

VICTORIAN INSTITUTE OF TEACHING  
DECISION AND REASONS OF THE FORMAL HEARING

NUMBER: 145

REGISTERED TEACHER: Javier RODRIGUEZ

PANEL MEMBERS: Terry Hayes, Chairperson  
Paul Wilhelm, Registered Teacher  
Gail McHardy, Panel Member

ATTENDANCE: The teacher attended the Formal Hearing and was represented by Ms Letizia Torres, Barrister  
  
Mr Rodney Hepburn, Counsel Assisting, with Mr Damien Cricchiola, Instructing Solicitor on behalf of the Victorian Institute of Teaching

DATE OF HEARING: 4 February 2014

DATE OF DECISION: 6 March 2014

FINDINGS AND DETERMINATION:

Pursuant to section 2.6.46 of the *Education and Training Reform Act 2006*, on 6 March 2014 the Panel found the teacher unfit to teach.

The teacher is currently unregistered and therefore the Panel makes no determination in respect of his registration.

## REASONS

### BACKGROUND

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

On 10 June 2011, the Institute was informed by Victoria Police that the teacher had been charged with indictable offences.

A court certificate dated 24 August 2012 confirmed that the teacher appeared in the County Court of Victoria and was convicted of an indictable offence.

The matter was referred to the Disciplinary Proceedings Committee (the Committee) of the Institute on 23 October 2013 and the Committee decided to refer the matter to a Formal Hearing.

By letter dated 12 November 2013, the Institute advised the teacher that he had not yet successfully renewed his registration for 2014. The teacher was further advised that if he did not commence his registration renewal by 31 December 2013, his registration would expire on 1 January 2014.

A Notice of Formal Hearing dated 23 December 2013 was served upon the teacher by registered post on 24 December 2013.

By letter dated 9 January 2014, the teacher was notified by the Institute that his registration had expired due to his failure to renew.

On 3 February 2014, the Committee decided to continue with the inquiry and referred the matter to a Formal Hearing.

### THE ALLEGATIONS

The information the Institute has received as evidence of possible lack of fitness to teach is:

1. Whilst registered as a teacher in Victoria, the teacher:
  - (a) appeared in the County Court of Victoria on 24 August 2012 charged with the indictable offence of use a carriage service to cause offence (s474.17 (1) of the *Criminal Code* (Cth)). The Court convicted the teacher and he was sentenced to 6 months imprisonment which was partially suspended for 3 months.
  - (b) Appealed the sentence imposed by the County Court and on 20 August 2013 the Victorian Supreme Court upheld the appeal, quashed the sentence handed down

at the County Court and instead imprisoned the teacher for 6 months wholly suspended with a 2 year good behaviour bond.

## TEACHER'S SUBMISSIONS

In her opening submission the teacher's Counsel (Ms Torres) gave an overview of his teaching career, the circumstances which led to his offending and the responses he has made to being charged and convicted of that offence.

Ms Torres said that the teacher has had a successful career as a teacher and had made a valuable contribution to the profession in a number of different roles spanning twenty years. He had taught humanities subjects and physical education in public and private schools, in single sex and co- educational schools, and in permanent and relief teaching positions. He had been a classroom teacher as well as a head of department. In more recent years he had worked with tertiary students as a clinical placement coordinator. He had worked successfully in those contexts with a large number of teachers, student and parents over many years and had never experienced any problems. In his teaching career he has always behaved appropriately.

Ms Torres said the teacher had conceded that the behaviour for which he was convicted was wrong and that he had made a serious error of judgment.

Ms Torres said that in 2008 the teacher had experienced a number of personal and professional problems. His eight year relationship broke up and he was forced to sell a jointly owned property. He had a normal intimate relationship with his partner and they remain friends. His ex-partner was aware of his situation and remains supportive of him. At the same time the teacher lost his job with university 1 because of funding cuts. At the age of 38, because of financial constrictions, he was forced to return home to live with his parents. He felt depressed about this loss of independence, his self-esteem was very low, and he found it difficult to withdraw from the negative state of mind he in which he found himself.

Ms Torres said that the teacher became increasingly lonely and socially isolated. It was in this context that he started staying up late at night and using the internet to talk to people online. This became a form of escape and his main connection with the outside world.

