

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 056

REGISTERED TEACHER: Alistair Donald MORTYN

PANEL MEMBERS

Terry Hayes, Chairperson

Anne Farrelly, Registered Teacher

Stewart Cheal, Registered Teacher

ATTENDANCE: The teacher did not attend the formal hearing

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

DATE OF HEARING: 15 November 2007

DETERMINATION UNDER SECTION 2.6.46 OF THE ACT:

On 15 November 2007 the panel decided to cancel the registration of the teacher from the date of this determination, 15 November 2007.

REASONS

BACKGROUND

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

By letter dated 14 November 2006, the principal of the school notified the Institute that he had taken action in relation to the alleged serious misconduct and/or lack of fitness to teach of the teacher. The allegations relate to inappropriate comments made to three of his students whilst he was teaching a language subject in 2006.

The matter was referred to the Institute's Disciplinary Proceedings Committee (the Committee) on 20 December 2006 and the Committee determined that the matter proceed to a formal hearing.

On 17 January 2007, the Institute received a letter from the teacher indicating that he no longer wished to remain registered with the Institute.

On 14 February 2007, the Committee decided that the inquiry should continue in accordance with section 2.6.47 of the *Education and Training Reform Act 2006* (the Act).

On 20 February 2007, the teacher informed the Institute that given the inquiry was continuing, he did not wish to relinquish his registration.

The matter was referred back to the Committee for consideration on 11 July 2007 when it was confirmed that the inquiry should proceed to formal hearing.

Nature of allegations:

It is alleged that:

Whilst employed as a registered teacher at the school during 2006, the teacher:

1. *Failed to maintain a professional relationship with students of the school*
 - a. Failed to communicate appropriately with student 1 -
 - i. On the afternoon of 27 October 2006, after a language class, said to student 1 words to the effect of:
 - 1) 'I need to tell you something, but then you might get scared.'
 - 2) 'You can't tell anyone.'
 - 3) 'I want you.'
 - 4) 'I like you.'
 - 5) 'I am attracted to you.'
 - 6) 'Are you scared of me now?'
 - 7) 'You're not going to tell anyone are you?'
 - 8) 'I'm scared that I can't teach properly anymore because I'm getting too distracted'

- 9) 'What is your opinion of me?'
- 10) 'It's because of the music you put on my player.'
- 11) 'I like you and student 2 because you are the ones who put the music on my player.'

b. Failed to communicate appropriately with student 2 -

- i. Sent emails of a personal and/or inappropriate nature to student 2, via his email address, containing words to the effect of:
 - 1) On 1 November 2006, 'Why?? Do you hate me?'
 - 2) On 6 November 2006, 'Promise U wont tell others & betray me.'
 - 3) On 22 November 2006, 'Did you deliberately want to bring me down?'
- ii. Sent emails of a personal and/or inappropriate nature to student 2, via his email address, containing words to the effect of:
 - 1) On 30 December 2006:
 - o 'U'll never know who I am....cos I neva trusted U...'
 - o 'I'd never touch U til U were old enough.....+ consented.'
 - o 'I wrote and recorded a song 4 U...but wiped it.'
 - o 'I'll always luv U...Ur fucken unreal!!'
 - o 'U don't know me....& only eva knew some parts of me....'
 - o 'I wanted you (later) to cum on my face ova & ova again...'
 - o 'I fucken love you...Ur SO cool...but maybe don't even know it....'
 - o 'Person 1 is a dumb fucken stupid bitch who can go fuck herself....'
 - o 'U didn't have power over me.... I anticipated + chose my destiny....'
 - o 'If U...+ others...planned that....then I didn't want to be there anyway.....!!!'
 - o 'I NEVA wanted U to be sad....left alone...but there was NOTHING I could do!!!...what the fuck could I do....i was in a hopeless situation.... I was so fucken frustrated'
 - o 'Goodbye 4eva....I'll always luv U.....'
- iii. Returned a test to student 2, having corrected the test and written 'I (heart) you' in red pencil in the right hand corner of the page.

