

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 079

REGISTERED TEACHER: SWS

PANEL MEMBERS: Terry Hayes, Chairperson
Drew Hopkins, Registered Teacher
Kevin Moloney, Registered Teacher

ATTENDANCE: The teacher did not attend the Formal Hearing
Ms Melinda Richards Counsel Assisting with Ms C Sherman instructing

DATE OF HEARING: 20 November 2008

DETERMINATION UNDER SECTION 2.6.46(2) OF THE *EDUCATION AND TRAINING REFORM ACT 2006*:

On 28th November 2008 the Panel found that the teacher was not guilty of serious misconduct.

REASONS

BACKGROUND

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

On 4 June 2007, the Institute received notice from the teacher that he no longer wished to be registered as a teacher with the Institute, effective from 4 June 2007.

By letter dated 7 June 2007, the employer notified the Institute that it had taken action in relation to the alleged serious misconduct and/or fitness to teach of the teacher. The teacher resigned from the employer with effect 1 June 2007.

On 17 October 2007, the matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute and under section 2.6.47 of the *Education and Training Reform Act 2006* (the Act), the Committee decided that the teacher should be treated as if he is a registered teacher and referred the matter for investigation.

The Institute arranged for an investigation of the allegations and on 22 July 2008, the Committee considered the investigation report and determined to refer the matter to a formal hearing.

A Notice of Formal Hearing dated 10 October 2008 was served upon the teacher by Registered Post on 13 October 2008.

DOCUMENTS CONSIDERED

The Panel was provided with the following documentary evidence:

1. Letter the employer to the Victorian Institute of Teaching dated 7 July 2007 (2 pages) **001 - 002**
2. Letter the teacher to the Institute, dated 4 June 2007 (1 page) **003**
3. The teacher - Registration Details (4 pages) **004 - 007**
4. (pages **008 - 011** removed)
5. Document entitled 'Chronology' (2 pages) **012 - 013**
6. Notice of Investigation letter the Institute to the teacher, dated 16 November 2007 (2 pages) **014 - 015**

7. Witness statement of the principal dated December 2007 (3 pages)
016 - 018
- Attachment 1 – Letter Victoria Police Officer to the employer dated 25 September 2006 attaching SMS transcript (3 pages) **019 - 021**
 - Attachment 2.1 – Letter the employer to the principal, dated 26 September 2006 (1 page) **022**
 - Attachment 2.2 – Letter the employer to the teacher dated 26 September 2006 (2 pages) **023 - 024**
 - Attachment 3 – Incident Report, various dates (2 pages) **025 – 026**
 - Attachment 4 – Letter the teacher to the employer, received 4 October 2006 (1 page) **027**
 - Attachment 5 – Notes of Interview with student 1 and student 2 (2 page) **028 - 029**
 - Attachment 6 – Letter the employer to the teacher dated 20 October 2006 (1 page) **030**
 - Attachment 7 – Letter the employer to the principal dated 23 October 2006 (1 page) **031**
 - Attachment 8 – Letter the teacher to the employer dated 27 October 2006 (1 page) **032**
 - Attachment 9 – Letter the employer to the teacher dated 31 October 2006 (1 page) **033**
 - Attachment 10 – Notes of Interview with student 1 (undated) (2 pages) **034 - 035**
 - Attachment 11 – Notes of Interview with student 3 (undated) (2 pages) **036 - 037**
 - Attachment 12 – Notes of Interview with student 2 dated 7 December 2006 (2 pages) **038 - 039**
 - Attachment 13 – Letter (unsigned) the principal to the teacher dated 21 December 2008 (13 pages) **040 - 052**
 - Attachment 14 – Response, the teacher dated 29 January 2007 (6 pages) **053 - 058**
 - Attachment 15 – Notes of Interview with the teacher dated 26 February 2007 (3 pages) **059 - 061**
 - Attachment 16 – Investigator’s Report (undated) (7 pages) **062 - 068**
 - Attachment 17.1 – Letter the principal to the teacher dated 17 April 2007 (1 page) **069**
 - Attachment 17.2 – Letter the principal to the employer dated 17 April 2007 (1 page) **070**
 - Attachment 18.1 – Letter the teacher to the employer dated 19 April 2007 (1 page) **071**
 - Attachment 18.2 – Letter the teacher to the employer dated 19 April 2007 (1 page) **072**
 - Attachment 19 – Letter the employer to the teacher dated 24 April 2007 (1 page) **073**
 - Attachment 20 – Letter the employer to the teacher dated 23 May 2007 (12 pages) **074 - 085**