Ms Torres said that the teacher said that he first communicated with the undercover police officer when the officer sent him a 'friend' request on Facebook. He thought that, at the time he started the internet communications, the person in question was a 21 year old female because of her Facebook profile. He proceeded to have a flirtatious, then openly sexual, dialogue with her and later sent her an image of an erect penis he obtained via a Google search. Later, during the communications the person stated that she was a 14 year old girl. Ms Torres said the fact that the teacher did not seem to acknowledge this in subsequent communications was because of the language used, the change of name, the change of age and the fact that initially the person would not send him a photograph of 'herself'.

Ms Torres said that the teacher started to think that the person was playing games and was not who she said she was. He thought he may have been talking to a man. He then insisted on a photo to enable him to identify the person.

Ms Torres said that the teacher then sent the other offensive images, also obtained from a Google search, because he was upset at being specifically targeted for a trick. He had done this in the context of other online communications he had been involved in, which turned out to be elaborate financial scams.

Ms Torres said that the teacher fully acknowledged that he should have given the communication much more serious thought, and discontinued it. He said he should never have sent the offensive pictures, regardless of whom he thought he was talking to. He is ashamed and upset when he reads and sees what he sent.

Ms Torres stated that at no time did the teacher attempt to meet the person, and he ceased communication of his own accord in April 2010 when he realised he was being 'drawn into negative behaviour'.

Ms Torres said that the teacher had wanted to plead guilty to the charge in December 2011 and, had the prosecution accepted his offer at that time, the teacher would have been sentenced in the Magistrates' Court quickly and inexpensively. Instead the matter continued through legal processes, on the advice of lawyers, which cost the teacher a great deal financially and emotionally, as well as causing him to lose his job at university 2. The important point Ms Torres said was that, in wanting to plead guilty to the charge right at the beginning and then subsequently pleading guilty to the appropriate charge, the teacher clearly accepted his criminal behaviour.

Ms Torres drew attention to the fact that the teacher had voluntarily sought psychological counseling from consultant clinical psychologist Mr BH in order to better understand why he had offended and to address the issues of depression and anxiety he was feeling. Ms Torres cited Mr BH's reports as an indication, she believed, that the teacher was insightful and remorseful about his behaviour. (The reports are described in detail below in the Discussion section of the decision).

Ms Torres said that the teacher had had no prior convictions and there had been no offending since this matter which had occurred nearly four years ago. She said the teacher was currently engaged in office work in his brother's mechanic business, but would like to reestablish himself professionally and possibly return to working in tertiary education which he enjoyed. A reinstatement of his registration would give him the option of working in a secondary context as well.

## THE EVIDENCE

The teacher

The teacher gave oral and written evidence by affirmation.

The teacher outlined his employment record to date. He was currently working in an administrative role for his brother. He had taught at school 1 and had been the Sports Coordinator at school 2 (a non-teaching role). His teaching career had been interspersed with overseas travel (he taught Spanish in the USA) and post graduate work. After leaving school 2, because of a change in the job description, he was employed as a clinical placements officer at university 1 for two years until the job ceased because of funding cuts. He was similarly employed at university 2 but lost that job because of his court case and conviction.

The teacher described the combination of personal misfortunes, instanced by Ms Torres, which befell him in 2008. He said that, while his parents were very supportive, he felt that returning home to live with them because he was unemployed was a 'step back'. He said he became very depressed, emotionally upset and reclusive.

Regarding the period when the offending took place from Dec 2009-April 2010 the teacher said that going online was a 'release from real life'. His days turned into nights and his sleeping patterns were turned around.

The teacher said the 'friend' request on Facebook gave him joy and initially the contact seemed very innocent. At the beginning he thought he was talking in a lighthearted flirtatious way with a 21 year old female. When she informed him that she was a 14 year old girl he said it had crossed his mind that someone, possibly a male, was playing a trick on him, which is why he had sent his initial request for a photograph of the person. He had sent the offending images from Google out of frustration as he had previously been involved in online financial scams where his credit card had been used illegally.

The teacher said he had ended the communication of his own accord. He believed it was something out of character and involved behaviour he had never engaged in before. He said that, looking back, he felt a sense of disbelief and really bad about the whole incident. Had the person really been a 14 year old girl he would have felt really terrible about the consequences of his actions.

The teacher said that, in 2010, he had taken steps to see a psychologist (not Mr BH) about his problems and then at the end of that year had secured permanent employment at university 2. He had also gone on a trip to South Africa. He said, at that time, he felt life had begun to turn for the better.

The teacher said that in June 2010 the police took an interest in him because of their investigations of another matter. He had offered to plead guilty but this had been rejected by the lawyers and the matter seemed to stretch out. He said his family knew of his offending and he had told a few friends who were very surprised that he had engaged in behaviour that was completely out of character.