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 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** 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 school 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:

1. Statement of the principal, dated 8 May 2007 (3 pages) **001-003**
 - 1 – Letter the principal to the Institute’s legal officer, dated 14 November 2006 (2 pages) **004-005**
 - 2 – Record of Interview, dated 8 November 2006 (5 pages) **006-010**
 - 3 – Email correspondence, dated 1 November 2006 to 4 November 2006 (1 page) **011**
 - 4 – Record of Interview with the teacher, dated 10 November 2006 (1 page) **012**
 - 5 – Letter the principal to parents, dated 13 November 2006 (1 page) **013**
2. Statement of student 1, dated 8 May 2007 (3 pages) **014-016**
3. Statement of student 2, dated 8 May 2007 (3 pages) **017-019**
 - 1 – Essay (1 page) **020**
 - 2 – Email correspondence, dated 1 November 2006 to 22 November 2006 (2 pages) **021-022**
 - 3 – Email correspondence, dated 30 December 2006 (1 pages) **023**
4. Statement of student 3, dated 8 May 2007 (2 pages) **024-025**
5. Correspondence with the teacher
 - Letter the Institute’s investigator to the teacher, dated 21 May 2007 (3 pages) **026-028**
 - Letter the teacher to the Institute’s investigator, dated 23 May 2007 (2 pages) **029-030**

The following exhibits were presented to the Panel:

- A. Facsimile from telecommunications provider 1 dated 12 November 2007
- B. Statement of the principal dated 8 May 2007 and attachments numbered 001 - 013
- C. Statement of student 1 dated 8 May 2007
- D. Statement of student 2 dated 8 May 2007 and attachments numbered **017 - 019**
- E. Emails to student 2 dated November and December 2006 numbered **021 – 023**
- F. Statement of student 3 dated 8 May 2007
- G. Australia Post – signature proof of receipt of Notice of Formal Hearing
- H. Telecommunications provider 2 material dated 9 November 2007 received by summons
- I. Facsimile from telecommunications provider 1 dated 15 November 2007

THE EVIDENCE

At the request of Counsel Assisting, the Panel closed the hearing pursuant to section 2.6.45(d) and (e) of the *Education and Training Reform Act 2001*. The orders were as follows:

1. The hearing into the serious misconduct and/or lack of fitness to teach of the teacher, a registered teacher, be closed to the public while the evidence of the following witnesses is being taken because of the intimate or personal nature of the evidence:

Student 2

Student 1

Student 3
2. Anything that may identify the above witnesses, including their names and the name of the school not be published or broadcast.

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

- The principal
- Student 3
- Student 1
- Student 2

The Principal

The principal provided to the Panel written (Exhibit B) and oral evidence which addressed the allegations and provided a context to enable the Panel to understand the circumstances surrounding the allegations. The principal informed the Panel that he had worked in the school which was a P-12 school of 500 students since 1989 and had been principal from 2002 – July 2007. The school's underlying philosophy was to educate children in the context of a religious world view. He explained that the teacher had been appointed to teach a language subject at the primary and secondary levels of the school at the beginning of 2005 on the recommendation of a teacher at the school. Previously the teacher had taught at school 1, school 2, school 3, school 4 and school 5. The teacher, he said, had worked overseas and his wife was of that particular ethnic background.

The principal characterised the teacher as an adequate teacher but one with weaknesses in both his personal maturity and his manner of relating to students. According to the principal, he lacked the proper authoritative role, especially on matters of student management. He wanted to be a friend to students rather than a leader. He had demonstrated this failing, the principal stated, on an interstate school mission trip with students. The teacher did not receive counselling for this perceived failing but the

principal believed it would have been addressed in the school's teacher appraisal program.

