Teachers with a criminal record: An analysis of the legislative regime governing the registration of Victorian teachers and principals insofar as it deals with convictions that come to light once a teacher has obtained initial registration

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Abstract

This thesis examines the appropriateness of the occupational licensing scheme embodied in the Victorian Education and Training Reform Act (ETRA) insofar as it deals with convictions that come to light once a teacher has obtained initial registration. It considers this primary question from two perspectives; the extent to which this system is consistent with principles of good regulatory design, and the extent to which it operates fairly, having regard to the competing interests that arise; ie the public interest in protecting the rights of individual teachers, and any competing public interests that may be served by excluding teachers from the teaching profession, including the public interest in protecting the rights of children and of the broader school community.

The thesis is based on an analysis of the legislative framework created by the ETRA, including its historical origins, and of the published decisions of formal hearing panels relating to teachers with criminal records, which are considered from the perspective of procedural and substantive fairness, drawing on general principles derived from administrative law, human rights instruments and regulatory theory. It also draws and builds on issues identified in a review of the VIT conducted on behalf of the Minister for Education in 2008.

The aspects of the ETRA considered fall into two groups: the provisions requiring automatic deregistration in respect of specified offences and those which require a formal hearing panel to consider whether or not a teachers remains fit to teach.

As highlighted using the case study of Andrew Phillips, the requirement for automatic deregistration where a teacher is found guilty of specific serious offences, irrespective of extenuating factors, is inherently unfair. It is argued that without any discretion to allow continuation of the registration in exceptional circumstances, and without any right of review, this component of the ETRA process inadequately balances the competing interests involved and compares unfavourably with the more flexible regimes that exist in other parts of Australia in relation to teachers who have committed similar offences.

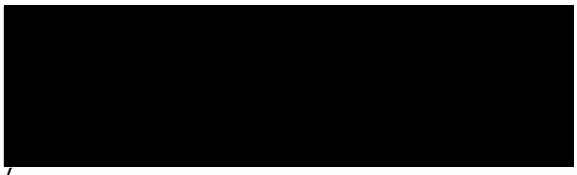
In the case of decision-making involving hearing panels, the issues identified are much broader and span three specific areas; variations in the approach taken to the teacher's role

when assessing fitness to teach, procedural fairness and issues of substantive fairness. This analysis suggests that a narrower view is preferable and fairer but it is more frequently the case that panels adopt a broader view. Procedural issues identified include delays, insufficient use of adjournments, unfairness in hearing where teachers are unrepresented and the potential for bias arising from the membership rules for hearing panels. The thesis also identified substantive issues arising from the interrelationship between teachers' criminal offending and their fitness to teach, failures to apply the correct test, inconsistency of outcomes for teachers for like cases and privacy issues.

The thesis suggests a way forward based on statutory reforms to the procedures for automatic cancellation and rules relating to the membership and composition of hearing panels, provision of additional guidance materials for panel member and additional measures to protect the privacy of teachers.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma at any university or equivalent institution and that, to the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signature of candidate: 

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I dedicate this thesis however to my family members who have supported me over the years, John, Nick and Stella and to the memory of my late son Theo John.

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CHAPTER 1 – INTRODUCTION

Introduction and overview

In 2005, Andrew Phillips, a well-regarded teacher was forced to resign when a criminal records check revealed an offence committed some thirteen years earlier when he was a young man. Five years later Tara Sutton was deregistered following guilty findings, without conviction, for offences related to her personal use of cannabis and for which courts had imposed low penalties of a non-custodial nature. Both these incidents arose in the context of the teacher registration regime now embodied in the *Education and Training Act 2006* (Vic) (ETRA). This regime includes requirements for ongoing criminal records checking, automatic deregistration for specific offences and, in relation to other offences, referrals to formal hearing panels and possible loss of registration based on an assessment of fitness to teach.

This thesis considers the appropriateness of the occupational licensing scheme embodied in the ETRA insofar as it deals with convictions that come to light once a teacher or principal has obtained initial registration. It does not consider the related issue of denial of employment due to criminal offending, owing to the lack of availability of data about this aspect of decision-making by the Victorian Institute of Teaching (VIT). The number of teachers who are denied employment based on criminal records checks in each year is now listed in the VIT's annual reports,[1] but there is no data available as to the offences in question or the reasoning involved in denying initial applications for employment.

The thesis considers its primary question from two perspectives: the extent to which this system is consistent with principles of good regulatory design; and the extent to which it operates fairly, having regard to the competing interests that arise - ie the public interest in protecting the rights of individual teachers, and any competing public interests that may be served by excluding teachers from the teaching profession, including the public interest in protecting the rights of children and of the broader school community.

Questions that flow from the principal question include consideration of the rationales and justifications for occupational licensing regimes and for regimes based on compulsory

[1] See, for example, Victorian Institute of Teaching, *Annual Report 2014* (2015), p 6.

criminal records checks and of the rationales and justifications for the specific design features of the ETRA regime, including its procedures for exclusion of teachers who have been found guilty of sexual offences and for regulating the VIT hearing process in relation to teachers found guilty of other types of indictable offences.

The thesis is based on an analysis of the formal legislative framework created by the ETRA, including its historical origins, and all of the published decisions of formal hearing panels relating to teachers with convictions for indictable criminal offences. The latter are accessible online via the VIT's website[2] but have not previously been the subject of scholarly analysis. A summary of all the cases discussed in this thesis appears at Appendix 2. They are considered from the perspective of procedural and substantive fairness, drawing on general principles derived from administrative law, human rights instruments and regulatory theory.