The teacher said that he had sought counseling from Mr BH because he felt he was more specific to his needs. In the course of the counseling he had made changes to his lifestyle and attitudes. He was no longer isolated and reclusive, played indoor soccer with friends, and joined in family activities. He no longer used the computer for communicating with strangers because he thought it a negative way to live; instead he used it for checking

soccer results, communicating with relatives and friends and for accessing the news. He said that even though he was still living at home he was accepting of his situation.

The teacher said he had never behaved inappropriately before either at work or in his private life, and would never ever engage in such inappropriate behaviour again.

The teacher said that he was passionate about teaching. He believed he was good at it and showed patience and understanding in dealing with students. He enjoyed learning new things and was accepting of change. He said he still had ambitions for future employment in an educational environment.

The teacher said he was willing to engage in further counseling if the Panel so required.

Under cross examination from Counsel Assisting, the teacher made the following responses:

1. He was aware of the *Victorian Teaching Profession Code of Conduct* and what it said about the responsibilities of the teacher to conduct himself professionally, even when not in a school context, and the need for a teacher to be a role model both in the school and in the community. He agreed that he had breached the *Code of Conduct* by his behaviour.
2. He believed that describing himself as an 'older more mature guy' was an appropriate way, in the internet context, to characterise the relationship between a 21 year old and a 29 year old.
3. He did not know who the Cassandra, who was referred to in one of the 'girl's' emails (11/1/10), was when she said: 'Hey I saw a note u posted on cassandras blog...it said u were jorge from Essendon???' Nor did he know who 'jorge of Essendon' was.
4. He thought the person was 21 because of her Facebook profile, and it was she, not him, who instigated the first contact. He responded when asked questions about the nature and meaning of his first message on 8/12/09, and whether there had been any messages sent prior to that date by saying 'I can't recall', 'my understanding was that the friend request was sent first', 'I can't recall, it is such a long time ago', and 'well there is no previous message mentioned there.' When asked why he would draft the 8/12/09 message in the way he did if there was no previous message he said 'I can't recall why I said what I said'. The Panel noted in the County Court judgment of 20 August 2013, it was stated in regard to the first message on 8 December 2009, "*.....you told the 'girl' you were attracted to her and queried whether she was interested in getting to know an 'older and mature guy'. You said you were from Los Angeles. Two days later you told her you worked in the 'glamorous world of Television production'. Eight days later, you noted that you were 29 and asked her if she had ever been with an 'older guy, like in a sexual way'.*
5. He did not believe the girl was 14 years old when she told him in an email (7/12/09). He stated that, at the same time, he came to believe that the conversation was a

game and agreed that he could have terminated the conversation at any time from then.

6. The last message he received from the 'girl' was on 13/1/10. He persisted in trying to contact her, despite the fact that she was not responding, because he thought he had been deceived and was feeling hurt. He said he was not 'keeping track of the time' because he was feeling 'vulnerable' and was 'in a fragile state of mind.' He 'wanted answers because of the understanding they were playing a game.'
7. He agreed that he had requested a pornographic image of the person on 12 occasions. He conceded that it was inappropriate to request such images, even if the person was 21. He said he was remorseful for having done so, but 'my state of mind wasn't quite right at the time.' He had done so, he said, as a way of making the 'girl' prove her identity. He also agreed that, just as he had with his Google images, the person could have provided an image of a vaginal area from Google, and he would have been none the wiser as to the gender of the person sending it.
8. He agreed with Mr Justice Howard's statement that 'Offences (such as the one for which he was convicted) are pernicious and difficult to detect and the principle of general deterrence looms large because it is necessary to protect children, often from themselves, in their use of the internet'.
9. He agreed that had the person been an actual 14 year old girl she could have been someone living in his local community, even the child of one of his neighbours, or a student attending the local school. He agreed that, in retrospect, he should have given more weight to the possibility that the person was, in fact, a 14 year old girl.
10. He said he had been doing emergency teaching in a school environment around the period of offending but the periods of that teaching and the offending did not overlap.
11. He did not agree with Mr Justice Howard's sentencing remark in the County Court that he was a person who 'in the short term would not be considered suitable to work with children'.
12. He conceded that an offence carrying a 3-5 year maximum term of imprisonment could not be considered 'minor' in spite of his previous claims in his letter to the Institute( 1/10/12) about the 'minor' nature of the offence, based on the fact that there was no real 14 year old girl involved.