Before outlining the circumstances involving the allegations the principal informed the Panel of an incident in August 2006 involving the teacher regarding allegations of improper sexual advances to a fellow teacher. This female teacher informed the principal that the teacher had wanted to visit her at home when her husband was absent, had sent her emails which were suggestive and gave her unwanted attention. In a subsequent interview the teacher made a full admission of his improper feelings and actions, expressed remorse about his behaviour and stated that he had told his wife. The principal then put the teacher under a disciplinary action which involved counselling, close supervision of accountability with the Middle School Coordinator, an apology to the teacher and her husband and a weekly meeting to discuss compliance.

The principal first became aware of the circumstances involving the allegations before the Panel when the school chaplain telephoned him at home on Friday 3rd November 2006. The chaplain had been approached by one of the school's students who also attended his youth group. The student was troubled by what she had heard at school about the teacher's behaviour and had shared her concerns with him. The chaplain was sufficiently concerned to immediately relay to the principal the alleged statements that the teacher had made to some girls at the school and concerns the student had about the teacher's relationship with other students. On the following Monday, the principal requested his Head of Senior School to speak with a number of people in order to ascertain the truth of the concerns raised by the student to the chaplain. The Head subsequently advised the principal that there were some issues of real concern.

The principal then initiated a series of interviews with student 1, student 2 and student 3 and the teacher (record of interviews contained in Exhibit B).

In his interview with student 1, the principal was informed that the teacher allowed students to load sexually explicit music onto his MP3 player and to play it in class through his computer, of a conversation between student 1 and the teacher which occurred on the afternoon of Friday 27 October 2006 after a language class, student 1's subsequent behaviour, and an email exchange received by student 2 in the name of the (unknown) sender containing the words, 'WHY? Do you hate me ... Promise U wont tell others & betray me....Did you deliberately want to bring me down?'

In commenting on the fact of a teacher allowing students to download and play explicitly sexual music in class on his MP3 player and computer, the principal stated that he believed such behaviour to exhibit a total abrogation of a teacher's professional role as a moral guide and mentor to young people. Apart from the content of the music being morally dubious and totally outside the school's religious perspective, for a teacher to tacitly accede to the appropriateness of the music would be confusing to young people and could cause personal and psychological damage. The appropriate professional course of action for a teacher in this situation, the principal noted, would have been to interview the students in a pastoral context about their behaviour in listening to and downloading such music, and to discuss that behaviour with their parents.

Regarding the conversation which occurred on 27 October 2006 the principal stated that he requested student 1 to be very clear regarding the actual words used by the teacher.

Student 1 reported the conversation as follows: the teacher had told her he needed to tell her something but that she might get scared if he told her. He warned her that 'you can't tell anyone.' Student 1 then got annoyed and made the teacher tell her what he wanted to say. He then said 'I want you.' Student 1 said she thought it was a joke and told the teacher the comment was not funny. The teacher repeated 'I like you' a number of times and also said 'I'm attracted to you.' He then asked 'Are you scared of me?' Student 1 replied 'You can't expect me to be happy after hearing that.' The teacher then said, 'You're not going to tell anyone are you?' and continued with 'I'm scared that I can't teach properly any more because I'm getting too distracted.' The teacher then asked student 1 'What's your opinion of me?' student 1 reacted with a smirk and the teacher said 'It's because of the music you put on my player.' Student 1 replied 'I don't even listen to that R and B sex music,' and added 'my brother is the one who puts the music on the player, so you should like him.' She then said 'If you don't like this music, take it off,' to which the teacher replied 'But I like this music.' Student 1 then asked 'Does your wife know you listen to this music?' to which the teacher replied 'I don't let her know I have it.' Student 1 then asked 'Is it just me you like in the class?' to which the teacher replied 'You and student 2 because you are the ones who put the music on the player.' At this point student 1 said she walked out of the room. Since the incident, she informed the Principal, she had tried to avoid interaction with the teacher.

Regarding the email sent to student 2 which is the basis of Allegation 1b(i), student 1 said that student 2 did not know for sure that the email was from the teacher.