The thesis also draws and builds on issues identified in a review of the VIT conducted on behalf of the Minister for Education in 2008 (the King Review).[3] This review gave effect to a commitment by the government to conduct a review of the VIT in the fifth full year of its operation. It made a large number of recommendations for reform, of which only a few were accepted and implemented by the Victorian Government.

The analysis of the decision-making by VIT hearing panels and the statutory context in which it takes place is framed by a consideration of the broader context in which the issue of fitness to teach arises, including the nature and scope of the role of teacher in the 21st century. A key aspect of this analysis is its consideration of the appropriateness of decision-making which takes a broad view of the role of the teacher and therefore attaches a high level of significance to offending that bears no direct relationship to the teacher's classroom role. This, in turn, raises further questions about boundaries of work and private life and the extent to which teachers can or should be expected to be good role models when conducting otherwise private dimensions of their lives.

[2] See <http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/disciplinary-decisions>.
[3] FJ and JM King and Associates, *Review of the Victorian Institute of Teaching*, March 2008 (King Review) accessed at <http://www.education.vic.gov.au/Documents/about/programs/archive/vitreview.pdf>.

In addressing its primary question, the thesis also draws on principles of administrative law and principles of regulatory theory, including good regulatory design principles. Fundamentally, it considers the specific nature of the harm or problem which those aspects of the ETRA regime that deal with teachers with criminal records are designed to address and whether the regime deals with them in an appropriate manner. A key focus of this analysis is on issues of fairness.

The analysis of the ETRA regime is also framed by a consideration of the nature of criminal records checking and the assumptions on which it is based. This chapter will set the context for the analysis of the ETRA regime by establishing key principles. It will first examine the concept of crime and the creation and release of a criminal record. Second, it will examine the ETRA scheme and its role in occupational licensing and regulation of teachers. Third, it will contextualize the ETRA in privacy laws and laws regulating spent convictions and discrimination in employment.

The following section addresses the concept of crime, the principles on which criminal sentencing is based and the policy considerations relating to compulsory criminal records checking practices.

Criminal offences and the criminal record check

Everyone knows something about crime. It is practically impossible to live in today's society without hearing, seeing or reading about crime. Both in fact and in fiction we learn about the commissions of crimes, the proceedings in courts and the punishments applied or not applied. Media coverage of crime is a daily event. In recent times even the language used in relation to crime has changed, with military language increasingly used to emphasise the urgency of the situation - the war on drugs, the fight against organised crime and the anti-terrorist offensive, just to name a few examples.[4]

The existence of criminal behaviour and its reporting cause community anxiety. Many people are concerned to know about the occurrence of crime in the community, and they are also concerned about coming into contact with individuals who have committed crimes for a range of reasons. What the fact of committing a crime means for a teacher - about risk of

[4] Andrew Ashworth, *Human Rights, Serious Crime and Criminal Procedure* (Sweet and Maxwell, 2002), p 1.

reoffending, about character, about professional capacities - is the focus of the work of the VIT and will be examined in the following chapters of the thesis.

What is a crime?

Many writers have attempted to define crime and punishment. In 1883, the jurist Sir James Stephen wrote that:

> No department of law can claim greater moral importance than that which with the detail and precision necessary for legal purposes, stigmatises certain kinds of conduct as crimes, and the commission of which involves, if detected, incredible infamy, and the loss, as the case may be, of life, property and personal liberty.[5]

Almost half a century later in 1940, criminal law was described as representing 'the pathology of civilisation'.[6]

Criminal law is fundamentally the law as framed by legislatures and applied by judges and tribunals as a set of principles which both organise and regulate interpersonal and institutional relationships.[7]

The word 'crime' is commonly used to denote a legal concept - the behaviour of a person which constitutes a legal wrong.[8] In everyday usage, it can denote the behaviour of an individual on a particular occasion which amounts to a crime.

Definitions of crime may be found in statutes, in common law decisions or a combination of both. However, the legal definition of a crime does not exist in the abstract. It exists to be tested against the person whose alleged conduct is held to satisfy the tests comprised in the definition, so that the person, if found guilty, may be punished.[9]

[5] Sir James Stephen, *The History of Criminal Law of England*, (1883), cited in Louis Waller and Charles Williams, *Criminal Law* (Chatswood, NSW; Butterworths, 9th Edition, 2001) p 2.
[6] Morris Cohen, 'Moral Aspects of the Criminal Law' (1940) 49 *Yale Law Journal* 987, 102-105.
[7] Anthony Grayling, *Ideas that Matter* (London: Weidenfeld and Nicolson, 2009), p 203.
[8] Peter Gillies, *Criminal Law* (North Ryde, NSW; Law Book Co, 4th Edition, 1997), p 4.
[9] Ibid.

A well-known description or definition of what it is that amounts to a crime, and of the circularity of attempts to define 'crime', is contained in the following statement by Lord Atkin in 1931 in the House of Lords:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by the authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co extensive; nor is the sphere of criminality part of a more extensive field covered by morality- unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle.[10]

Lord Atkin further commented that it appeared to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence', given that the domain of jurisprudence could be ascertained only by examining what acts were declared by the State to be crimes at any particular time. In his view, the only common nature they would be found to possess was that they were prohibited by the state and that those who commit them were punished.[11]

A 'crime' is not necessarily immoral, and not all immorality is defined as criminal. Morality is an arbitrary concept which varies from culture to culture, and from era to era. There are certain acts which are regarded as immoral and also criminal irrespective of culture or era, such as murder, rape and theft. However other crimes are not immoral in any sense. These would include regulatory offences such as baking bread on a day when it was prohibited.[12]

The importance of this here therefore is that the types of activities that are regarded as warranting punishment depend on legal and policy decisions about what to punish and may change over time, as may the inherent 'immorality' or harm of what is criminalised. This is relevant in considering the implications of making exclusionary decisions based on past convictions.