- Attachment 21 – Letter the teacher to the principal dated 1 June 2007 (1 page) **086**
 - Attachment 22 – Letter the teacher dated 4 June 2007 (1 pages) **087**
 - Attachment 23– Letter the employer to the teacher dated 6 June 2007 (2 pages) **088 - 089**
 - Attachment 24.1 – Letter the employer to the Institute dated 7 June 2007 (2 pages) **090 - 091**
 - Attachment 24.2 – Letter the employer to the Institute dated 20 September 2007 (1 page) **092**
- 8.** Witness statement of student 1 dated January 2008 (2 pages) **093 - 094**
- 9.** Witness statement of student 3 dated June 2008 (1 page) **095**
- 10.** Notice of Formal Hearing dated 10 October 2008.

The following exhibits were tendered at the formal hearing:

- A.** Letter from the Union, dated 23 October 2008
- C.** Witness Statement of the principal dated December 2007
- D.** Witness Statement of student 1 dated January 2008
- E.** Witness Statement of student 3 dated June 2008

THE EVIDENCE

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

In 2006, whilst employed as a registered teacher at the school, the teacher:

1. Failed to maintain a professional relationship with Year 10 female students, student 1, student 2 and student 3, in that:
 - a. During 2006, spent time with students 1, 2 and 3 during recess, lunchtime and after school.
 - b. During around August and September 2006, referred to student 1 by the nickname 'P,' student 2 by the nickname 'T' and student 3 by the nickname 'Pi' (and assigned himself the nickname 'R') in conversations and/or text messages with them.

2. Failed to maintain a professional relationship with student 1 in that:
 - a. During 2006, telephoned student 1 while she was staying with her grandmother in regional Victoria and discussed her personal family issues.
 - b. During 2006 and prior to 19 September 2006, had conversations with student 1 and/or sent her SMS messages via his mobile telephone of a personal nature including about:
 - i. Her personal family issues; and
 - ii. Problems he was having with his mother.
 - c. During term 3 school holidays, on or around Wednesday 19 September 2006, between around 4.20am and 4.52am sent student 1 inappropriate SMS messages via his mobile telephone number, including:
 - i. 'Silly, u couldn't lose us as friends, we won't let u!' Friendship is a 2 way thing. And 2 many people like u! Think that is gonna change quickly? No way!'
 - ii. 'Xoxox R'
 - iii. 'Hmmm wat sort of game would u lick to play? I wonder... Kiss n stroke is fun... Lick n poke is 2...E way lick is fant! Wat u think?'
 - iv. 'Hmmm some sort of gag would b the way to go ha ha spanking or just stuff n your mouth with my Snigger wat do u think? Should keep even u quiet , '
 - v. 'might leave stretch marks tho'
 - vi. 'Of course, R love P, and has a big carrot! Want some? Good night, sweaty dreams Xoxo'
 - vii. 'I'll b doing something similar I think..... Ur too good 4 me! Find ur selves boyfriends quick! Love u Xoxox'
3. Failed to maintain a professional relationship with student 2 in that:
 - a. During 2006:
 - i. After having provided student 2 with his mobile telephone number, sent her SMS messages of a personal nature including giving her advice about her personal life.
 - ii. On a few occasions, hugged student 2 at school, including when she was in an emotional state.
4. Failed to maintain a professional relationship with student 3 in that:
 - a. During 2006, sent SMS messages via his mobile telephone phone to Student 3 of a personal nature including:
 - i. About student 1 being upset.
 - ii. About his concern for student 2.
 - iii. Asking student 3 to keep an eye on student 2.

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

- The Principal
- Student 1
- Student 3

The principal gave written and verbal evidence under oath.

The principal is the principal of the school and took up her position there in mid 2006. She has a range of qualifications in computer and special education and educational administration. Since 1980 she has taught in a range of special primary and secondary schools. She chose to apply for the school because it is a P-12 school and she was 'passionate' about working in an education institution that addressed schooling from Prep to Year 12.