In commenting on the tenor and substance of the alleged conversation the principal made the following observations. The teacher failed in his responsibilities by condoning the behaviour of students in bringing sexually explicit materials to school. More importantly, the implications in the alleged conversation of a desired sexual relationship with the student violated the ethical nature of the teaching profession and involved stepping over the moral and ethical boundaries of the teacher-student relationship to a huge degree.

The principal indicated that in his interview with student 2, initially she was reluctant and nervous about the whole process because she was in, as he put it, 'uncharted waters' regarding possible reprisals. She definitely did not want her parents to be informed. However, he found her to be cooperative and honest in her responses. In her interview student 2 informed the principal that the teacher had been lending out his MP3 player for about three to four weeks and she had downloaded from the Internet songs with titles such as 'Sex is good' and 'Play with it'. She said she had asked the teacher for the player to allow her to remove the songs but he replied, 'Hey, I really like the music you put in.'

Student 2 also said that, although the teacher liked all the girls of a particular ethnic background in the class, most of the conversations were between student 1 and the

teacher. She also stated that she only knew about the conversation between the teacher and student 1 which occurred on 27 October because student 1 told her.

Student 2 informed the principal that she had used the teacher's laptop to log on to the MSN site which the teacher had viewed. She also said she changed her email address in case the teacher had noted it.

During the interview the principal asked student 2 if she could log on to her site so that the email exchange referred to in Allegation 1b(i) could be viewed in its entirety. The first email dated 1 November 2006 was a random email. As there was a reference to surfing and the teacher liked surfing student 2 assumed it was from him but she could not be sure.

The Panel received documentation (Exhibit A) from telecommunications provider 1 stating that the username for the IP address which was the source of the emails sent as email address 1 was the teacher's username.

The principal considered the emails to be wrong in the extreme. They revealed no sign of the appropriate exercise of authority in a teacher-student relationship and could be viewed as possible intimidation of the student by the teacher to remain silent. In particular the accusation implied in the email dated 22/11/06, 'Did you deliberately want to bring me down?' revealed an 'extraordinary level of intimidation' because it suggested that student had unduly influenced the school's actions in relation to the teacher.

The principal also enquired about the test administered in class by the teacher referred to in Allegation 1b(iii). Student 2 stated that the teacher always favoured her. It was only because of a suggestion of student 2 that the teacher had pencilled the remark 'I heart U' on her test.

The principal interviewed student 3 who informed him that in the language class the teacher seemed to favour the girls of a particular ethnic background. He did not tell them off, he let them get away with things, and let them borrow his MP3 player. She said student 1 and student 2 put music into the teacher's player which 'affects' him sexually. The principal asked if student 3 was aware of the conversation between the teacher and student 1 on Friday 27 October after the language class. Student 3 stated that student 1 had told her on the following Monday that the teacher had told her 'I like you' and that had she walked out of the classroom.

The principal enquired as to whether student 3 had noticed anything different between student 1 and student 2 on the one hand and the teacher on the other after the incident. She indicated that she noticed they were not talking to each other.

Student 3 stated that on 2 November 2006, after school, the teacher asked her if she knew where his MP3 player was and she then took the opportunity to ask him what had happened between him and student 1. The teacher then pulled her away from another student (student 4) to talk personally to her about the whereabouts of his MP3 player.

He stated that student 1 wanted to borrow it and that she and student 2 had been rude to him and were not coming to school because of some people.

Student 4 told the teacher that he needed to talk to someone instead of keeping 'it' to himself. Student 3 also told him that student 1 and student 2 had been acting weird and if he knew anything about why he should tell them. Student 3 then said that before she went home the teacher approached her again and said she should not approach student 1 or student 2 to ask what was going on.

Student 3 said she had not believed student 1 at the start but after her conversations with the teacher she thought that there might be some truth to her story that the teacher liked her.

When asked by the principal about any further information that might be helpful, student 3 volunteered that the teacher found out student 2's email address through his laptop and may have sent her an email.