[10] *Propriety Articles Trade Association v Attorney-General* (Canada) [1931] AC 310, 324.
[11] Gillies, op cit, p 4.
[12] Ibid, p 6.

The purposes of criminal law and of punishment of criminal behaviour, as conventionally stated, are fourfold. The first is to benefit of the victim by providing retribution or retaliation for the wrong committed against them. Retribution is generally known by the public as justice; society expects certain wrongs to be punished and, if they are not, then there may be the risk of private revenge. The second is to provide deterrence, which is a preventative approach. The criminal law punishes certain conduct in order to deter further breaches by the offender or to deter others from committing similar acts. The third is to provide community protection and restraint, by imprisoning offenders where the purpose of criminal law is to protect society from harm and the offender poses a potential threat. The final one is provide rehabilitation, where it is argued that programs designed to reform persons convicted in certain circumstances render future acts of crime less likely.[13] As noted by Paterson and Naylor, this objective 'prioritises the need to address post-sentence consequences with a view to enhancing rehabilitation and reintegration into the community'.[14]

The punishment of a crime will therefore depend on (a) how serious the crime is seen to be (eg as reflected in the legislated range of possible punishments) and (b) how the sentencing court balances the four aims outlined above. The weight which is attached to each of these objectives may be relevant in assessing practices in relation to criminal records: (a) in what is recorded and (b) how the employer or profession interprets what is recorded.

Categories of criminal offences

Criminal offences in Australia are typically categorised into two groups based on the procedures used to prosecute them.

Summary offences are more minor offences that can be dealt with summarily; ie by a Magistrate, rather than a judge and jury.[15] While their categorisation is based on an assessment that they are less serious and therefore do not warrant the protection of a jury trial, they may nevertheless attract heavy penalties, including imprisonment. In contrast, indictable offences (previously known as 'felonies') are more serious crimes which attract

[13] Ibid.
[14] Moira Paterson and Bronwyn Naylor, 'Australian Spent Convictions Reform: A Contextual Analysis' (2011) 34 *University of New South Wales Law Journal* 938, 946.
[15] Nash G and Bagaric M, *Criminal Legislation in Victoria*, Butterworths, 2003, p 979.

higher maximum penalties. Indictable offences are usually tried in the superior courts (County and Supreme Court) before a jury.[16]

The offence classification is significant for the present discussion because, as Goode points out, it is "about more than penalty or the amount of money involved - it also has to do with social stigma, the non-formal consequences of conviction, and the perceived seriousness of a given label".[17] This difference is reflected in the ETRA which attaches more significance to convictions for indictable offences. Section 2.6.32 requires the VIT to conduct an inquiry into a registered teacher's fitness to teach if it is informed that the teacher has been convicted or found guilty of an indictable offence other than a sexual offence.[18] Sexual offences result in automatic deregistration under s 2.6.29.

Criminal v civil sanctions

Why do some specific behaviours attract criminal as opposed to civil sanctions?

Society regulates undesirable behaviour in different ways. Some such behaviour is left to individuals to manage, ie to civil remedies. Some is regulated by the state through regulatory controls which carry quasi-criminal sanctions, and some is recognized as 'criminal' and having different levels of seriousness - as already noted - reflected in the way they are punished and the potential sentence.

If we are looking for a logical system for categorising specific crimes as being more 'serious', Ashworth suggests the following model. First, it is necessary to decide what crimes are the most serious; this is often thought to be obvious, but is in reality controversial and calls for careful weighing the interests invaded by certain types of offending. Second, the more serious the interests invaded or threatened by the offence, the stronger is the case for criminalising the conduct, in addition to relying on civil or regulatory measures. Third, the more serious the offence, the higher is the priority that ought to be given to dealing with it.

[16] Unless they are legislatively permitted to be tried summarily, before a Magistrate: *Criminal Procedure Act 2009* (Vic), s 28.
[17] Matthew Goode, "Committals, Offence Classification and the Jurisdiction of the Magistrate's Court" in Julia Vernon (Ed), *The future of committals: proceedings of a conference held 1-2 May 1990*, Australian Institute of Criminology, 1991, pp 197, 204, accessed at <http://www.aic.gov.au/media_library/publications/proceedings/07/goode.pdf>.
[18] See also ETRA, s 2.6.33(c).

This requires a range of preventative and other social measures, but it also calls for a reallocation of resources for enforcement.[19]

The significance of the criminal record

The consequences of a criminal record will vary from time to time and from one country to another. A criminal conviction, unless wiped or hidden, involves a stain on a person's record that may have a number of potential adverse consequences.

In Australia a criminal conviction does not carry the same harsh collateral consequences that exist in the United States,[20] but it does result in what may be characterised as a lifetime sentence in terms of employment opportunities. Criminal records checking is increasingly being used as a 'standard risk management tool' due to our increasingly risk averse culture and it is also the case that laws impose mandatory criminal records checking or character-based restrictions on employment in many professions and other occupations. This means that an individual with a criminal record may be unable to find a job or lose their job if their conviction comes to the attention of their employer. They may also potentially be denied training opportunities or promotion or subjected to less favourable working conditions. Discrimination in employment is prohibited by the International Labour Organisation's Discrimination (Employment and Occupation) Convention (ILO III),[21] as discussed further below at p 43.

