

VICTORIAN INSTITUTE OF TEACHING

DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 083

REGISTERED TEACHER: Wayne Anthony GIULIERI

PANEL MEMBERS: Susan Halliday, Chairperson
Marilyn Mooney, Registered Teacher
Drew Hopkins, Registered Teacher

ATTENDANCE: The teacher was represented by Mr Serge Petrovic Counsel,
Instructed by Oakley Thompson & Co
Ms Melinda Richards Counsel Assisting with Ms C Sherman,
instructing

DATE OF HEARING: 19 February 2009

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

On 23 March 2009 the Panel decided that the teacher remains registered as a teacher in Victoria.

REASONS

BACKGROUND

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

By complaint form dated 19 August 2008, the student lodged a complaint with the Institute against the teacher regarding allegations of serious misconduct. The complaint was lodged in accordance with section 2.6.30 of the *Education and Training Reform Act 2006*.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute on 10 September 2008 and the Committee decided to refer the matter to an investigation.

The Institute arranged for an investigation of the allegations and on 3 December 2008, the Committee considered the investigator's report and decided to refer the matter to a formal hearing.

A Notice of Formal Hearing dated 14 January 2009 was served upon the teacher's solicitor by registered post on 15 January 2009.

DOCUMENTS CONSIDERED

The Panel was provided with the following documentary evidence:

1. Complaint Form dated 22 August 2008 (2 pages) **001 – 002**
2. Registration Details – the teacher (1 page) **003**
3. Document entitled 'Chronology' (1 page) **004**
4. Witness statement of the student dated 26 October 2008 (2 pages) **005 - 006**
 - Attachment 1- Letter the student dated 19 August 2008 (1 page) **007**
 - Attachment 2 - Complaint Form dated 19 August 2008 (2 pages) **008 - 009**
5. Witness statement of witness 1 dated 5 November 2008 (1 page) **010**
6. Witness statement of principal 1 dated 7 November 2008 (1 page) **011**
 - Attachment 1 - Ground floor and first floor plans of the school in 1985 (2 pages) **012 - 013**
7. Notice of Formal Hearing dated 14 January 2009.

The following exhibits were accepted by the Panel:

- A.** Witness statement of the student dated 26 October 2008
- B.** Witness statement of witness 1 dated 5 November 2008
- C.** Witness statement of principal 1 dated 7 November 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 1985, whilst employed as a teacher at the school, the teacher:

1. Engaged in inappropriate physical contact with Year 6 student, the student, in that he:
 - a) At the back of his classroom, after the student had been undertaking some physical activity in the school yard:
 - i. Undid some of the buttons of the student's summer school uniform, exposing her breast;
 - ii. Felt around the student's chest area and breast with the tips of his fingers feeling for a pulse for about 10-15 seconds.
 - b) While alone with the student in a storage room attached to the side of the school, as she was helping him put sports equipment away, having told the student he wanted to check how to arrange her costume for a proposed school play (in which she was to play a pregnant woman):
 - i. Felt the student's lower stomach just above her crotch area through her clothes with his fingers for about 10-15 seconds.
2. Engaged in inappropriate communication with the student in that he:
 - a) Told the student that she was well developed physically.

The student

The student gave evidence under oath and confirmed her written statement including attachments. The Panel heard that the student has a Bachelor of Social Sciences (Pastoral Studies) and that she worked in a voluntary capacity with the youth group at the school for approximately 10 years. She told the Panel that in 1985 she was a grade 6 student at the school.

The student explained to the Panel that she first met witness 1 when witness 1 worked at the school. At the time the student was a student there. The student said that their relationship further developed when she joined the youth group and since then they have become good friends. The Panel was told that principal 1 was principal at the school

when the student was in the senior primary grades. The student told the Panel that she was an average student academically and was never in trouble with teachers.