The principal interviewed the teacher on 10 November 2006 to establish his level of awareness of the seriousness of the issue as up to this point the principal only had the students' versions of the incidents. He began by raising the issue of the MP3 player and his conversation with student 1 and student 2. The teacher admitted that he had loaned his MP3 player to the students and had listened to their R and B sex music on it. He told the students 'I like the music' and that 'my wife was not aware of the sexual songs.' He had admitted to the students that he was distracted because of the sexual nature of the music and what it made him think of about them. He referred to a song about a girl masturbating. The teacher then admitted to saying to student 1 'I want you' and 'I am attracted to you' and that this was referring to sexual desire. He admitted up front his attraction to the students and his special weakness for teenage girls of a particular ethnic background. He felt he should not be teaching and tendered his resignation.

The principal stated that the rest of the interview was of a pastoral nature regarding the teacher's financial arrangements, his future career prospects and the urgent need for him to seek the right kind of help, that is, proper and stronger counselling in contrast to that which he engaged in over the incident with the female teacher. The principal indicated that the teacher expressed genuine concern for the effects of his behaviour on his wife and some concern for its effects on the students concerned, though the principal expressed scepticism about the sincerity of this remorse.

The principal was asked to consider the tenor and substance of the teacher's letter to the Institute (Attachment F dated 23/5/2007). The principal stated that he found the following passage a 'scary accusation':

These students set me up, tried to seduce my will to get their own way, and then I make some inappropriate comment. They asked me to say the 'F' word, which I declined. Prior to the very regrettable 'I want you comment' student 1 had remarked " c'mon, out with it.' In hindsight, it is clear that they were determined to frame me and provoke me to say something inappropriate. Numerous words and actions on their behalf were extremely provocative.

The principal found such accusations scary because they indicated that the teacher's first consideration was for his own feelings. His attitude toward the students was self-righteous and without concern for their well being. His response failed to consider the difficult nature of the students' backgrounds and their emotional and psychological problems. The principal stated he believed this, even in the light of his willingness to take the teacher's accusation regarding the students' seductive behaviour seriously. On the basis of his extensive interviews with the students and others he rejected such an accusation. He also denied that he had told the teacher that the students in question were 'screwed in the head'. It was simply not the kind of language he used when talking about students' emotional and behavioural problems. On another point, he questioned the teacher's veracity. He doubted if the teacher had raised in his counselling and support group related to the incident with the female teacher, the 'difficult' situation he was having with student 1 and student 2.

Overall the principal characterised the tenor of the teacher's letter as defensive by seeking to lay the blame elsewhere for his actions.

Student 1

The Panel received written (Exhibit C) and oral evidence from student 1. She explained that she had been a member of the teacher's language class. There were a small number of students in the class which was a really chatty class where it was possible to 'bludge through'. Several students in the class complained that the teacher favoured girls of a particular ethnic background like herself even though they did not do much work.

Student 1 explained that she and student 2 were the first to borrow the teacher's MP3 player to use in and out of the classroom. The music did not have to be downloaded to the teacher's computer. It was only saved and played through his computer in the classroom if he wanted to do so for the whole class to hear. The students believed that the teacher liked the music because he liked to show off his hip hop dancing. On one occasion, student 1 said, when a group of female students were practising dancing in the Art room the teacher came in, taught the girls some dances and 'just hung around after.'

Student 1 said that she and student 2 pressed the teacher many times to remove their music from his MP3 player because they were scared that some other teachers would hear it and think that they put it there on purpose, but the teacher insisted on keeping it on his MP3 player.

Student 1 described the incident and conversation which occurred after the language class on Friday 27 October 2006. Her account mirrored the detailed account she gave to the principal in her interview with him. She also explained that one day the teacher told her and student 2 that there was inappropriate music on his MP3 player. Student 2 apologised but student 1 said she had not put that kind of music (R'n B) on his player. They had asked him to take it off but he said he did not mind the music because he liked the way the music goes.