In Australia, discrimination in employment on the basis of a criminal record was the main area of complaint to the former HREOC (now the Australian Human Rights Commission) under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), representing 34% of complaints.[22]

The Australian Human Rights Commission has been sufficiently concerned about the issue of discrimination on the grounds of criminal record that it has issued a specific set of guidelines

[19] Ashworth, op cit, pp 112-115.
[20] See Michael Pinard, 'An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced By Formerly Incarcerated Individuals' (2006) 86 *Boston University Law Review* 623.
[21] Discrimination (Employment and Occupation) Convention (adopted 25 June 1958) [ILO 111].
[22] HREOC, *Annual Report* 2006-2007 (2007), p 63.

to assist employers in preventing discrimination against people with criminal records. In 2012 when it updated these guidelines, it commented that '[h]aving any form of criminal record can be a major obstacle for people looking for employment' and noted that it had received over 68 complaints alleging discrimination in employment on the ground of criminal record in the last year alone.[23]

While its relative prevalence has since decreased, discrimination on the grounds of criminal record still accounted for 12% of the complaints received by the Australian Human Rights Commission in 2014-2015.[24] It is significant that complaints in the criminal record category exceeded complaints of discrimination in employment on the basis of religion, political opinion, social origin, medical record, sexual activity and trade union membership.

Criminal records checking is designed to improve public safety, but it has many negative implications, especially when used indiscriminately. The indiscriminate use of criminal records may be contrary to the broader goals of protection of privacy and fair treatment of people such as teachers with these particular characteristics and who have already been punished by the justice system. The sentence goes on for life.

As pointed out earlier, laws are not absolute codes of moral conduct. They vary across time and space, reflecting ever-changing differences in the moral beliefs of law-makers and their backers.[25] Whether a law is fair or not, in its labelling of a serious social 'harm', depends largely upon social perception. If the boundaries of socially acceptable behaviour shift over time, does it make sense to permanently stigmatise all ex-offenders with the 'criminal' label?[26]

This issue arose in relation to the decriminalization of consensual adult homosexual acts. These acts constituted criminal offences in Victoria until the enactment of the *Crimes (Sexual Offences) Act 1980* (Vic). However, individuals who had been convicted for acts which are now legal continued to carry the stigma of criminal offending impacting adversely on them,

[23] Australian Human Rights Commission, e-bulletin: Apr 2012, accessed at <https://www.humanrights.gov.au/news/e-bulletin/e-bulletin-apr-2012>.
[24] AHRC, *Annual Report for 2014-2015*, p 158.
[25] Helen Lam and Mark Harcourt, 'Record in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public' (2003) 47 *Journal of Business Ethics* 237, 243.
[26] Ibid.

including in relation to their career choices and opportunities.[27] That situation has now been addressed in a new scheme created via the *Sentencing Amendment (Historical Homosexual Convictions Expungement Act) 2014* (Vic), which came into operation on 1 September 2015. This allows for individuals with historical convictions for homosexual sexual activity that is no longer a criminal offence to apply to the Secretary of the Department of Justice and Regulation to have those convictions expunged. The expungement of a conviction entitles the individual to claim not to have been convicted or found guilty of that offence, thereby ensuring that they are not required to disclose this information. In addition, the conviction will not be disclosed on a police records check.[28]

Further, as pointed out by Lam and Harcourt, not all laws are fair or fairly enforced, so caution must be exercised in relying on a criminal record to justify differential treatment.[29] This is especially so where offences are minor in nature and do not involve harm to others. It is also the case that convictions are not always determined fairly, given the systematic biases in the legal system.[30] It is also important to bear in mind in relation to offences committed when an individual is young, that offenders generally stop offending as they age. Most convictions are for minor offences. For example Australian Bureau of Statistics figures show that 'the most prevalent category of offending in Australia in 2013-14 was the category of public order offences (74,630 offenders or 18%).[31] The question then becomes, should such minor offences be allowed to permanently and adversely affect the ex-offender's future employment opportunities? Are the laws always just and fair so that employers could and should rely on them to 'discriminate' in their hiring?

In addition as pointed out by Naylor, Paterson and Pittard, "it must be remembered that criminal record checks are not the 'magic bullet' for avoiding risk. They will never negate the

[27] See Paula Gerber and Katie O'Bryan, 'Should gay men still be labelled criminals?' (2013) 38 *Alternative Law Journal* 82.
[28] Details can be accessed at <http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/criminal+law/expungement+scheme>.
[29] Lam and Harcourt, op cit, p 244.
[30] Ibid.
[31] See <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4519.0/>. This category includes offences such as using obscene language and being drunk in a public place.

risks posed by the first time offender or the criminal who has successfully avoided detection".[32]

These factors suggest that there should be caution in relying too heavily on criminal records checking and that it is important to ensure that any decision-making based on criminal record it sufficiently nuanced to ensure that individuals are not unfairly discriminated against. However, there is clear evidence that the notion of a criminal taint continues to have currency.

The prevalence of criminal records checking

Over the past two decades there has been a huge increase in the requests for disclosure from individuals for criminal history information, both within Australia and throughout the world. In Australia requests to CrimTrac, the national criminal record agency increased from 2.3 million in 2006-07 [33] to 3.9 million in 2014-15,[34] a massive increase of over 39%. This phenomenon is by no means unique to Australia. In the United Kingdom, earlier research has shown that about two thirds of employers request criminal history information from job applicants, regardless of the position for which they were applying.[35]

CrimTrac specifically mentions the use of its National Police Checking Service 'to assist with screening personnel, volunteers or employees working with children or vulnerable groups, and those occupying positions of Trust.' It also states that 'the use of this service can form part of a recruitment package for an organisation considering employing a person'[36] and cites as an example a statement by a small counselling service to the effect that:

> Working with vulnerable clients requires us to ensure our staff meet the highest standards. The National Police Check service offered by our partners, means we can recruit with the knowledge that new employees have no issues in their past that may impact on our clients' future.[37]

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[32] Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171, 185.
[33] CrimTrac, *Annual Report 2006-2007* (2007), p 37.
[34] CrimTrac, *Annual Report 2014-2015* (2015), p iv.
[35] Hilary Metcalf, Tracy Anderson and Heather Rolfe, *Department for Work and Pensions, UK Barriers to Employment for Offenders and Ex Offenders - Part 1*, Research Report No 155 (2001) 74.
[36] CrimTrac, *Annual Report 2012-2013* (2013), p 45.
[37] Ibid.