The student said that the teacher was her grade 6 teacher and also her sports coach. The student told the Panel that during her grade 6 year the teacher touched her inappropriately on two occasions. The first occasion was during a health and physical education activity that required significant physical exercise to elevate the pulse rate. Students measured and compared their resting heart and pulse rates, to their heart and pulse rates after strenuous exercise. The Panel heard that the student was wearing a summer school uniform with buttons down to the waist. The student stated that when they returned to the classroom after the skipping exercise she was at the back of the room with another student near the teacher's desk. She said that the teacher undid the top few buttons of her dress, exposing her breast, and felt around her chest and breast area with the tips of his fingers for her pulse for about 10-15 seconds although her breasts were exposed for about 1 minute. The student stated that the teacher separated the undone dress and when she looked down she could see her breasts. She told the Panel she was very self-conscious and remembers feeling embarrassed, but didn't say anything. She stated that she was now in her adult years annoyed at herself for not saying or doing anything. She also stated that she was reasonably developed but did not wear a bra in grade 6. The Panel heard that the teacher did not attempt to check her wrist or neck for her pulse at any time.

Responding to questions posed by the teacher's representative, the student said the teacher took her hand and placed it on his chest for her to feel his pulse. She said she had no recall of a stethoscope being used by the teacher at all and did not remember the chest pulse method of pulse taking being explained to students.

The Panel heard from the student that the second occasion of inappropriate touching occurred when she was helping the teacher put away sports equipment in the storage area. She explained that around the same period of time her class was preparing a play for the school concert, and that she had the role of a pregnant woman, so she would be using a pillow under her clothes. She stated that the teacher indicated that he wanted to check how to arrange the costume on her. She stated that, with his fingers, he felt her lower stomach just above her crotch area through her clothes for about 10-15 seconds. She was definite that it was not her stomach area that was touched and in reply to the Panel's question said, "*Yes, it was below the bikini line.*" The student stated that at the time "*I didn't say anything ... nothing ... I didn't flinch.*" She told the Panel that she didn't initiate the conversation of where the pillow should go - the teacher did.

The student detailed another incident during her evidence that involved the teacher asking her and another girl to stay behind after class she stated that in conversation with the two of them he commented that they were well developed physically. She said that his comments about them both being more developed than the other girls in class, were comments that she took to mean that their breast development was more advanced.

The student told the Panel that the incidents made her feel embarrassed, very awkward and uncomfortable. She said that she didn't know why she hadn't told anyone until later in life, but she did know that she was not confident to report the incidents to anyone at

the time that they had happened. She stated that she couldn't pinpoint her exact age, or the time when she started thinking about the incidents, but noted that she had experienced recurring thoughts about what had happened, on a regular basis over the last 22 years. She also stated "*some thoughts are with me every day.*"

Given her recollections and repeated thoughts the student stated that she had often wondered about the teacher and if he was teaching. She said that she had looked in the White Pages for the teacher and had also 'googled' his name, but had done nothing formal about her experiences until making the complaint to the Institute. The student explained her actions by informing the Panel that her fear was the possibility of the inappropriate behaviour continuing if the teacher was still teaching.

The Panel heard that whilst attending a school function at school 1 - the school where her husband taught, she recognised the teacher. It turned out that the teacher was also in attendance due to the fact that he was a teacher at the same school. She said she got quite a shock but said nothing to her husband until later that night as she knew she would get very upset and didn't want to embarrass anybody at the function.

The student stated that she told her husband everything that night and the next day went to witness 1, her friend and also the Pastoral Associate at the school, for advice.

Witness 1

Witness 1 gave evidence under oath and confirmed her written statement. She told the Panel she was a Pastoral Associate at the school where she has been a long time parish member. She has a degree in Social Science (Pastoral Counselling). Witness 1 stated she had known the student for a long time. Her son was in the same class as the student, and she had worked in the library at the school when the student attended the school. She also worked with the student in youth groups at the school and parish 1. Witness 1 said that she herself had only had a few dealings with the teacher and didn't think that he had taught her children.

The Panel heard that early in 2007 the student went to see witness 1 in a very distressed state. She told witness 1 that her grade 6 teacher the teacher had inappropriately touched her on the breast and the lower stomach area when she was in his class in 1985. Witness 1 told the Panel that she was stunned with this disclosure from the student. Responding to questions put by the teacher's representative, witness 1 confirmed that she would have been available to talk to the student at the time the allegations occurred, if she had come to her. As far as witness 1 knew the student had not spoken to anyone in more recent times about the incidents, other than perhaps her husband.

Witness 1 stated that the student was a reasonably popular person, and that people spoke highly of her, and no issues were ever raised as far as she knew concerning the student whilst she was at school. She stated that the student was an extremely honest and reliable person.