The principal stated that the school had 180 staff and 1900 students. It drew from a low socio economic area and has many students with both learning difficulties and difficult family circumstances.

The principal stated that one of her intentions was to reform the pastoral care/welfare culture of the school which she described as 'fairly laissez faire' before her appointment. She believed it was important to set up structures and processes which enabled the teaching staff to teach and the welfare personnel to deal with student welfare issues.

The principal stated that she believed the teacher to be a genuine, decent, caring and compassionate teacher but with a poor understanding of professional boundaries. She also considered him to be a good KLA administrator as well as teacher, being a bit more right brain than other KLA coordinators she had experienced.

The principal informed the Panel of the chronology of events related to the incidents referred to in the allegations and the steps she had undertaken as both principal and employer appointed investigator.

The principal stated that on 22 September 2006 police had received a report from student 1's mother that the teacher had been sending inappropriate messages to student 1. The police had subsequently informed the employer. The messages which had been sent to student 1's mobile phone referred to student 1 and two other students, student 2 and student 3 by pet names. The principal stated that on 26 September she was informed by a senior officer of the employer that he had suspended the teacher from duty.

The principal stated that on 2 October 2006 she had met with student 1 and her mother and the school psychologist. Student 1's mother had been upset by the nature of the messages and had sought welfare assistance from the school for student 1. At that meeting student 1 had displayed 'mixed emotions' about the inappropriate messages and said that the teacher had been a supportive teacher to her.

The principal stated that on 4 October 2006 student 2 had spoken to the school psychologist and had indicated that the teacher was a supportive teacher who had helped

her. The principal stated that on 17 October 2006 student 1 and student 2 had attended a counselling session with the school psychologist and expressed their disappointment at the teacher's suspension as well as their concerns for their loss of his support. The two students had met with the school psychologist again on 1 November and the school psychologist had observed that they were adjusting to their normal routine.

The principal stated that the teacher had phoned her during the third term break to state that he had 'made a mistake'. The principal said she had found the conversation ambiguous as the teacher intimated he had been talking about a disagreement he had had with parents and family, not with students. There had been no mention of sexually explicit text messages. She stated that she had informed the teacher that she would talk to him when school resumed. She was subsequently contacted by the region about the complaint about the teacher. The principal also stated that she was aware that the employer had received a written statement from the teacher on 4 October 2006 in which he stated that he thought an initial text message he had received on 19 September was a prank and he had responded in like manner. The principal also stated that she was aware that the teacher had written to the employer on 27 October 2006 requesting that the suspension from duty to be lifted and expressing regret for his actions.

The principal stated that she had conducted preliminary interviews with student 1 and student 2 and, after she was appointed the investigator by the employer, had formally interviewed the three students individually in the presence of the middle school assistant principal.

The principal stated that she provided the teacher with a Notice of Allegations on 21 December 2006 and the teacher provided her on 29 January with a written response to the Notice. She stated that she had then interviewed the teacher on 26 February 2007. The principal stated that in March 2007 she had prepared a report of her investigation in which she found the allegations to be substantiated. In response to questioning from Counsel Assisting, the principal stated that she believed the teacher's relationship with the students was inappropriate. In particular she believed his talking to them about self harm and discussing his own issues with self harm, bordered on counselling when he was not qualified to do so. She expressed her concerns that he had continued to talk to the students even after he had encouraged them to see the school counsellors.

The principal described the reactions within the school community that occurred following the teacher's removal from teaching. The students involved were worried about getting him in to trouble. Several families, whose students he had taught, liked him and expressed concern about his removal. There had been a mixed reaction from staff: some staff members had been upset; others indicated they were not particularly surprised by what had occurred. The principal said there had been a lot of intrigue and rumours at the time and she had called a meeting of staff to put an end to such.

Student 1 is a Year 12 student at the school. She is currently completing her VCE studies. Student 1 started at the school in Year 10, having previously been at school 1 and school 2. She had moved to the school because 'her dad had essentially kicked her out' and she had been forced to go and live with her mother. Her mother expected her to look after her brother and sister.