This upward trend in criminal records checking has implications for a significant proportion of the population given the large numbers of individuals with criminal records. In the United Kingdom one in three males is reported to have a criminal record by age 30.[38] Similarly, in the United States criminologists have estimated that one-fourth to one-half of all young men are active in crime prior to their eighteenth birthday.[39] One third of all males in California had been arrested at least once between the ages of 18 to 29.[40] Likewise, one in four males in New Zealand had a criminal record by age 25.[41]

It is likely that Australian rates are comparable. Australian Bureau of Statistics figures show that there were 5,057 offenders per 100,000 persons aged 15-19 years in 2013-4.[42] In the case of the case of Victoria, the youth offender rate for persons aged 10-19 years was 2462 per 100,000 persons.[43]

One possible explanation for the increased resort to criminal record checks is the intense interest in security and risk management. Some of the elements of security and fear over the past decade may stem from acts of terrorism, organised crime, paedophilia and child abuse.[44] In the case of teachers it is clear that concerns about paedophilia and child abuse have had an important role to play in the development of regimes such as the ETRA.

The question of child abuse was increasingly identified as an important issue in the mid-1970s when the United Nations started to develop covenants and conventions pertaining to

[38] Anonymous, 1996, p 2 cited in Lam and Harcourt, op cit, at 237.
[39] Jeffrey Grogger, 'The *Effect of Arrests on the Employment and Earnings of Young Men'* (1995) 110 *The Quarterly Journal of Economics* 51 cited in Lam and Harcourt, op cit, p 242.
[40] Robert Tillman, "The Size of the 'Criminal Population': The Prevalence and Incidence of Adult Arrest" (1987) 25 *Criminology* 561, cited in Lam and Harcourt, op cit, p 237.
[41] Ron Lovell and Marion Norris, *One in Four: Offending from Age 10-24 in a Cohort of New Zealand Males: Study of Social Adjustment*: Research Report No. 8. (Wellington: Department of Social Welfare, 1990) 1, cited in Lam and Harcourt, op cit, p 251.
[42] 4519.0 - Recorded Crime - Offenders, 2013-14 accessed at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2013-14~Main%20Features~Age~10>.
[43] 4519.0 - Recorded Crime - Offenders, 2013-14 accessed at <4519.0 - Recorded Crime - Offenders, 2013-14>.
[44] Naylor, op cit, p 174.

education and children, including the United Nations Convention on the Rights of the Child, which is discussed below at pp 42-43.[45]

In Australia the issue of child protection achieved prominence in the context of the 1997 Wood Royal Commission.[46] The Commission was initially set up to investigate police corruption but the scope of its inquiry was later expanded to include the protection of paedophiles by New South Wales police.[47] The fourth volume of its report, which focused on the paedophile inquiry, revealed extensive child abuse in New South Wales schools and deficiency in the management by schools of allegations of sexual abuse.[48] The Commission's report, which gave in principle support to proposals for establishment of a Teacher Registration Authority in New South Wales, provided the impetus for the enactment of new regulatory regime for New South Wales teachers overseen by an Institute of Teaching. That, in turn, provided the model for the *Victorian Institute of Teaching Act 2001* (Vic), which introduced the regime now found in the ETRA.

It is significant that this issue has resurfaced today in the context of the current Royal Commission into Institutional Responses to Child Sexual Abuse. For example, the Commission has recently issued a Working with Children Report[49] which contains specific recommendations aimed at strengthening the Working with Children (WWC) regime, including recommendations to broaden the range of offences which are taken into account in issuing that working with children checks. Interestingly, however, the report acknowledges that measures of this type can instil a false sense of security.

> [O]ver-reliance on WWCCs can be detrimental to children's safety. They can provide a false sense of comfort to parents and communities, and may cause organisations to become complacent due to the belief that people who have undergone WWCCs do not pose any risks to children - this is not the case.[50]

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[45] Anthony Giddens, *Sociology* (Cambridge: Polity Press, 6th Edition, 2009), p 347.
[46] The Royal Commission into the New South Wales Police Service, 1997.
[47] See the website entry for its report at <https://www.pic.nsw.gov.au/RoyalCommission.aspx>.
[48] Royal Commission into the New South Wales Police Service, The Wood Royal Commission, *Final Report* (August 1997), Volume 1V, The Paedophile Inquiry, Ch 10, pp 865-896.
[49] Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Report*, 2015 accessed at <http://www.childabuseroyalcommission.gov.au/getattachment/7ecd3db9-0b17-483e-9a0e-8fb247140f3e/Working-with-Children-Checks-Report>.
[50] Ibid, p 3.

The WWC Act is discussed below.

The ETRA regime

Criminal record checks are now, as noted, integral to many occupational licensing schemes, including for teachers. The Victorian teaching scheme ETRA will now be outlined to set out the background for the following chapters.

Overview

To be able to work as a teacher in a government or non-government school in Victoria, a person must be registered by the VIT as required under the *Education Training and Reform Act 2006* (Vic) (ETRA).[51] A criminal record can be relevant both on initial application, and if it arises while the person is registered. These will be dealt with in turn.