Regarding questions from the Panel the teacher made the following responses:

1. He had introduced the matter of the police investigation of a public menace in the neighbourhood and him being a possible suspect, at the behest of his lawyers.
2. He would be open with any future employer about his offending, and believed he would have a plan in place were he questioned about his offending by a student in a

school in which he might be employed. He was vague as to what the specifics of that plan might be.

3. He believed his understanding of his responsibilities under the *Code of Conduct* were now clearer because of the counseling he had undertaken with Mr BH. He said his 'mind was now in a different place.' He indicated he was prepared to continue with whatever counseling the Institute deemed necessary.
4. He stated that most of his work in educational contexts since 2000 had been administrative based, but that he would welcome the chance to return to a teaching role.
5. He said he understood the role of a public regulator such as the Institute in protecting the public interest, and, in his case, would hope that it would take an overview of his situation by seeing his offence as a 'one off'. This would also involve taking into account the progress he had made in redeeming his situation and the remorse he had expressed. He believed that the experience had been very traumatic for him, given his loss of livelihood and public humiliation, and that, in itself, was a solid underpinning of a guarantee that he would not offend again.

The written evidence from the teacher, apart from a supplementary report by BH, was dated before the teacher's appeal against his County Court sentence of six months imprisonment, partially suspended to three months in the Supreme Court on 4/2/13. The Supreme Court allowed the appeal and instead wholly suspended the term of imprisonment and reduced the recognizance order amount from \$5000 to \$2500, while at the same time increasing the good behaviour time frame from 18 months to two years.

In his letter to the Institute (1/10/12) the teacher stated that his case would be heard before the Supreme Court of Victoria because the judgment in the County Court of Victoria on 12/8/12 had serious flaws and errors.

The teacher stated that he had not been charged or found guilty of anything related to any sexual offence, nor did the matter have anything to do with a 'minor'. The court referred to an offence through the use of an electronic message. There was no victim involved and, therefore, no victim impact statement. The teacher stated that, according to his lawyer, the matter should have been finalized in the Magistrates' Court where he would have been fined and no criminal conviction recorded. Instead, because of some legal disagreement, the matter was escalated to the County Court where the judge made an error with the sentencing.

The teacher stated he had taken it upon himself to stop teaching so that the circumstances would not reflect poorly on his place of employment, the teaching profession and himself. He stated he had not been teaching since 2010 and since that time had been receiving counseling as it had been an extremely stressful and worrying time for him. His psychological report from Mr BH, which was submitted to the County Court, stated that he did not pose a problem or concern to children, and that he had made significant progress with his anxiety and concerns.

The teacher stated that he had worked in an office administration role since 2011.

In a letter received by the Institute on 28/1/13 the teacher elaborated on the matters alluded to in his letter of 10/10/12.

The teacher stated that in 2009 he had gone through some very personal and private problems involving the break-up of a relationship, the loss of work and income and the forced selling of property. He had been diagnosed with depression in 2010. He had become a social recluse losing contact with family and friends. He stated he had resorted to online activities such as playing games, finding entertainment and communicating with various people.

The teacher stated that it was during this time that Victoria Police had commenced an investigation into an individual who was visiting schools in the area and had consequently become a menace. That individual was subsequently caught. The teacher stated that it came to light at the Magistrates' Court that he had been incorrectly accused in this investigation. However, it was on the basis of this investigation that he became entrapped in a police undercover operation and subsequently charged with six offences including, as well as the use of a carriage service to cause offence, the commissioning and possession of child pornography. All charges, other than the use of a carriage service to cause offence, were subsequently dropped.

The teacher informed the Institute that he was continuing to have 'this whole matter' removed legally because he was deliberately set up and entrapped. He provided the Institute with his 'Defence Response to Summary Prosecution' because it stated how he was going to defend the charges in court. He stated the document was not presented to the sentencing judge because of legal advice, but he was obliged to plead guilty to the one charge of use of a carriage service to cause offence. The teacher stated that the key points from the 'Defence Response to Summary Prosecution' were as follows:

1. He was not in contact with a real person but an undercover Police informant.
2. The age of the informant was originally listed as being 21 years old.
3. He had no relationship with the Facebook page operator of 'JR'.
4. How did the material cause an actual 'offence' since nothing was reported as being offensive, there was NO victim impact statement and the person being 'offended' was a trained undercover Police informant?

The teacher stated that he recognized that the new charge was still an indictable offence but that it was a 'minor indictable offence' and not a 'serious indictable offence'. The original offence was a 'summary offence'.

The teacher stated that since mid 2010 he had removed himself from doing any teaching in Victoria and had declined several teaching job offers because he believed that it would not be fair to work while the investigations and allegations were taking place. He was concerned that he not bring the profession into disrepute.