Student 1 stated that the teacher had been her teacher in Year 10. She said that she found the teacher friendly and personable in that he seemed to know all the students and seemed to want to get to know them. This was very different from her experiences at her previous schools. Student 1 stated that on more than one occasion she had talked to the teacher about personal family issues she was dealing with and he had talked about problems he had had with his mother and about his son. Student 1 described these conversations as 'just friendly chats'. She said that the teacher had encouraged her to open up and share her thoughts with student 2 and student 3.

Student 1 stated that she and her friends, student 2 and student 3 gave one another nicknames based on characters in a book. Student 2 was 'T', student 3 was 'Pi' and she was 'P'. Student 1 said that this was a joke that had begun before the third term holidays but she could not remember how or why the nicknames were assigned. Student 1 stated that she and her friends used to spend lunchtime in a classroom supervised by the teacher in which all students were allowed, and he picked up on the nicknames she and her friends were using. Student 1 said that the teacher had assigned himself the nickname, 'R'. She stated that the teacher would use the nicknames during the lunchtime social times as a joke.

Student 1 stated that on one occasion in Term 3 2006 during a class she had been upset about something and the teacher had loaned her his iPod which contained music that she liked. She said that the teacher played music during his classes and allowed students to load music on to his computer and iPod. Student 1 stated that while she had the teacher's iPod she took his stored mobile number from it because student 2 and student 3 had it and she wanted it as well. She stated that she did not know how they got the teacher's number.

Student 1 stated that on or around 19 September during the first week of the school holidays she had sent a phone text message to the teacher whom she believed was on holidays interstate. She stated that somewhere between 8pm and 11pm she sent him a message about her thoughts that she did not seem to keep friends for too long. Student 1 stated that she was not sleeping very well and was aware that she received a text message back from the teacher about 4.30 am. She said that over the next half hour or so she and the teacher exchanged several text messages. Student 1 stated that at the time she thought the teacher's text messages were a joke but in retrospect she now realized that they were inappropriate. She said that she did not recall receiving an apology from the teacher later in the day. She stated that she now believed that her text messaging the teacher was very silly.

Student 1 stated that she had exchanged several text messages with the teacher a few times before 19 September but none of the messages he had sent back were inappropriate or used inappropriate language. Student 1 also said that the teacher had telephoned her once some time in 2006 when she was staying with her grandmother in regional Victoria and they talked about family matters that were concerning her.

Student 1 said that she had no idea if the teacher's text messages with student 2 were inappropriate or not.

Student 1 stated that after the teacher had left the school she was teased and ridiculed by students at school and accused of having sex with the teacher. She said that one teacher had told the class what had happened.

Student 1 stated that she did not regret knowing the teacher as because of him she had made a friend of student 2 and student 3. She stated that the school was a school with lots of open classrooms and many students had close relationships with teachers.

Student 3 gave written and verbal evidence under affirmation. Student 3 began by amending her written statement. In paragraph 4 she stated that 'I remember (the teacher) assigned himself the name 'R'. She now wished that to read 'student 2 gave him the name R'.

Student 3 stated that she was a Year 12 student at the school currently completing her VCAL studies. She hoped to travel in 2009 then resume study. She said she was a Year 10 student at the school in 2006 having commenced there in 2005. Previously she had been home schooled.

Student 3 said the teacher had not been one of her subject teachers but she got to know him when she attended movie sessions which he conducted and supervised during lunchtimes. The teacher had offered 'a warm place to go on cold days'. She said she found the teacher to be a friendly teacher who seemed to be helpful to her friends, some of whom had been having problems with their home life. The teacher, she stated, never asked her any personal questions. She had friendly conversations with him about everyday things like music.

Student 3 stated that in Term 3 2006 she received a number of mobile phone text messages from the teacher, maybe two or three, in which he asked her to keep an eye on her friend student 2. Student 3 stated that the teacher said he was worried about student 2 but she could not remember what else he said. Student 3 said she did not know how the teacher obtained her mobile phone number and she did not have his number. She agreed to do as he requested. Consequently, whenever she texted him she did so to find out where he was in the school. She said that the teacher never used inappropriate language in the text messages he sent to her but student 1 had told her that he had sent some inappropriate messages to her. Student 3 stated she had not seen those messages.