Convictions for criminal offences are relevant in relation to initial registration. The ETRA provides that the VIT may refuse to grant an applicant registration on one or more of five specified grounds. These relate to character defects; criminal convictions, cancellation or suspension under teaching regimes in other places and serious incompetence. The two grounds relating to convictions are that: the applicant has been convicted or found guilty of a specified 'sexual offence' or an indictable offence in Victoria (or an equivalent offence in another jurisdiction);[52] or the applicant has been convicted or found guilty of an offence where the ability of the applicant to teach in a school is likely to be affected because of the conviction or finding of guilt or where it is not in the public interest to allow the applicant to teach in a school because of the conviction or finding of guilt.[53]

Criminal record checks are required at the time of appointment,[54] and then every five years.[55] In addition, the VIT may require a registered teacher to provide information about any criminal records to them at any time during the period of their registration as a teacher.[56]

[51] Jim Jackson and Sally Varnham, *Law for Educators: School and University Law in Australia*, (Chatswood, NSW: LexisNexis Butterworths, 2007), p 309.
[52] *Working with Children Act 2005* (Vic), s 2.6.9(2)(b).
[53] *Working with Children Act 2005* (Vic), s 2.6.9(2)(c).
[54] ETRA, s 2.6.7(2A).
[55] ETRA, s 2.6.22A.
[56] ETRA, s 2.6.23.

Registration under the ETRA provides teachers with exemption from the requirements of the *Working with Children Act 2005* (Vic) (WWCA), which apply to all other people who work with children. This is based on the rationale that the ETRA regime provides adequate (indeed greater) oversight of teachers. The lack of integration between these regimes is further discussed in Chapter 3.

Under the WWC regime any individuals (including volunteers) whose work involves interaction with children must have a WWC permit. These are issued by a special unit within the Department of Justice. The WWC process involves carrying out a National Criminal History Record Check (NCHRC) and assessing the results against specific criteria outlined in the WWCA. It also involves subsequent monitoring in conjunction with Victoria Police.

At the time when the WWC regime was introduced it was decided to exclude teachers registered via the VIT as they were already required to undergo a criminal record checking process.[57] As noted in the King Review, the VIT imposes a higher standard for teachers when assessing NCRHC outcomes; it covers a broader range of offences and applies a greater number of criteria as part of its assessment process.[58]

Another key difference between the schemes of relevance here is the way in which the most serious category of offences is dealt with. The WWCA groups offences into three categories with the most serious falling within category A. It requires the Secretary to refuse to give an applicant an assessment notice on a category A application[59] (with the consequence that the applicant is unable to work with children) and must revoke an existing notice if the applicant commits a category A offence.[60] However, there is a right of override by the Victorian Civil and Administrative Tribunal (VCAT) where it is satisfied that the person would not pose an unjustifiable risk to the safety of children.[61] Under the ETRA a conviction for a 'sexual offence' (as defined in s 46) results in automatic deregistration and ineligibility to work as a teacher, and there is no scope for the exercise of any override power by the VCAT.[62]

[57] King Review, p 11.
[58] Ibid.
[59] *Working with Children Act 2005* (Vic), s 12(2).
[60] *Working with Children Act 2005* (Vic), s 21AB(2).
[61] *Working with Children Act 2005* (Vic), s 26A.
[62] ETRA, s 2.6.29.

This thesis focuses on loss of registration rather than refusal of initial registration due to the lack of available data in relation to decision-making in respect of refusals because decisions in respect of initial eligibility are not made publicly available. However loss of registration involves formal processes, reported decisions, and potential for review (except in the case of teachers with convictions for specified sexual offences).

At the time when it conducted its review of the VIT, the King Review commented that the approaches taken to criminal records in relation to registration and cancellation of registration was essentially similar:

> The VIT looks at each case on its merits, and the criminal record is assessed against its criteria. For all criminal offences, the criteria include: nature of the offence; applicant's personal circumstances; period of time that has elapsed since the offence(s) took place; severity of the penalty; whether the offence involved a child; whether violence was involved; etc.
>
> For certain offences (ie sex, violence, dishonesty and drug offences), additional assessment criteria are considered. For example, where sex offences have been identified, the age and vulnerability of the victim and any injury to the victim would be considered.[63]

The approach taken to cancellations, as evidenced via the reported decisions of formal hearing is discussed in subsequent chapters and is the primary focus of this thesis. This process is based on an obligation to assess 'fitness to teach' in cases where the VIT is informed that a registered teacher has been convicted or found guilty of an indictable offence other than a sexual offence. If the Institute is informed that a registered teacher has been convicted or found guilty of an indictable offence other than a sexual offence, the Institute must conduct an inquiry under this Part into the registered teacher's fitness to teach. This process is discussed in detail in Chapters 3 and 4.

As a matter of background, however, it can be noted that the available statistics relating to numbers of refusals of registrations based on the results of the criminal records check show that these are comparatively small (see Table 1 below). However, it is unclear how many

[63] King Review, p 37.

students are deterred from becoming teachers or refused entry to Education degrees based on criminal records.

If a criminal records check reveals that an applicant for registration has been convicted or found guilty of an indictable offence or a relevant summary offence, the Inquiries and Litigation Branch of the VIT prepares a special attention report for the Registration Committee of Council, which then decides whether or not offending affects the applicant's suitability to be a teacher.[64]

Table 1: Statistics relating to denial of registration based on criminal offending*

	Special Attention Reports	Refusal of Registration	Acceptance of Registration
2013-14	37	2	32
2012-13	157	5	159
2011-12	37	2	32
2010-11	87	2	82
2009-10	78	2	74

*These figures are obtained from the VIT Annual Reports for the relevant years

The ETRA requires national criminal history checks not only when a teacher is appointed but also every five years at a minimum.[65] These checks are performed with the consent of the teacher, but teachers are required to provide this consent and also provide the identity information and pay the necessary fee required for the purposes of the check.[66] If a teacher