Student 1 said she had concluded the conversation with the teacher by saying that he was old enough to fix the problem himself and that he should not put it on her, and then she just walked out of the classroom. Student 1 said she avoided the teacher from then on, skipping his class and running from him if she saw him in the halls, even though she had been told he was looking for her. She felt that going back into the language class would be really uncomfortable for the teacher and 'make his life hell.' She said the conversation had made her feel 'kind of guilty'. She knew the teacher had a wife and two 'really nice little kids' and she 'felt for them.'

Student 1 said that she told several friends what the teacher had said to her after which they 'kind of played a game with him as to where (his player) had got to'. He told the students in the class that he 'had to sort things out' and that he needed to take a break from 'people' and 'school' and 'students'. He also told them that she and student 2 were mad at him, and that student 2 was giving him attitude.

Student 1 said that the incident had affected her view about teachers, that they were people who are capable of thinking and feeling things without students knowing about it. She had previously thought of the teacher as a bit of a 'try hard' who liked being 'buddies' with students. After the incident she thought he was 'scheming' and 'paranoid'.

Student 1 also stated in her written evidence that she had been with student 2 when the latter had shown the Head of Senior School an email to her from an unknown person but with an address relating to surfing. She and student 2 thought the email was from the teacher because he was in to surfing. The final email (30/12/06) came from a different address but had the same tone. Student 1 said that student 2 had wondered how the teacher might have got her email address but she remembered that she had signed into her MSN messenger in his presence.

Student 2

Student 2 gave written (Exhibit D) and oral evidence to the Panel. She explained that she was no longer at the school in question having transferred to another school in the area. She had been a member of the teacher's language class in 2005 and 2006. She considered herself to be a good student in 2005. She did not consider the 2006 class to be a 'proper class' and, along with the other students, she mucked around. She believed that the girls of a particular ethnic background like herself got away with things more than the other kids, such as being allowed to play music through the teacher's computer. On one occasion she said she logged on to her MSN on the teacher's laptop but quickly logged off. Realising that MSN automatically saves the last user she attempted to change her email address to a fake one to prevent the teacher seeing hers.

Student 2 explained that the teacher originally loaned her his MP3 player because she had lost hers and was feeling sad at the time. Over two weeks she downloaded about 200 songs on to the player but not just R and B sex music. The list included rock, slow punk, R and B and techno. When she returned the MP3 player to the teacher she forgot to delete the songs. Shortly after while walking along the hall he said to her 'I really like

your music.’ As there were some songs that were unreligious she asked if she could have it back so she could delete them. He repeated that he really liked them and that she didn’t need to delete them, then walked off. After that, in class student 2 felt the teacher showed even more favouritism to herself and student 1. He would ask to talk to them together after class, which they did.

In regard to the email exchange which is the basis of Allegation 1b(i) student 2 explained that on 1 November 2006 she received an email from an unknown sender with the address, email address 1. She hardly ever received emails and thought it was from the teacher because he liked water sports and had shown her videos of himself engaged in water sport. Also the name was a name only her female school friends called her, and the teacher heard them calling her that in class. She believes she received the first and second emails after student 1 had told her about her conversation with the teacher on 27 October 2006 after which student 1’s friends, including herself, had been really harsh to the teacher in class. Student 2 stated that the third email (22/11/06) had left her really confused. She felt it might have been sent because she had told the teachers about the message (on her test) and the music on the MP3 player, though she had not been thinking too much about betraying him at the time.

In regard to the email dated 30 December 2006 which is the basis of Allegation 1b(ii) student 2 stated that she thought that it had also come from the teacher even though it was from a different email address. The girl referred to in the email was a girl in the language class and what was being said ‘just connected somehow’ with the previous emails and what had happened at school.

The Panel received documentation from telecommunications provider 2 (Exhibit H) which established the user address for the email dated 30 December 2006 as user address 1 and the billing address as person 2, address 1.

In regard to the returned test which is the basis of Allegation 1b(iii) student 2 explained that the test was done in class, marked by the teacher and quickly returned. The returned test contained a pencilled love ‘note’ consisting of a heart and the message ‘I love you’ in symbols. Student 2 immediately assumed it had been written/drawn by the teacher because of his character. She said he was the ‘type of guy who would do random stuff’ like water sports and break dancing. She thought he was still holding on to his ‘younger era’. The note made her feel ‘weirded out’ and to think that it was not normal for a teacher to write ‘I love you’.

