of Teaching (the Institute) since 31 December 2002.

By letter dated 23 August 2006, the principal of the school, notified the Institute that the school had taken action in relation to the alleged serious misconduct and/or lack of fitness to teach of the teacher.

The principal advised that the teacher tendered his resignation from the school on 17 August 2006.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) on 13 September 2006 and the Committee decided to refer the matter for investigation. The Institute arranged for an investigation of the allegations and on 24 January 2007, the Committee decided to refer the matter to a formal hearing.

A Notice of Formal Hearing dated 12 April 2007 was served upon the registered teacher by registered post and was received on 13 April 2007.

### THE LAW

Section 2.6.31 of the *Education and Training Reform Act 2006* states:

**2.6.31. 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.*

Section 2.6.30 of the *Education and Training Reform Act 2006* states:

**2.6.30 Powers of inquiry**

*(1) The Institute may in accordance with this Part*  
*(a) inquire into any information it receives under section 2.6.31 or 2.6.32 or;*  
*(b) inquire into any complaint that provides evidence –*  
*(i) of the serious incompetence of a registered teacher;*  
*(ii) of the serious misconduct of a registered teacher;*  
*(iii) that a registered teacher is unfit to be a teacher*

The terms *serious misconduct* and *unfit to be a teacher* are not defined in the Act. The panel considered 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).

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 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*).

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 12 April 2007.
- 6 Witness Statements including attachments numbered 001 to 032.

The following exhibits were presented to the Panel:

- A. Optus records of mobile telephone calls and text messages from the teacher's mobile telephone number
- B. Summary of telephone contact between the teacher and the student from 28/07/2006 and 05/09/2006
- C. Medical report re the teacher by the medical practitioner dated 18 May 2007
- D. Specialist Psychology Counsellor's Qualification
- E. Letter requesting report from the legal firm to the Specialist Psychology Counsellor dated 15 July 2007
- F. Report of Specialist Psychology Counsellor re the teacher dated 3 September 2007

## **THE EVIDENCE**

The allegations of possible serious misconduct and/or lack of fitness to teach are as follows:

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

From about 5 August 2006 to 10 August 2006, whilst a teacher at the school, the teacher sent inappropriate text messages to the student, including

- a. 'Because you are attractive and so sweet and girls like that don't talk to me. You make me blush.'
- b. There is this really sexy girl in a class I teach and the thoughts I've had about her. Pity I am old. She does not know I exist.
- c. 'So you're tucked up in bed. There's a really nice vision. He he'
- d. 'I want to become great friends but my other half of brain wants to give you a big hug and proper kiss. But I can't. I can't.'
- e. 'What I would like to do would be really wrong so talking would be a good step.'
- f. 'Goodnight sexy, see you soon.'
- g. 'Kisses wow. If they were real I would be shaking and blushing.'
- h. 'I feel very strong feelings. Not sure how to say it in words.'
- i. 'Now I'm blushing.'
- j. 'I think my needs are different to yours.'

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

- The teacher
- The Specialist Psychology Counsellor

The Hearing was conducted over two days, on May 21, 2007 and September 17, 2007. The registered teacher submitted a written statement prior to the hearing commencing on May 21 2007. In this statement he admitted that when acting as a private music tutor to a student, he communicated inappropriately with her by phone and text messaging.

### **Day 1**

The teacher's legal counsel indicated that the teacher admitted the allegations as set out by the Institute. He also admitted that his behaviour constituted serious misconduct. The teacher's legal counsel told the Panel that the teacher had undertaken not to engage in the teaching of anyone under 18 until the Hearing is finalised.

The teacher's counsel requested a four month adjournment to enable the teacher to seek counselling from a Specialist Psychology Counsellor.