Principal 1

Principal 1 gave evidence under oath. He confirmed his written statement after amending it by deleting paragraph 5. Principal 1 was principal at the school from 1985 to 1990.

Since then he has held a variety of teacher, vice-principal, and principal roles in a number of schools. For a short time he ran his own business. He currently teaches at school 2.

Principal 1 told the Panel that the teacher was a grade 6 teacher. He said that he was a good and caring teacher, and someone who became involved in a range of jobs and activities outside his teaching requirements.

The Panel heard that in 1985 or 1986 principal 1 received a verbal complaint from a parent of a student. The student had told her father about her friend alleging that the teacher had touched her on the breast while she was in class. Principal 1 said that he did not raise this issue with the student who had apparently been touched, nor did he raise the matter with her parents. Principal 1 told the Panel that he raised the matter directly and fully with the teacher, and asked him for his response.

Principal 1 stated that at first the teacher said that he didn't know what he was talking about but eventually offered the suggestion that it may have occurred when he was correcting work. Principal 1 said that the teacher was shocked when he raised the complaint with him, as he recalled. Principal 1 said that he had no reason to doubt the teacher's honesty in general, and accepted his response, doing nothing further.

The Panel heard that measuring pulses after physical activity was part of the health and physical education curriculum in the mid 1980's. Principal 1 said that stethoscopes were in the school then *"but you wouldn't go near a child with a stethoscope today"* He added. *"I wouldn't do it then either."* Principal 1 explained that he would measure the arterial or carotid pulse but would never take a pulse on the chest of a child – then or now. He said perhaps it could have been done but it was not appropriate for a male teacher to undo buttons and place a hand on a female student's chest then or now, irrespective of the curriculum activity.

Principal 1 stated that the teacher would have understood that touching a breast was inappropriate. He said that general advice would have been given to all staff concerning their responsibilities, work attire and appropriate behaviour towards students. He stated that such advice would include leaving doors open and never being alone with a student. He indicated that as principal he gave general advice about how to interact with students in staff meetings.

The teacher

The teacher gave evidence under oath. He said that he graduated from Burwood SCV in 1976 with a Diploma of Teaching (Primary) with a PE/Science major. He later retrained and completed a Technology (welding) course.

He told the Panel that in 1985 he was teaching grade 6 at the school, but he had no recollection of the student. He said he taught there for 2 to 3 years, and when he was offered a position at school 1, he moved and taught there for 21 years. He noted that he had also done some casual relief teaching and was currently teaching at school 3. The teacher indicated that he had been heavily involved in sporting and social service programs. He stated that most of these extra curricula activities were with boys only

groups, but sometimes they were mixed groups. He stated that there had been no complaints from any of these mixed groups.

The teacher told the Panel that he was shocked and dumbfounded when he was informed of the complaint relating to these proceedings. *"It set me back on my heels."* He said he had no recall of the pulse activity and was not sure if it would be PE or Science. He did remember checking people's pulses with a stethoscope on the chest. Carotid and arterial checking was also done.

The Panel heard that the teacher had no recollection of undoing the student's buttons on her school uniform, no recollection of exposing her breast, or touching her chest area and breast with the tips of his fingers feeling for a pulse for about 10-15 seconds. The teacher said this would have been inappropriate. He said that he believed that he would have helped the students with how to do it but would not have done it himself. He told the Panel he had no explanation for the allegations.

In regards to feeling the student's lower stomach and crotch area through her clothes with his fingers for 10-15 seconds, the teacher stated he had no memory of it. He said he was aware of male/female issues and that principal 1's advice was to send girls to female teachers if they had issues. The teacher stated that principal 1 was probably more alert than him, and that he was probably somewhat naïve and young when teaching at the school.

The teacher told the Panel that after principal 1 had raised the complaint regarding him touching a student's breast, that he made a decision to stop checking pulses. He indicated that he made this decision even though he told principal 1 that the incident raised must have been an accident when correcting work.

The teacher told the Panel that as he recalled he would help students and give advice as to how to use the stethoscope, but couldn't imagine why he would use it on them himself. He then said that he may have assisted students to use the stethoscope on their chests, but if he did there was no malicious intent.

When asked, the teacher agreed with Counsel Assisting that it is presently inappropriate to touch a female student on the chest and the lower stomach around the bikini line, and that it was also inappropriate in 1985.