The teacher stated he had also been on a 'Mental Health Care' plan where he visited Mr BH on a 'somewhat regular basis'. The counseling visits had been beneficial and therapeutic in assisting him to deal with his depression and the court related matters. The teacher said the report (which he provided and which is discussed below) highlighted several positives, including that he was remorseful for what had happened; that he had made positive steps with his treatment; and that he did not pose a threat to minors in the community.

The teacher stated that since the start of 2011 he had gained full time employment and had involved himself in a more social capacity with friends and family. The only set back had been the ongoing court matter which had been a great source of stress and anxiety. He had only let his family and a few of his closest friends know of it, thinking this was the best way to deal with a very private and personal matter. One whom he did let know was his referee who had known him personally and professionally for 16 years. His referee, who provided a written character reference (referred to below), the teacher stated, was fully aware of his situation and had been very supportive during this difficult period.

The teacher concluded by stating that he did not believe he had ever acted with a 'criminal mind' and that the offence had occurred during a time in his life when he was mentally frail and not in the right frame of mind. He stated that he had sought treatment, improved his existence and had made positive strides in his professional and personal life. He stated he wished to have his teaching registration reinstated because he felt it to be important and he had made great strides in preserving it.

The teacher provided two psychological reports from consultant clinical psychologist, Mr BH.

In his report (9/8/12) Mr BH stated that the teacher had attended five hour long counseling sessions from 22/7/11 until 9/8/12. Mr BH stated that the teacher's general depression and anxiety had begun to ease until he became apprehensive about his forthcoming court appearance at which he understood the teacher was pleading guilty to using a carriage service to convey offensive material.

Mr BH stated that the teacher had expressed genuine remorse about this matter and, as a result of the shame experienced, had withdrawn from teaching and undertaken an administrative role at university.

Mr BH stated that the teacher, in searching for some understanding of his conduct, had said that at the time he had become increasingly lonely and isolated following the ending of a two year relationship (some 4-5 years ago), the vacating of his own property which was subsequently sold and his moving back to live with his parents. Mr BH stated that, in the course of consultations with him, the teacher had become more involved socially with family and friends, but felt that he could not take the initiative with potential relationships in view of his impending court appearances.

Mr BH stated that the teacher had been emotionally distressed by the breakdown of his relationship brought about by differing aspirations and financial management. His

distress had been compounded by the sale of his and his ex-partner's joint property and the fact that his employment contract at university 1 was not extended. This had required him to return home to live with his parents. Mr BH stated that the teacher felt his self-esteem had been diminished and he was embarrassed to tell his friends what had happened. As well, the teacher's attempts to consolidate his finances were now being undermined by legal costs and the fact that his offending might jeopardise his employment status.

Mr BH stated that intellectual testing undertaken by the teacher revealed average capacity though there was some concern about his low working memory index and his powers for delayed recall were also reduced. Mr BH stated that personality testing of the teacher was not indicative of major psychological or emotional disturbances, which he believed was a positive indicator that there was nothing to impede the teacher's future sound adjustment within the community. There was nothing, Mr BH stated, in the formal testing and extensive discussions he had with the teacher, to suggest that he would pose a danger to minors in the community.

Mr BH stated that the teacher had clearly benefited from the counseling process with the development of better insight and the need to be more circumspect in his communications. He said that the teacher had been buoyed by the support he had received from his family and anticipated enjoying a planned holiday with them in the United States.

In conclusion Mr BH stated that it would appear that the teacher's offending occurred in the context of what he regarded as a 'trend' in communication on the Internet and, in a phase of unemployment and feelings of isolation, he had engaged in a type of interaction that was 'uncharacteristic of his repertoire.' Mr BH stated that, as the teacher became better able to confide in him, and through the ongoing support of his family, he had gained more strength and his depression and anxiety had begun to abate.

In a subsequent letter (23/1/14) Mr BH stated that, on referral from his GP, the teacher had attended five counseling sessions with him from 14/11/12 to 17/1/14. In his more recent visits there had been increasing concerns in regard to stress and symptoms of depression. Note was taken of the Judgment of Court of Appeal, Supreme Court, 20/8/13.

Mr BH stated that the teacher had responded to the support offered and had remained a conforming person who was resolved never to be complacent, as he had been previously in relation to his offending. He had reflected seriously on all matters, and had not drifted into any such unacceptable communication again.