The Panel adjourned the Hearing till mid September 2007 with the following conditions:

- That the teacher attend a Specialist Psychology Counsellor on no fewer than six occasions to receive counselling for his depressive illness. Such counselling also to explore the issues of trust and power in professional relationships, and of setting professional boundaries within those relationships
- That a detailed report addressing these issues be provided to the Panel by the treating psychologist
- That the teacher not undertake any paid or voluntary employment in a school during this time

The Panel considered the teacher's on-going mental health issues and ordered that his name be suppressed for the duration of the Hearing.

## **Day 2**

Counsel for the Institute noted that on July 1 2007 the *Victorian Institute of Teaching Act 2001* had been repealed. However Schedule 8 1.12a-d of the *Education Training and Reform Act 2006* provided identical provisions as to the matters alleged.

Counsel for the Institute also noted that the Suppression Order made on May 21 2007 still pertained.

**The teacher** gave evidence under oath and testified that in 2006 he was employed at the school teaching music to years 7-12. He was also responsible for Instrumental Music. The teacher told the Panel that he has a partner, a step-child and twins. The Panel heard that since the episode of the messages to the student the teacher has seen the Specialist Psychology Counsellor seven times, covering matters including personal assessments, his behaviours in relation to the student, and examination of the Institute's Code of Ethics, and draft Code of Conduct.

The teacher spoke of being "strung out" emotionally prior to the twins' birth, and having difficulty in adjusting to his new role of fatherhood. As director of the school production, he was conducting rehearsals each weekend and writing scores for the band. He told the Panel he had felt in need of support, and had mistaken the friendship offered by the private student for something other than that and had responded inappropriately. He said he regretted the episode deeply, "more than anyone could understand".

The teacher described a now much improved relationship with both his partner and his parents. He indicated he was very ready to engage in ongoing counselling with the Specialist Psychology Counsellor. The teacher said that, with hindsight, he now recognizes how badly he was coping at the time of the messages. He was not a regular alcohol user but that on two occasions in July 2006 he drank "a lot", coinciding with the period of the messaging. The teacher said he did not have a clear recollection of sending these, but agreed that he had done so. He did recall some phone calls to the student and said these were mostly about music theory.

He said he has an undiagnosed cardiac condition, present since childhood, which causes him to lose consciousness at times of severe stress.

The teacher acknowledged that his mistakes had badly affected the student's well being and education; that he understood the wrong he had done. He stated that the student had been seeking friendship in a new school environment and that he had misused his position, his authority and power, giving her wrong advice and the "wrong message". The teacher said that while he already understood his actions to have been "a huge mistake", he wanted help, through counselling, to know why he had acted thus. He said he believed he was no longer depressed and that he was now much more aware of the early warning signals of a recurrence of depression or severe stress. He felt confident

that the imminent relocation of his sister to a nearby suburb would provide additional support.

The teacher reported that he had scrutinised his own approaches to teaching and building teacher-student relationships, especially in relation to recognising professional boundaries. He said he now saw that he needed to make adjustments, to be less “relaxed” and more aware of differing needs of students. He said he thought methods could differ from the classroom to other teaching situations, but that the boundaries should remain the same. He now believes that any electronic or phone communications needed with students should go through the parent.

He stated that he would redirect any student who he saw to have problems beyond his expertise. The teacher told the Panel that if he were able to continue teaching he would elect not to take private students. When queried as to the reason for this he indicated that as well as wanting to spend more time with his family, he saw it as a “safety net”. He said he felt confident in his own capacity to behave appropriately, but did not want to take any risks he could avoid.

**The Specialist Psychology Counsellor**, who is a Clinical Psychologist, gave evidence under affirmation and testified that the material contained in her report dated 3 September 2007, presented to the Panel, was true and accurate. She stated that she had conducted a series of psychological, personal and behavioural assessments with the teacher over several sessions and she had the expectation of conducting several more such sessions.

The Specialist Psychology Counsellor stated that at the time of the unacceptable behaviour the teacher was very vulnerable to stress and tended to turn it inward. She said she felt the teacher had gained considerable insight into his dysfunctional emotional state, the lead-up to his actions and the consequences on the student, the school, himself, and his family.