In regards to Allegation 2 the teacher could not recall talking to the student and telling her that she was well developed physically. The teacher stated *"I can't surmise what I would have said. I have no memory of it."*

The teacher explained to the Panel that he moved to school 1 from the school as he found primary teaching very tiring and thought secondary teaching would be easier. He indicated that the complaint raised by principal 1 had contributed to his decision to move, but wasn't the only reason.

Principal 2

Principal 2 gave evidence under oath and stated he was the principal at school 3 where the teacher is now teaching. Principal 2 stated that he knew the teacher through his teaching at school 3 where his own two sons were students and through working bees and sporting functions.

Principal 2 told the Panel that the teacher was a very giving and committed teacher who carried out his duties in a professional manner. He said he was considered an honest and a good staff member. He said that in 2007 the teacher was leaving secondary teaching as he wanted a change so principal 2 employed him as an emergency teacher and then in a long service leave replacement role. The Panel heard that the teacher conducted himself professionally during this time and that parents asked if the teacher could continue on as a class teacher.

Principal 2 stated that the teacher informed him of the VIT formal hearing and that there was a matter being progressed. He said that he did not inform him of the allegations as the teacher was not aware of the allegations, as he understood it.

DISCUSSION OF THE EVIDENCE

The Panel acknowledged that it was bound by the principles of natural justice. The Panel was comfortable that the principles of natural justice had been applied throughout the preparation for the Hearing, and to the fullest extent possible during the progression of the Hearing.

The Panel noted that it was not bound by the rules of evidence and could inform itself as it saw fit. Accordingly the Panel made every effort to inform itself about all matters relevant to the specific allegations before it. The Panel was particularly concerned to follow the guidance provided by Dixon J in *Briginshaw v Briginshaw* (1938) 60 CLR 336 when assessing the evidence in this case.

The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes.....Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. 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. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony or indirect inferences.

The Panel also took into account that Formal Hearings are not a form of punishment or criminal proceedings. Panels that conduct Formal Hearings have a clear range of responsibilities however, as well as defined parameters within which they can operate as they progress their obligations under administrative law. Cognisant of this, as well as mindful that Formal Hearings exist to protect the public and the integrity of the teaching profession, the Panel reflected extensively on a number of issues that complicated the proceedings and the arguments put.

The matter before the Panel was 24 years old; indeed a significant period of time had lapsed since the occurrences raised by the complainant. Additionally, the teacher it appeared from the available evidence had pursued a successful career post his time at the school, for which other respected members of the profession continued to hold him in high regard. No issues in relation to the teacher's classroom ability were questioned.

When considering the complexities associated with such cases, and in particular this case, the Panel noted a series of relevant contributions put during a key Supreme Court of Victoria, Court of Appeal matter namely *R v Gavin Maxwell Hopper* [2005] VSCA 214. With particular reference to commentary in relation to time delay, human memory, the age of the complainant, the potential for prejudice, lack of recollection or faulty recollection and the issue of corroborating material, the Panel carefully considered the evidence before it.

The Panel specifically noted that while the recall of the complainant was clear and exact on many counts key to the allegations, several of which remained emotive issues for the complainant, that the teacher on the other hand generally had limited recall about much of his early teaching years and the activities he was involved in at the school. Further, while short of express denial, the teacher's specific recall of the key matters raised was particularly limited, and on several counts non-existent. The teacher's inability to provide an absolute answer on several points did not escape the Panel. The teacher's assessment of himself as a young teacher was also considered, as were the appropriate standards for teachers albeit a quarter of a century ago.

While hearsay evidence is often a cause for clear caution, it did at the time it was brought to the principal's attention some 24 years ago, provide cause for a conversation between the principal and the teacher, about which useful direct evidence could be provided at the Hearing.

In relation to the allegations of serious misconduct and/or lack of fitness to teach as set out in the Notice of Formal Hearing, the Panel has determined that based on the balance of probabilities and the available evidence Allegation 1 and each of its particulars is substantiated. However the Panel has determined that there is insufficient evidence to make a clear finding in relation to Allegation 2.

The Panel noted that principal 2 stated that the teacher informed him of the VIT Formal Hearing and that there was a matter being progressed, given that he was employing him. He also said that the teacher did not inform him of the VIT allegations as the teacher was

not aware of the allegations, as he understood it. Having heard this evidence the Panel did note that the teacher would have had at the time of the conversation, some detail about the nature of the allegations.