Mr BH stated that the teacher had demonstrated, in practical terms, strong self reproach. He had paid a heavy penalty for his careless and clearly stupid involvement on the Internet with loss of prestigious work, which accounted in no small way for his fluctuating stress and symptoms of depression.

Mr BH stated that a resolution of the teacher's work status would assist greatly and there was no reason for him to believe that the teacher would offend again in this or any other way.

The character reference provided by his referee (16/8/12) attested to his personal and professional relationships with the teacher since the latter began working at school 1 in 1996. His referee stated that the teacher had a very good relationship with staff and students because of his passion for sports, especially soccer, and he was very popular because of his organization of lunchtime staff-student soccer games. The teacher's assistance with anything related to computers was also invaluable. His referee stated that when teachers such as himself could not do something the teacher would drop everything to solve the problem. When the teacher left the school his referee said the boys missed him.

His referee stated that, as a friend, he had always known the teacher to be a pleasant and easy going person who always got along well with others. His referee said he was very well aware of the teacher's current situation and they had had several 'deep and meaningful conversations' about it. He said he could honestly state that the teacher was truly remorseful and had felt that he had let down his family and friends with the 'very much out of character behaviour'.

The teacher also provided performance reviews from university 2 related to his work as an administrative coordinator dated 27/6/11 and as a clinical placements coordinator dated 29/6/12. The reviews characterized the teacher as a conscientious and able worker who adapted well to the changing nature of his role as the school had developed and consolidated. He had developed a good rapport with fellow staff members and was keen to engage in professional development to enhance his performance. The report also mentioned that the teacher 'needs more informal get togethers with other admin and executive staff'.

## DISCUSSION OF THE EVIDENCE

The Panel was fully conversant with the circumstances of the teacher's criminal indictment, his conviction in the County Court and his subsequent successful appeal in the Supreme Court, based on the exhibits filed and referred to in Closing Submissions. However it was always conscious of the need to consider the teacher's behaviour and, perhaps more importantly, the understandings he demonstrated of it in the context of standards of teacher professionalism when assessing his current fitness to teach. In recognizing this the Panel was mindful of the distinction the teacher's Counsel made in her closing submission between personal and professional misconduct and the consequences she believed proceeded from that distinction.

Counsel for the teacher said that the Panel should bear in mind that the offences relate to (the teacher's) personal misconduct as opposed to his professional conduct and the approach to such misconduct must therefore be different. His professional conduct in the past is unblemished and he also did very well in his most recent job which is post the offending and during the stressful court process.

The Panel believed that, in making a judgment against standards of teacher professionalism, this distinction is not so clear cut. The *Victorian Teaching Profession Code of Conduct* makes clear that a teacher's personal conduct impinges on judgments about their professionalism. This is particularly true about the way in which a teacher conducts personal relationships with students, 'whether at school or not' (Principle 1.5), but it also underpins the Code of Conduct's expectation that a teacher's personal conduct impacts on their ability to act as a role model in the community (Principle 2.1a).

The Panel found the teacher to be a problematic witness. It recognized his admission of the offence, the remorse he expressed for bringing the profession into disrepute, and the fact that he had sought and continued with psychological counseling.

However, the Panel also felt that his recall of his behaviour was, at times, vague, even evasive. Similarly, the remorse he expressed seemed tokenistic, more a matter of going through the motions than being fully attuned to the serious implications of his actions, and the impact they might have on the reputation of the profession. The Panel noted a comment by Mr BH, the consultant psychologist from whom the teacher sought counseling: 'He has responded to the support offered...and resolved never to be complacent as he was previously in relation to his offering.' The Panel believed that the teacher, while obviously no longer 'complacent about his offending', given its devastating consequences for him, still has some way to go in fully understanding how gross a breach his behaviour was of the professionalism expected of teachers, especially the expectation that they are role models in the community.

Regarding the recall of his behaviour the Panel felt the teacher was particularly vague about how he had initially engaged in the exchange with the person. As Counsel Assisting asserted he was challenged five times in cross examination about the nature and meaning behind his first message on 8/12/09 which suggested there had been prior communication. The Panel noted that in his second report Mr BH spoke of the teacher 'drifting' into 'unacceptable communications' because of his 'careless and clearly stupid involvement on the internet'. This aura of casualness, the Panel felt, was clearly at odds with its interpretation of the conversations between himself and the 'girl'. As Mr Justice Howard noted, they were indicative of 'calculated conduct', that is conduct which was deliberate, premeditated and assured. In particular, the conversation does not seem to skip a beat when the person reveals she is a 14 year old girl, when, in fact, the Panel felt every professional instinct should have alerted the teacher to the dangers of continuing the conversation.