She noted that the teacher had perfectionist tendencies and she saw his self-imposition of the “safety net” not as reflecting a felt need for it on his part but rather the avoidance of any possible misinterpretation.

The Specialist Psychology Counsellor told the Panel that she thought the teacher would benefit from further counselling. When pressed she indicated that this was not intended to create any doubt about his fitness to return to teaching but merely professional caution. The Specialist Psychology Counsellor stated that she believed the teacher now has a good understanding of his behaviour, and of professional boundaries. However, on-going counselling would continue to focus on his ability to determine and implement professional boundaries as well as focussing on matters of handling personal stress and good communication strategies.

The Specialist Psychology Counsellor explained to the Panel that she had covered with the teacher each section of the Code of Ethics and the draft Code of Conduct and was satisfied with his understanding of this material. She described a teacher’s professional boundary as being around the teacher, at all times and in all places.

The Specialist Psychology Counsellor stated her opinion that the teacher now fully grasped the **import** of the vulnerabilities of young people and the unique position of influence and trust held by teachers. She felt confident, she said, that if students were to “push the boundaries”, that the teacher would act appropriately. She had found him, she said, forthright, compliant and fully engaged in all aspects of the counselling.

The Specialist Psychology Counsellor indicated she had diagnosed the teacher as suffering from a disorder. While this, or depression, could recur periodically, she believed the teacher was now more likely to manage stress better. Moreover, the ongoing work he was undertaking with her should, she felt, provide him with further skills to take forward into his personal and professional life.

When pressed as to the reasons for her opinion that the teacher should undertake further counselling, the Specialist Psychology Counsellor indicated that she thought periodic ongoing counselling would be helpful as a support measure, complementing and sustaining the focus of the current intensive sessions.

## **DISCUSSION OF EVIDENCE**

The Panel’s role in this case was greatly assisted by the teacher’s willingness to honestly and openly respond to the accusations.

The teacher had submitted a written statement prior to the proceedings. In this statement he admitted to the allegations. This position was re-iterated by the teacher’s counsel in the opening remarks.

As a consequence, no witnesses, other than the teacher and the Specialist Psychology Counsellor, the psychologist he has been working with between the two hearings, needed to be called. This situation simplified and shortened proceedings and allowed for the panel to oversee a process of the teacher addressing his mistakes, resolving some personal issues and exploring the ways in which he could move forward from this incident.

Institute counsel commended his actions, especially as it saved a number of people including the student involved from having to attend and give evidence. It contributed towards the clarity the panel saw in the teacher’s remorse and progress in dealing with the matter before the Panel.

As the teacher had admitted to the allegations and acknowledged that his behaviour constituted serious misconduct, most attention was focused on the subsequent counselling and the teacher’s current understanding of his professional responsibilities.

The Panel heard of some of the circumstances in which the allegations occurred by way of context. It was to the teacher’s credit that the issues of his health situation, his impending fatherhood and the rare circumstances of his drinking excessively at the time of some of the text messages, helped to explain his aberrant behaviour and were not proffered as an excuse. The Panel heard evidence from the Specialist Psychology



Counsellor that contextual issues had been explored by the teacher as an important part of his developing self-awareness and as part of his understanding for his future professional growth.

The Specialist Psychology Counsellor's evidence was incisive and decisive. She was able to provide the Panel with the level of detail that could demonstrate that the matters that needed to be fully explored with the teacher had been covered and that the testing processes used were assisting him to reflect effectively on the incident and grow significantly from them.

The teacher's evidence demonstrated considerable remorse. The Panel valued the voluntary undertakings made by him and his willingness to embrace the situation, accept responsibility for it and seek ownership in its resolution. He demonstrated, importantly, insights into the effects of the breach of trust he has been guilty of and has apologised to the student and many others he has hurt by his actions, including his partner and his parents.

In evidence before the Panel, the teacher not only demonstrated that he has reflected on the incident, he also has a much deeper understanding of the professional boundaries that must exist between teachers and students and a deeper understanding of himself.