Student 3 stated that at about this time student 2 had given herself, student 1 and her nicknames from a book. Student 2 was 'T', student 1 was 'P' and she was 'Pi'. Student 3 said it was just a silly joke and she could not remember how the names were used. Student 2 also gave the teacher the nickname 'R'.

Student 3 said she considered the teacher 'a good friend' and never felt he singled her out for special attention. The kind of personal relationship she had with him she also had with her Maths teacher in Year 12.

The teacher did not give written or verbal evidence under oath or affirmation. However he provided responses to the allegations in the following:

* letter sent to the employer, received on 4 October 2006

* letter to the employer dated 27 October 2006

* interview with the principal on 29 January 2007

* letter sent to the employer on 19 April 2007

The teacher stated that he had been a teacher since 1989 and had taught in a number of western suburbs schools. He had taught at the school for ten years. He also stated that he suffers from a depressive medical condition and provided the names of his doctor and clinical psychologist.

The teacher admitted that he had sent the offending text messages which were the basis of Allegation 2c and expressed a deep sense of shame and shock about the content of the messages. He stated that he only had a partial recall of the text messages as, when he sent them, he was in an inebriated state as a result of a pre-wedding family event and more than half asleep. He believed he had been responding to a prank message. He stated that he apologized to Student 1 by leaving a message on her phone the next day and had also contacted the Principal to inform her of what had happened. The teacher stated that he was a practicing Catholic and that his behaviour was an aberration. He stated he had 'never before sent messages like that to anyone'.

The teacher stated that he had not provided Student 1 with his mobile number but he had loaned her his iPod on an occasion when she was very upset about having to go to see her father. He said that she had been crying for most of the day and he had loaned her the iPod which had music that she liked on it to cheer her up. He had not loaned the iPod so that she could obtain his personal contacts.

The teacher admitted that he had provided student 2 with his personal mobile phone number, but he did so only after talking to the school psychologist, a school counsellor. He stated he offered his number to Student 2 only as a last resort. The teacher said he did not initiate contact with any students who had his mobile number nor was he the only teacher at the school who had dealt with similar issues involving students. He said that in student 2's case she did send him text messages to which he replied. The content involved her feelings of self worth. The teacher stated that, as a former self harmer, he had also explained to student 2 the power that self harm can have over people but that power can be controlled and managed. He had explained to student 2 what techniques he had used to prevent cutting, burning or puncturing himself.

The teacher stated that he recommended on several occasions to student 2 that she should seek professional advice and that he would have to inform the school counsellors, which he did. He had also said that, as a former self harmer, he would listen to her whenever she needed someone to listen. He had advised other students likewise in similar circumstances.

The teacher stated that he did receive a personal letter from student 2 and did reply to the letter in a similar vein to the advice he had offered in text messages. He stated that his intent always was to try to show her ways to avoid self harm.

The teacher stated that he did hug student 2 on a few occasions while at school but this occurred in public with others present. They were side to side, not front to front hugs. The teacher said he has never tried to form a romantic attachment with any of his students.

The teacher stated that he did engage in communication with student 3 who had text messaged him about the reasons as to why student 1 and student 2 seemed so upset. He stated that 'to the best of my recollection' the communication was about how upset student 1 had been about going to see her father. He said that he remembered replying that he agreed that it was sad that student 1's mother was in a terrible state about this and seemed to be taking her anger out on student 1, but it was something they should not talk about because it was an internal family matter. The teacher stated that he did not know how student 3 got his mobile number.

The teacher stated that he had for several years offered his classroom as a shelter for students during lunchtime. He said that he was also obliged to remain in the room to supervise because of the amount of equipment present. He stated that he could not recall a time when only the three students in question were there. There were always other students present and teachers were regular visitors to the room as well. The teacher said that he only saw the students in question on two occasions after school and these meetings occurred in the classroom. He said he had never seen or met any of them outside of school and would never have contemplated doing so.

The teacher said that the nicknames from the book had come about because the students had discovered he had an interest in the author's stories and illustrations. He said the nicknaming had started as innocent joke and he believed had remained so for himself and the students. He said there was no malice or other meaning intended in the nicknames.

The teacher stated that he had always had the welfare of his students in mind when dealing with the Year 10 students. He said his concern was with 'self harm and what happens to people that indulge it'. He said he had used his experiences of self harm and the way he had managed his own behaviour in the hope that it would give them options and choices that they would not have considered or were unaware of. He said that he had consulted with the school counsellor, the school psychologist and had repeatedly told the students to seek professional help.