The Panel was also unconvinced by the teacher's explanation that he had quickly become aware of the fact that he was dealing with someone, probably a male, masquerading as a 14 year old girl. This was evident in the nature of the images he sent to, and requested from, the 'girl', and the persistent insistence that she reply to him in the three and a half month period, when there was no communication from her. The Panel also expressed concern about how cavalier and blasé the teacher seemed to be in dismissing the possibility that he was, in fact, communicating with a 14 year old girl, given how devastating the consequences might have been both for her, and for his career, were that actually the case. It was only under rigorous cross examination from Counsel Assisting

that he seemed to become aware of the possible implications of the 'girl' being a real person living in a community close to him.

The Panel expressed concern at the vehemence of the teacher's reaction to either a rejection on the part of the 'girl,' or a recognition that he was being duped. The image he sent twice was not only grossly offensive but probably misogynistic, as suggested by the sentencing judge in the County Court, Mr Justice Howard: '...you twice sent her an image of a male defecating onto the face of another who looked like a female. The text of the emails read: "When I think of you" and "What I think of you". The overwhelming inference is that you were upset and demonstrating your dislike of the "girl" because she had failed to reply to you'.

The Panel also expressed concern about the disjunction between the teacher's professed remorse in his oral evidence at the hearing, and how little it figured in his written evidence. The primary focus in the latter was on his sense of grievance that he had been ensnared in a police operation. As well, he played down the potential seriousness of the offence referring to it as 'minor' and a 'summary offence'. It was only under cross examination at the hearing that he conceded that an offence carrying the possibility of a 3-5 year term of imprisonment could not be considered 'minor'.

The Panel found Mr BH's reports lacked specificity and were not sufficiently helpful on those matters on which it required some surer guarantee. The first was the question of what strategies the teacher had put in place to ensure he did not again 'drift' into 'unacceptable communications' because of 'careless and clearly stupid involvement on the internet.' The Panel felt that these somewhat euphemistic descriptions required a more forensic unpacking regarding motivations, intentions and understood consequences than the reports provided. In fact, the reports instead of penetrating the air of vagueness of the teacher's own explanations for aspects of his behaviour – the fact that he felt 'vulnerable'; he had a 'fragile state of mind'; 'he wasn't keeping track of the time', etc. – simply added to it.

The second related to considerations of how the teacher's behaviour might impact on his relationship with students in his care. The Panel noted the differing opinions of Mr Justice Howard, that the teacher would not be suitable to work with children, certainly in the short term, and that of Mr BH that the teacher would not 'pose a danger to anyone in the community, children in particular.' The Panel was inclined to agree with Mr Justice Howard that '(Mr BH) provided scant assessment or analysis of the particularity and nature of (the teacher's) offending'. In addition, the Panel felt that, for the purposes of assisting its decision regarding the teacher's fitness to teach, the counseling could have been more searching in probing issues of how the teacher might handle matters of student management when challenged, given the anger and disdain he demonstrated in his communication with the 'girl' when he thought he had been rejected or duped.

Indeed, the Panel felt that all the supporting evidence provided by the teacher, none of which was tested by cross examination at the hearing, was unhelpful on the key issue of allowing it to assess how he might relate to students. The character reference provided by his referee attested to the teacher's competence and collegiality as a teacher, as well as to his general affability in what was, a male only student environment in the late 1990s. As

for his referee's assertion that he was 'well aware of (the teacher's) current situation, with this problem, as we have had several deep and meaningful conversations', the Panel felt it was faced with the same kind of opaque euphemisms that characterized Mr BH's psychological reports.

Similarly, the Panel felt that the performance reviews from university 2 attested to the teacher's conscientiousness and competence as an administrator (with increasing emphasis on "Head of School PA role"). However, they shed little light on how the teacher might conduct himself with adolescent students in a teaching environment in which the profession has become increasingly conscious of, and responsive to, questions of privacy, personal and professional boundaries, and communication in an increasingly complex cyber world. In fact, the reviews, together with the fact that the teacher's experiences at school 2, his one full time teaching position post his school 1 experience, were largely in an administrative role, underlined for the Panel the need for a more sustained insight on the teacher's part into how he might conduct a relationship with students in this changing cyber saturated environment.

## FINDINGS

The Panel found the allegations proved, largely on the teacher's admission.

The Panel found the teacher currently unfit to teach. In making this decision the Panel was mindful of the following:

- (a) The Statutory definition of 'fit to teach' in the *Education and Training Reform Act s2.6.1* which was defined as 'Whether the character, reputation and conduct of such a person are such that they should be allowed to teach in a school'.