He demonstrated he has dealt with the issue of how he will approach his teaching differently in future and how he will relate to all students with a clearer understanding of his professional responsibilities. The Panel accepted the Specialist Psychology Counsellor's and the teacher's explanations of the concept of the "safety net" (the voluntary not tutoring private students).

The Panel commends the student's friend who alerted the school authorities to this situation. Clearly had that not occurred the damage to the student may have been much more severe and the opportunities for the teacher to re-establish himself much more problematic.

Based on all the available evidence and the teacher's admission, the Panel concludes that the allegation of failing to maintain a professional relationship with a student, by using inappropriate language and sexual innuendo through the sending of inappropriate text messages, is proven.

## **CONCLUSION**

Disciplinary proceedings are not mechanisms to punish, but rather instruments to protect the public. The Panel was mindful of this distinction when making determinations in relation to this matter.

The Panel had to consider whether the teacher had engaged in serious misconduct and/or was unfit to teach. The Panel found that the teacher not only breached the professional standards of the teaching profession, he exploited the privileged position of

power and trust that a teacher is granted. The teacher's conduct reflected attitudes and characteristics inconsistent with the moral qualities required of a teacher. The Panel concludes that the teacher's behaviour amounts to serious misconduct.

However, the Panel does not consider the teacher unfit to teach. It is clear that in considering the issue of fitness to teach, the teacher's conduct is to be assessed at the time of the hearing and not when the conduct occurred. The Panel is of the view that the teacher has undergone significant education and counselling whilst he voluntarily removed himself from the profession whilst awaiting the reconvening of this hearing. He has admitted to the allegations and agreed that his actions were of a serious nature and that they represented a substantial departure from the accepted standards of the teaching profession.

The Panel is conscious of its responsibilities to protect the public interest. In other cases before the Institute where a teacher has been guilty of serious misconduct, a period of suspension has been imposed to emphasise to the teacher and other members of the profession that a certain type of conduct is not acceptable professional conduct and in order to give the teacher a period of time to undertake education and counselling programs. The Panel is of the view that this is not required in this case as the teacher has, with one short instance only, voluntarily removed himself from the profession awaiting this process.

The Victorian teaching profession and the public must be confident that students placed in the care of the teacher in the future will be safe from any repeated inappropriate behaviour. Within the bounds of the professional caution expressed by the Specialist Psychology Counsellor the Panel concludes that with the conditions imposed upon the teacher, the profession and the public can be confident that the teacher is fit to be a teacher.

### **FINDINGS UNDER SECTION 2.6.46(2) OF THE ACT**

The findings of the matter are not in dispute. The Panel finds that the teacher is guilty of serious misconduct.

### **DETERMINATION UNDER SECTION 2.6.46(2) OF THE ACT**

On 17 September 2007 the Panel decided that the teacher remain registered as a teacher in Victoria.

The following conditions are imposed on the teacher's registration as a teacher:

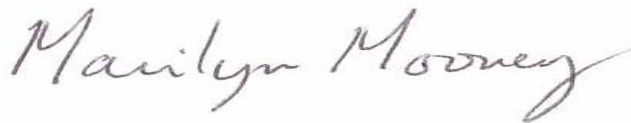
1. That the teacher attend on-going counselling with the Specialist Psychology Counsellor, between 17 September 2007 and 31 March 2008.

2. That by April 7 2008 the teacher submit to the Institute a detailed report from the Specialist Psychology Counsellor addressing the teacher's further progress in the following areas:

- insight into, and ability to determine and implement, the professional boundaries of a teacher
- identifying and expressing his feelings in a way that is appropriate to the occasion
- ability to recognise and deal appropriately with personal stressors



**MARILYN MOONEY, CHAIRPERSON**



**per:  
KATHLEEN BRAGGE, REGISTERED TEACHER**



**per:  
GRAHAM HOULT, SPECIALIST MEMBER**