DISCUSSION OF THE EVIDENCE

The Panel noted that the factual basis of the allegations was not disputed by the teacher. The Panel decided that the behaviour described in Allegation 2c was clearly inappropriate. The content of the text messages displayed an offensive puerile sexual innuendo clearly unworthy of a teacher. The teacher quickly recognised this, as shown in his apology the next day and in his attempt to contact the principal soon after to admit he

had made a mistake. The Panel also noted that the teacher did not initiate the communication but had responded to a text message from student 1. The Panel felt that the teacher's explanation that he was in an inebriated state was credible given the semi incoherent nature of the messages and the fact that they were sent in the early hours of the morning over a relatively brief period of time. The Panel also believed that the teacher's sense of shame and remorse had credibility as did the steps he took to address his behaviour with a consulting psychologist.

The Panel believed that many of the behaviours which formed the factual basis of the other allegations could be characterised as ones that the teacher had engaged in during his ten years of teaching at the school, believing them to be within the scope of what the principal called the school's 'fairly laissez affaire' approach to student welfare. These included: speaking to students outside class time, providing a friendly environment in his classroom during lunchtimes, allowing students access to his iPod and computer to listen to music, communicating with them through text messaging about their problems, using his own life experience as a way of illustrating approaches to those problems, asking another student to keep a watchful eye on her friends, and the occasional physical hug as a sign of concern or support. The principal may have been intent on changing a welfare culture that allowed these behaviours to occur, but there was no evidence produced to suggest that, in the relatively short time of her appointment, the teacher had been alerted to the fact that this was the case, or that he was warned that the form his friendships with students at school took was inappropriate.

The teacher certainly believed the above actions demonstrated that he had 'the welfare of (his) students in mind when dealing with the Year 10 Students' and the Panel was inclined to agree. There was no evidence to suggest that he was grooming the three students in question, singling them out for special attention, or working through personal issues in the conversations he had with them. The Panel noted that student 3 was adamant that the teacher did not name himself 'R' despite student 1's belief that he did. His participation in the nicknaming game, the Panel concluded, did not denote any sinister or ulterior intent. Silly yes, but nothing more.

Regarding the actions the teacher undertook in relation to advising student 2, he certainly did not see his actions as a substitute for her working through the school counsellors. He said he informed her, as he had done with other students, that he would be informing the school counsellors and advised her to seek their assistance. His actions in communicating with student 3 about student 2's well being, the Panel believed, should be seen as an element of his overall concern. He also believed that his intervention had had some success. Certainly there is little doubt that the students saw the teacher as 'a good friend' to use student 3's description and as a supportive teacher whose form of relationship with them was not uncommon to the relationships they had formed with other teachers at the school. Student 2 and student 1 were upset about the fact that his suspension meant the withdrawal of support which they valued.

FINDINGS UNDER SECTION 2.6.46(1) of the Act

Section 2.6.46 of the Act provides:

- (1) After considering all the submissions made to a formal hearing into the conduct of a registered teacher the panel may make findings about whether or not-
 - (a) the teacher has, whether by act or omission, engaged in serious misconduct; or
 - (b) the teacher has, whether by act or omission, been seriously incompetent; or
 - (c) the teacher is, whether by act or omission, not fit to teach.

- (2) If after considering the submissions made at an inquiry the panel finds that-
 - (a) the teacher is seriously incompetent in his or her teaching practice; or
 - (b) the teacher is not fit to teach; or
 - (c) the teacher is guilty of serious misconduct; or
 - (d) the teacher has contravened or failed to comply with any provision of this Chapter; or
 - (e) the teacher has contravened or failed to comply with any condition, limitation or restriction imposed on his or her registration; or
 - (f) the teacher has been convicted or found guilty in Victoria of an indictable offence or has elsewhere been convicted or found guilty of an offence which if committed in Victoria, would be an indictable offence and that the teacher is not fit to teach; or
 - (g) the registration of the teacher has been obtained by fraud or misrepresentation or concealment of facts-
the panel may make a determination to do one or more of the following-
 - (h) impose conditions, limitations or restrictions on the registration of the teacher;
 - (i) suspend the registration of the teacher for the period and subject to the conditions, limitations and restrictions, if any, specified in the determination;
 - (j) cancel the registration of the teacher.