Regarding section s2.6.1 of the Act, the teacher's conduct clearly transgressed the standards of professionalism articulated in the *Victorian Teaching Profession Code of Conduct*, especially Principle 2.1: the personal conduct of a teacher will have an impact on the professional standing of that teacher and on the profession as a whole. ...It is expected that teachers will:

- (a) be positive role models at school and in the community
- (b) respect the rule of law and provide a positive example in the performance of civil obligations

The teacher acknowledged that his conduct was a transgression of the *Code of Conduct*.

- (b) The judgment in *Ziems v Prothonary of the Supreme Court of New South Wales (1957) 97 CLR 279*, where the judge stated: 'The vital question in my opinion in such cases is not whether a practitioner has been convicted of an offence against the criminal law but whether his conduct has been such as to show he is unfit to remain a member of his profession'.

As stated above, the Panel has been scrupulous in observing this distinction. Its focus has been on the nature of the offending behaviour, not the conviction itself. The Panel found the behaviour grossly offensive, and wanting in terms of the professional behaviour expected of teachers by both the community and the profession.

- (c) The judgment in *Collins v Medical Practitioners Board* (2003) VCAT 1755, a case involving a serious indictable offence where the issue before the tribunal was whether or not registration of the practitioner should be interfered with, and the following matters were discussed: circumstances where there is egregious conduct (shocking and offensive) albeit outside the practice of the profession which would undermine a person's fitness to teach; and the time that has elapsed since the offence and rehabilitation.

The teacher's 'egregious conduct' occurred outside his professional practice but, as Principle 2.1 of the *Victorian Teaching Profession Code of Conduct* makes clear 'the personal conduct of a teacher will have an impact on the professional standing of that teacher and on the profession as a whole'.

Furthermore, the Panel questioned whether the teacher's 'rehabilitation' in terms of the insight he showed into the seriousness of his offence as it related to his role as a teacher had an appropriate depth of understanding. His persistent 'pursuit' of a 14 year old 'girl', in terms of the pressure he put on her to continue their conversation and to provide him with pornographic images of herself, irrespective of whether he thought he was engaged in a role play with someone older, was reckless in the extreme. A fact, the Panel believed, he failed to acknowledge.

- (d) The judgment in *Davidson v Victorian Institute of Teaching* (2007) VCAT 920, which articulates a number of criteria when considering fitness to teach:

'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 recognized that the teacher's behaviour was not of 'a continuing and persistent nature' – it was one incident that was sustained over several months, rather than a pattern of repeated incidents – and did not directly involve his working with children in a school. It did, however, involve criminal conduct of a kind which the Panel believes raises serious questions about any potential relationship he might have with children in his care, and his standing in the school and wider community. While the Panel believes that his behaviour did not reflect an approach to children which was 'irretrievably flawed' the emphasis fell decisively on 'irretrievably'. Engaging in provocative sexual flirtation with a

14 year old 'girl', whether she was real or an internet 'role play', was certainly 'flawed', and the teacher needs to do considerably more work on recognizing the nature of that flaw. The Panel believes that the level of insight he showed into his behaviour, both in terms of its causes and the development of strategies for avoiding it in the future, was deficient. To achieve that insight certainly requires a more rigorous counseling process than the one to which he had voluntarily submitted.

#### DETERMINATION

The teacher is currently unregistered and therefore the Panel makes no determination in respect of his registration.

If the teacher were to apply for registration in the future he would likely need to establish his fitness to teach by, but not limited to, demonstrating genuine insight into the issues which brought him before the Panel and an understanding of important issues surrounding appropriate professional practice, including:

- his understanding of the substance of Principle 2. 1 of the *Victorian Teaching Profession Code of Conduct*, the importance for teachers to act as role models in their communities, and the ways in which that expectation might be compromised;
- the implications of teachers engaging in cyber communication and recognising appropriate protocols when doing so;
- the development of strategies for avoiding contexts and situations in such communication which might jeopardise the well-being of adolescents, as well as compromise his own responsibilities as a teacher and as a 'role model in the community';
- the development of strategies for dealing with rejection and/or duping, without resorting to angry and offensive responses, especially when dealing with adolescents.



TERRY HAYES, CHAIRPERSON



per:  
PAUL WILHELM, REGISTERED TEACHER

A handwritten signature in cursive script, appearing to read "Gail McHardy".

per  
GAIL MCHARDY, PANEL MEMBER