[64] This process in outlined in the VIT's 2013 Annual Report: see Victorian Institute of Teaching, *Annual Report 2013*, September 2013, p 13.
[65] See *Working with Children Act 2005* (Vic), s 2.6.22A(1). The VIT may conduct records checks within less than 5 years of the last one if it 'suspects that there are circumstances that warrant the check being conducted at that time': ETRA, s 2.6.22A(2).
[66] ETRA, s 2.6.22A(3).

fails to comply with these requirements, without reasonable excuse, the VIT may suspend his or her registration.[67]

While criminal records checks are usually performed with the consent of a teacher, the chief executive officer of the VIT also has power to request the Chief Commissioner of Police to give him or her the information concerning the criminal record, if any, of a registered teacher and, may for that purpose disclose to the Chief Commissioner the information required to conduct such a check.[68] This may be done without the consent of the teacher, although the teacher must be provided with notice of the request.[69]

Furthermore, a registered teacher is required to advise the VIT if he or she is committed for trial, found guilty or convicted of a sexual offence or other indictable offence.[70]. In addition, the Chief Commissioner of Police is required to notify the Institute 'if a registered teacher has been charged with, committed for trial, found guilty or convicted of certain violent or drug offences'.[71]

The current procedures follow from amendments that were made to the ETRA via amending legislation that came into operation in 2011.[72] As noted in the VIT's 2013 Annual Report, these have enabled greater scrutiny of the ongoing fitness of registered teachers through the implementation of systematic, routine, ongoing criminal record checking being undertaken by the Institute. Under this procedure, Victoria Police provides the Institute with regular reports identifying registered teachers who have matters in Victoria 'under police investigation, matters awaiting a court hearing or relevant criminal history information'.[73]

The procedures that follow where criminal records checks reveal guilty findings are discussed and critically analysed in subsequent chapters of the thesis. They are also illustrated with case

[67] ETRA, s 2.6.22A(4).
[68] ETRA, s 2.6.21A(1).
[69] ETRA, s 2.6.21A(2).
[70] ETRA, s 2.6.57.
[71] See VIT, Indictable offences brochure, 2014 accessed at <http://www.vit.vic.edu.au/*SiteCollectionDocuments/PDF/DisciplinaryProcess/-Indictable_Offence_Brochure.pdf*>.
[72] See the *Education and Training Reform Amendment Act 2010* (Vic).
[73] Victorian Institute of Teaching, *2013 Annual Report*, September 2013, p 12.

studies, which highlight the negative ways in which these checks can impact on individual teachers.

Criminal offending on the part of the teacher has different consequences according to the nature of the offence, as discussed in more detail in Chapters 2 and 3. Teachers who have committed sexual offences are subject to automatic deregistration whereas those who have committed other forms of offences are a subset; are a common feature subject to hearings which may result in deregistration. Teachers who lose their registration need to apply for a WWC check only if they wish to continue working with children, but not teaching them. The number of individuals affected is illustrated in Table 1.

Table 2: Statistics relating to loss of registration based on criminal offending

	Indictable offences Assessments of lack of fitness to teach#	**Mandatory loss of registration (sexual offences)***
2013-14	31	4
2012-13	35	7
2011-12	51	5
2010-11	18	9
2009-10	38	7

* These figures are obtained from the VIT Annual Reports for the relevant years
# These figures are based on an analysis of the reported decisions - see Appendix 2

ETRA as occupational licensing scheme

Occupational licensing regimes are a sub-set of licensing regimes more generally and are a common feature of the regulation of most professions. There is a body of literature relating to licensing as a regulatory approach, including literature that considers licensing in the general context of occupational licensing and the more specific context of professional regulation.[74]

[74] See, for example, Morris Kleiner 'Regulating Occupations: The Growth and Labor-Market Impact of Licensing' (2005) *Perspectives on Work* 40: Morris Kleiner, *Licensing Occupations: Ensuring*

The key rationale for occupational licensing is to protect the public interest, including the public interest in consumer protection, in terms of the quality of members of the profession. As noted in the King Review in the context of the licensing of teachers,

> Registration of the teaching profession is the mechanism by which the community can be confident of the performance of the range of teaching duties and the safety and wellbeing of their children while in the care of the teacher. Registration is also undertaken to ensure the quality of teaching as a profession.[75]

It is arguable that the most significant interests protected by a teacher registration regime are those of school children; namely their interest in receiving high quality teaching and in receiving protection from physical and other harm. However, licensing can also serve to enhance the reputation of a group, and is common in the case of the occupations that are, or wish to be recognized as, professions. The extent to which the latter consideration should receive emphasis is affected is considered in detail in Chapter 5 in the context of the role of the teacher.

Although Victoria was a leader in establishing a teacher registration body, teacher registration bodies now exist in all Australian states and Territories and have legislative power to deregister teachers for misconduct. These powers, which are further discussed in Chapters 2 and 3, allow for a teacher who has engaged in misconduct to be deregistered in two ways:

- via an independent inquiry or investigation into the conduct of a member following a complaint; and
- via processes that differ from state to state to discipline members who have been found guilty of offences under other legislation. 'In some cases and in some jurisdictions a member convicted of such an offence would still have the benefit of an independent inquiry by the registration body before any action has taken by it. Some offences, however, result in instant deregistration.'[76]

Quality or Restricting Competition? (Kalamazoo Michigan: WJ Upjohn Institute for Employment Research, 2006).

[75] King Review, p 27.