Student 3

Student 3 gave written (Exhibit F) and oral evidence to the Panel. She described herself as quiet at times but easily distracted and the language class as a ‘fun’ class in which they were allowed to watch movies, do research on computers and play music as background while they worked’. She considered herself a friend of student 1 who would confide in her. She said that student 1 was having difficulties with her family and had a tendency to exaggerate.

Student 3 believed that the teacher favoured the girls of a particular ethnic background in the class and was very lenient with them, especially student 1. He let them off on things, like being too noisy, that he wouldn't let other students get away with.

Student 3 described an incident which occurred one Friday in late October 2006. The language class was dismissed for recess but student 1 stayed back. After recess student 1 did not attend class and the teacher reported her absence to the office. Student 3 was later told that student 1 was found crying in the toilet but did not see this herself. The following Monday student 1 confided in her that the teacher had asked her to stay back after the class on the previous Friday and he had confessed to her that he had feelings for her, that he liked her. Student 3 stated that she thought student 1 was joking and making something up so she said 'whatever'. Student 1, in response, said she was serious. During assembly student 3 said that student 1 had asked her if the teacher was looking at her and she had replied, 'Yea, for a bit.' Student 1 then told her that she had felt weird about what the teacher had said to her and just walked out of the classroom.

Student 3 said that the teacher was absent from their next language class. On the next day when she and a friend (student 4) questioned him about his absence he replied that he had different things that he had to solve. Later in the week the teacher told student 3 and student 4 that student 1 and student 2 were acting weird around him. In response, they told him that he should see school people about it.

Student 3 said that although she knew student 1 had a tendency to exaggerate she believed her when she told her what the teacher had said to her because of what the teacher had said to herself and student 4.

DISCUSSION OF EVIDENCE

In discussing the evidence the Panel considered both the specific details of the allegations and the contexts in which they occurred. In doing so the Panel was assisted considerably by the clarity and thoroughness of the principal's investigation of the teacher's behaviour, and the measured and considered evaluations he gave as to the degree of lack of professionalism in each of the allegations. Similarly, the Panel was considerably assisted by the forthrightness, openness and frankness of the students in discussing issues of a delicate and sensitive nature. It took considerable personal courage to do so. The panel found the evidence of the three students to be clear and compelling. Equally important, the evidence provided by the three students was corroborating. All three gave a consistent account of the lax and permissive atmosphere in the teacher's class, his favouring of the girls of a particular ethnic background in the class, the students' use of his MP3 player and the playing of inappropriate music through his computer. While student 2 and student 3 were not present at the conversation between the teacher and student 1 they gave a similar account of the consequences of that conversation in the visible distress expressed by student 1 and the teacher's agitated behaviour in the days following.

A consideration of Allegation 1(a) required the Panel to make a decision about whose version of the incident to believe: the teacher's or student 1's. The teacher admitted in

his letter to parts of the conversation. He stated he did say 'I want you' and admitted that it had sexual connotations. He also admitted to saying that the music downloaded by the students onto his MP3 player had an effect on him. He denied saying the rest which forms the basis of student 1's version of the conversation. The Panel found student 1's version more plausible. A conversation took place, not a single remark and the tenor of the comments alluded to in the allegation have a mix of insinuating intimacy and flirtatious innuendo consistent with the fact that the teacher was propositioning Student 1. Furthermore that action was compounded by the fact that it placed a vulnerable student in position to keep secret something which is wrong.

In regard to Allegation 1b(i) the documentation from telecommunications provider 1 establishes conclusively that email address 1 emanated from the teacher's username.. Student 2's suspicion that the teacher was the author of the emails was well founded. Furthermore the content, timing and the chain of communication in the emails paralleled the way events were unfolding at the school and the flurry of activity the teacher was engaged in to find out which students knew exactly what, and his attempts to ensure the students' silence on the matter.