FINDINGS UNDER SECTION 2.6.46(1) OF THE ACT

The Panel given the nature of this case, and the positions put, decided it proper and timely to comment on the issue of physical contact. The Panel wanted to make it clear that in its view there are some appropriate means and legitimate reasons for touching students.

During this teacher's Formal Hearing the teacher inferred that he'd dealt with the principal's concern about him touching a student, by adopting a somewhat blanket approach to not touching students and giving away the exercise of measuring hearts and pulse rates. Whether or not this is true, is not the point. It's the simplistic and unrealistic nature of the mindset that concerned the Panel, in turn leading to further Panel comment.

The Panel does not view it as appropriate, or reflective of the sophisticated level of professional thinking and care that is required of a teacher, to project the need for a blanket mindset of never touching a student, no matter what the circumstances or the age or need of the student. To do so is naïve, feeble and unhelpful.

When discussing a teacher's physical contact with students, it is essential to draw a distinction between touching which has a **sexual, intimate or overly familiar** element to it, and **supportive, appropriate and essential** physical contact.

It is highly inappropriate for a teacher to touch a student in a way that is **sexual, intimate or overly familiar**. Such physical contact might also amount to indecent or sexual assault. Physical contact that is unnecessary, or moves beyond professional interaction or conveys sexual innuendo or suggestion, or could be reasonably interpreted by the student as doing so, is clearly inappropriate. The substantiated physical contact in the matter before the Panel was about highly inappropriate touching. The determination was made irrespective of the age of the student or the 'activity' under the auspice of which it took place.

However, supportive physical contact or touching, which might involve an encouraging pat on the shoulder on the sporting field, or the need to help a student who has been injured off the ground and to a safe place, or physical contact during a drama or dance class which has been explained prior to the physical contact taking place, or using a child's hand when it comes to demonstrating how to hold a pencil or dealing with children in special education settings, can be normal and appropriate contact by a teacher. Here the student gives implicit or direct consent, and accordingly the physical contact will be appropriate provided that it is necessary and / or curriculum related, and does not have a sexual, intimate or overly familiar quality to it. The teacher should always consider whether the physical contact might cause discomfort or embarrassment to the student, and if so, desist.

It may on rare occasions be appropriate for a teacher to physically restrain a student. It may also be appropriate on rare occasions for a teacher to comfort an emotionally traumatised child or adolescent. This is appropriate if the student has consented, and in addition there is an acknowledgement by the teacher that there are ways to do so that fit within the boundaries of professional support and care. If consent is withdrawn verbally or non-verbally, the physical contact should of course cease immediately.

The question of when teachers may touch students was discussed by the Queensland Court of Appeal in *Horan v Fergusson* (1995) 2 Qd R 490. Demack J (at p25) made the following general comments about the law relating to tactile contact between teacher and student:

... there is every reason to accept the concept that a child attending school tacitly consents to receiving from a teacher tactile expressions of encouragement. The traditional pat on the shoulder for a significant achievement falls within this concept. To deny this concept would be to insist that schools become sterile, unemotional and devoid of normal expressions of friendly human interaction.

Demack J elaborated further at p29:

First, I use the word "tacit" meaning unspoken, rather than implied, in order to emphasise that this "consent" may be withdrawn by a word or, indeed, a gesture. In other words, I do not suggest that children consent to receiving prolonged or effusive expressions of encouragement. The child must be allowed to respond negatively if that is that child's wish.

Demack J concluded (p32) with the following comments:

...ordinary commonsense requires that children be encouraged in the process of learning. That is fundamental to the learning process. Tactile expressions of encouragement are not essential but they are a common form of human expression. So, in my opinion, it is consistent with the aims of the statutory scheme for primary education to allow as justification for the appropriate, non-sexual touching of a student by a teacher, the student's tacit consent to receiving encouragement.

Accordingly, whilst teachers may engage in supportive physical contact, they **must be particularly sensitive and astute** to the student's level of comfort at the time, whilst simultaneously ensuring that the physical contact falls within professional boundaries and is on top of clothing, and / or is essential for the safety of the student or others.