The first matter the Panel must address is whether the teacher has, by an act or acts or by omission engaged in serious misconduct. The term *serious misconduct* is not defined in the Act.

As stated above the Panel found the factual basis of the allegations not in dispute on the teacher's own admission. However, the Panel finds that only Allegation 2c constituted misconduct on the grounds that it involved the use of inappropriate language in communicating with students.

The Panel determines the other allegations did not constitute misconduct. While they raised questions of professional judgement regarding the role of a teacher in relation to that of designated school counsellors in matters of student welfare the Panel believes that the teacher's behaviour did indicate a teacher exercising concern for the well being of students in a student welfare context which the Principal described as 'fairly laissez faire'.

In finding the behaviour in Allegation 2c misconduct rather than serious misconduct, the Panel was mindful of the ruling in Kellam J in *Parr v Nurses Board of Victoria* VCAT (2 December 1998):

In my view the question of whether or not a nurse has engaged in unprofessional conduct of a serious nature must depend on the facts of each case. Clearly such conduct would not be serious if it was trivial, or of momentary effect only at the time of the commission or omission by which the conduct was so defined. It must be a departure, in a substantial manner, from the standards which might be reasonably expected of a registered nurse. The departure from such standards must be blameworthy and deserving of more than passing censure.

The Panel does not want to downplay the inappropriate nature of the communication, nor to dismiss it as trivial or of momentary effect. It sees it as a serious lapse of judgment on the part of a teacher, described as caring and compassionate by his Principal, responding to a text message from a student whose welfare he was concerned about at a time in which he seemed in no fit state to recognise the offensively smutty tenor of some of his remarks which were intermixed with what looked like genuine responses to a plea for assistance on the student's part. The fact that these two elements co-existed in what he said he thought was only a prank message simply adds to the impression of the general blur of his consciousness at the time. The quick recognition by the teacher of his wrong doing came in the clear sober light of day when he realized his error and sought to make due rectification by apology to the student and by informing the Principal of his behaviour. The text messaging was a cause of shame for the teacher, and rightly so, and required appropriate censure.

In determining that the teacher remains fit to teach the Panel reflected on the words of Justice Harbison, Vice President and Mr. Eccles, Member when addressing issues in relation to *Davidson v Victorian Institute of Teaching* [2007] VCAT 920. The Panel noted:

We take the view that a finding that a teacher is unfit to teach must carry with it a perception that the conduct complained of is of a continuing and persistent nature. It is conduct which throws doubt on how he would conduct himself in the future in the classroom. A teacher may commit a single act of serious misconduct, or a series of such acts, but those acts may be explicable in context and unlikely to recur. A determination that a teacher is unfit to teach appears to us to be a more severe penalty. It carries with it an assessment that that person should not be in a position of authority and trust with children, because his whole approach to teaching and to the children in his care is profoundly and irretrievably flawed. It would often involve consideration of criminal conduct.

The Panel does not believe that the teacher's conduct was of a 'continuing and persistent nature'. Instead it sees it as a momentary aberration in a career of some sixteen years in which he had demonstrated that he was a supportive, caring teacher, well liked by students and their families. The Panel finds that the teacher is not guilty of serious misconduct, although guilty of misconduct. Because the Panel has not found the teacher guilty of serious misconduct it makes no determination under section 2.6.46(2) of the Act.

However, the Panel recommends that should the teacher apply for re-registration in the future, before he does so, he acquaint himself thoroughly with the Victorian Institute of Teaching's The Victorian Teaching Profession Code of Conduct. This should enable him to recognize the tact, discrimination and professionalism teachers need to exercise in the area of teacher-student relationships, especially in terms of the distinctions the Code

makes between being friendly with students and 'being a friend'. The distinction made is as much for the self preservation of the teacher working in emotionally charged contexts with vulnerable adolescents as it is for the protection of the students.



TERRY HAYES, CHAIRPERSON



**per:
DREW HOPKINS, REGISTERED TEACHER**



**per:
KEVIN MOLONEY, PANEL MEMBER**