In regard to Allegation 1b(ii) the Panel had difficulty in accepting that this was in fact sent by the teacher. The documentation provided by telecommunications provider 2 gave the billing name as person 2. While the Panel was sympathetic to student 2's rationale for connecting this email with previous emails it would seem more plausible that it was sent by someone who knew of the events and incidents at the school and was, in this case, making mischief.

In regard to Allegation 1b(iii) the Panel believed it was entirely possible for the teacher to have penned the love 'note' on the returned test. Student 2's estimation of his character suggested he was capable of seeing such as a flippant, frivolous gesture, oblivious to the foolishness and the irresponsibility of his actions and the consequences which might ensue from them.

FINDINGS UNDER SECTION 2.6.46 OF THE ACT:

The Panel finds on the balance of probabilities the following:

- Allegation 1a is proved
- Allegation 1b(i) is proved
- Allegation 1b(ii) is not proved
- Allegation 1b(iii) is proved.

Consequently the Panel finds that in relation to Allegations 1a and 1b(i) the teacher is guilty of serious misconduct and is deemed unfit to teach. In relation to Allegation 1b(iii) the Panel considers it an act of extreme foolishness but not of sufficient weight to be deemed serious misconduct.

In making these judgments the Panel was mindful of the importance of the following:

- The fact that 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 school 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).

The serious misconduct proven in Allegation 1a and Allegation 1b(i) contain elements of improper behaviour, the abuse of teacher authority, the betrayal of the trust implicit in the teacher pupil relationship, harassment, intimidation and the exploitation of vulnerable young people with potentially serious effects for their emotional and psychological development. As the principal indicated in his evidence, the boundaries of ethical and professional behaviour expected of a teacher were transgressed again and again to the utmost degree. The conversation at the heart of Allegation 1a was a compelling and chilling situation in which a student was forced to face alone the full weight of a teacher's misuse of his authority. It involved the sexual propositioning and harassment of a child under the teacher's care, compounded by an attempt to swear that child to secrecy about such action. The series of emails which are the substance of Allegation 1b(i) continued that pattern of intimidation in which the teacher sought to exploit the atmosphere of lax familiarity and 'friendship' he had cultivated with his students, at the expense of exercising a properly authoritative leadership with them.

The Panel found the teacher's response to the allegations in his letter (23 May 2007), in the words of Counsel Assisting, 'extremely troubling'. While the Panel gave him credit for his frank admission, both in the letter and in his interview with the principal, of his sexual attraction to and propositioning of student 1, there is no recognition of the harm he has done to either her or student 2, both of whom spoke of their wariness about teachers' seemingly good intentions in the future. Instead he blames them for his predicament and presents himself as the victim of 'scheming teenagers' who deliberately set out to seduce him against his will. In the process he shows no awareness of his culpability in allowing the development of lax and permissive

classroom behaviours which deluded him into thinking that the conversation with student 1 would be viewed favourably by her. The contrast of his lack of remorse about his behaviour with the response of student 1 is significant. She felt both guilt and sympathy for the teacher's wife and children. Indeed, when both responses are compared, hers is the more adult one.

While the teacher claims he has moved on with his life and is continuing counselling with his pastoral counselling support group, the substance of the letter reveals that there is no real evidence that he has achieved, or is seeking to achieve, significant insight into his behaviour and the consequences of that behaviour. Nor is there any evidence that he has expressed genuine remorse for the effect of his actions on the students within his care. Until such insight and remorse are evident and demonstrably acted upon he remains unfit to teach.

DETERMINATION UNDER SECTION 2.6.46 (2) OF THE ACT:

The Panel decided to cancel the registration of the teacher from the date of this determination, 15 November 2007.



TERRY HAYES, CHAIRPERSON



**per ,
ANNE FARRELLY, REGISTERED TEACHER**



**per ,
STEWART CHEAL, REGISTERED TEACHER**