Simplistic blanket approaches, cynicism and scare mongering about 'absolutely all' physical contact being banned and inappropriate, fall short of the common sense, professional discretion and the pedagogical maturity that the community rightly expects to come to the fore when educating and supporting our young people.

Given these observations the Panel considered the appropriate findings to make in this case. The Act does not define 'serious misconduct' or 'not fit to teach'. The Panel, as an appointed expert Panel, is entrusted to make a determination in relation to professional behaviour in light of the unique and specific set of circumstances before it.

The Panel is of the view that substantiated Allegation 1 does amount to serious misconduct. The behaviour of the teacher was not appropriate in 1985, and irrespective of the nature of the classroom or extracurricular activity, the behaviour fell well short of acknowledging and respecting the rights of the child in question, and adhering to professional standards as they existed in the mid 1980s. In making its decision about serious misconduct the Panel noted *“The gravity of professional misconduct is not to be measured by reference to the worst cases, but by the extent to which it departs from proper standards.”* Per Gleeson CJ, Meagher JA, Handley JA, *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630.

In addition the Panel noted that teachers in 1985 were well aware, as they are a quarter of a century later that they are in positions of power and influence in relation to the student. The position of ‘trusted adult’ was breached by the teacher, and the deleterious impact has been long term.

For misconduct to be ‘serious’ it 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).

Further, it was noted in *Guss v Law Institute of Victoria Ltd* [2006] VSCA 88 citing *Atkinson v General Council of Medical Education and Registration* [1894] All ER 750 that misconduct in a professional sense is conduct which would reasonably be regarded as disgraceful and dishonourable by fellow professionals of good repute.

When deciding that the conduct in question was ‘serious misconduct’ the Panel also noted *Parr v Nurses Board of Victoria* VCAT (2 December 1998) cited with approval in *Domburg v Nurses Board of Victoria* [2000] VSC 369, per Ashley J. *“... whether 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.”*

In finding serious misconduct the Panel is not of the view that it can explicitly determine motive a quarter of a century after the event. For this reason the Panel concluded that the physical contact was not sexually motivated. The Panel considered that the touching may have been purposeful and extremely inappropriate due to the sexual implication, or inexcusably naïve, thoughtless and disrespectful physical contact that was not only demeaning and invasive of the student’s privacy, but contact that lacked the appropriate regard for the educational rights of the child, sensitivity and the necessary commonsense and preparation required to teach the curriculum areas in question. In the end the Panel was of the view that given the specific circumstances and impact, that the outcome is the same. Due to the teacher’s actions, for which he alone is accountable, the student suffered embarrassment, discomfort and humiliation, and to this day the teacher is blameworthy. The teacher's actions were possible because of the student's vulnerability, and in turn his actions denied her the individual right to a psychologically and physically

safe learning environment. This in itself amounts to serious misconduct in the view of the Panel.

In relation to fitness to teach, the Panel is well aware that the public is to be protected from wrong doers and people who are ignorant of basic rules and professional requirements. The Panel after extensive consideration has agreed that the teacher in 2009 was most unlikely to pose a threat to the public interest, and is someone who is currently fit to teach. The Panel is very clear that it is charged with making decisions as they relate to current circumstances, in relation to fitness to teach.

A teacher's fitness to teach is determined at the time of the Panel hearing, not at the time that the alleged incidents occurred. (*A Solicitor v The Council of the Law Society of New South Wales* (2004) 216 CLR at 253)

In determining fitness to teach the Panel referred to *Davidson v Victorian Institute of Teaching* [2007] VCAT 920. It was noted that in relation to lack of fitness to teach there is a perception that the conduct complained of is of a continuing and persistent nature; that it is conduct which throws doubt on how the teacher will conduct himself in the future; and there is a perception that the person should not be in a position of authority and trust with children because his whole approach to teaching and children in his care is profoundly and irretrievably flawed.

Formal Hearings provide a means by which to achieve closure and a way to move forward given what has taken place. The Panel is of the view that the complainant acted responsibly in bringing the matter forward and did so in good faith for the right reasons. That said having determined that what took place a quarter of a century ago was serious misconduct, the Panel is not of the view that there is reason to remove or place conditions upon the teacher's registration in 2009.



SUSAN HALLIDAY, CHAIRPERSON



**per:
MARILYN MOONEY, REGISTERED TEACHER**



**per:
DREW HOPKINS, PANEL MEMBER**