[76] ACT Government Education Directorate, *Teacher Registration Issues in the ACT*, Issues Paper No 4 - Professional Conduct. This paper, which was prepared in anticipation of changes to the teacher registration requirements in the ACT, 2008 accessed at

The licensing scheme underlying the ETRA Act had its origins in the *Victorian Institute of Teaching Act 2001* (Vic). ETRA repealed and replaced that Act, and gave effect to a policy commitment by the Bracks Labor Government to introduce a new regulatory regime for teachers based on a statutory regulator.[77] Minister Delahunty's Second Reading Speech referred to three issues that the new regime proposed to address: the changing profile of the profession; the changing nature of teaching; and raising the status of teaching to secure the quantity and quality of the next generation of teachers. Minister Delahunty also commented that:

> As the new single registration authority for all primary and secondary government and non-government school teachers, [VIT would] act to reassure the Victorian community that teachers in our government and non-government schools are qualified, competent, fit to teach and of good character.[78]

Rather than taking time to develop a regulatory regime specifically designed for teachers, the government opted to use the model used by the Medical Practitioners Board and the Nurses Board of Victoria at that time. Significantly, those models were repealed and substantially redrafted not long afterwards (suggesting that they were themselves out of date). Moreover, the fact that the model used related to health professionals, meant that there was limited consideration given to the specific role of the teacher in the regulatory design.

The King review noted that the models used had been repealed and significantly redrafted not long after their adoption in relation to the VIT and commented that they 'were only partially appropriate, given the differences between the health and education sectors[79] It also noted that 'some adjustments to the model were required as VIT established its operations (such as in relation to the discipline function)'[80] but it did not further elaborate on this point.

In addition, there was no attempt to articulate any specific legislative objectives beyond addressing the issues referred to in the Second Reading speech. Both the VIT Act and the

<www.det.act.gov.au/__data/assets/pdf_file/0003/18255/tr_Issues_Paper_No_4_ProfessionalConduct.pdf>.

[77] King Review, p 25.
[78] Victorian Legislative Assembly, *Hansard*, 1 November 2001, p 1503.
[79] King Review, p 7.
[80] Ibid.

ETRA lack objects clauses explaining the objectives for teacher registration. However, it is arguable that they are fundamentally similar to those articulated in the equivalent South Australian legislation, ie to 'to safeguard the public interest in there being a teaching profession whose members are competent educators and fit and proper persons to have the care of children'.[81]

Occupational licensing laws typically protect the public interest in quality by requiring not only a 'competency component' but also a separate 'character component'. They likewise typically provide for loss of licensing in circumstances where the professional is incompetent or engages in serious misconduct. Arguably these components should reflect what is genuinely required to correct the harm that is perceived to exist in the absence of licensing but should go no further (at least to the extent that they impinge on the basic rights of those regulated).

As the focus of this thesis is on teachers with criminal records, a key issue to be determined is the interrelationship between criminal offending and professional misconduct and the appropriateness of the approaches taken by VIT hearing panels in relation to this issue. This will be discussed with reference to (a) regulatory theory and fairness and (b) human rights.

ETRA, Regulatory theory and legal concepts of fairness

Occupational licensing may be viewed as an aspect of regulation, and as such concerned with 'influence', 'power', and control.[82] Regulation involves the selection of a set of regulatory tools from a toolkit of possible options,[83] and is seen as a means to an end - to get people to do something they would not otherwise do, or not do something they would otherwise do.[84] However, there is no ideal regulatory configuration, nor a perfect set of tools; what is required will vary according to the context. The rationale for regulating is to address some specific harm or problem that has been identified. What is critical therefore is that it should address that harm but do so in way which is not counterproductive in the sense that it creates

[81] *Teachers Registration and Standards Act 2004* (SA), s 4.
[82] Arie Freiberg, *The Tools of Regulation*, (Sydney: Federation Press, 2010), p 84.
[83] Ibid; Arie Freiberg, 'Reconceptualising Sanctions' (1987) 25 *Criminology*, pp 223, 228.
[84] Ibid.

more harm than it seeks to avoid,[85] fails to have the intended effect, or diminishes or completely suppresses the activity it seeks to encourage.[86]

Moreover, a high level of complexity and intensity of regulation as conceptualized in the concept of the 'regulatory state' is open to criticism to the extent that it focuses simply on lessening risks as opposed to meeting some legitimate need.[87] As noted by Tilbury, decreasing trust in public institutions, including professions, has led to greater demands for accountability. However, it has been argued that institutionalized audit activities are 'mostly about producing reassurance' and may lead to diversion of resources from practices that can make a real difference.[88]

It is also important that regulation is fair and just. As observed by Freiberg, 'although a regulatory tool may be effective, it may also be illegal, unfair, or be out of proportion to the harm, which may affect certain groups in the population *more* than others'.[89]

In judging a regime it is important to pay attention not only to its formal framework and structure but how it operates in reality. In case of Victorian teachers with criminal records the framework is provided by the ETRA, but its operation is affected also by the way in which the VIT performs its decision-making role. This thesis will therefore examine both the ETRA itself and the reported decisions of the VIT in relation to teachers with criminal convictions.

As a regulator the VIT acts as an agent of the government and ultimately, of the public[90] and should be accountable for everything it does, financially, procedurally and substantively.[91] Process is an important part of regulation.[92] It is therefore important that the VIT's procedures should be fair and impartial and comply with administrative law principles

[85] *KL v State of NSW (Department of Education)* [2010] AusHRC 42 pp 12-13.
[86] Malcolm Sparrow, *The Character of Harms*, (Cambridge: Cambridge University Press, 2008), p 40.
[87] See Clare Tilbury, (2014) 49 *Australian Journal of Social Values* 87, 88 citing Michael Power, *The Audit Society: Rituals of Verification* (Oxford, Oxford University Press, 1997).
[88] Clare Tilbury, 'Working with Children Checks - Time to Step Back?' (2014) 49 *Australian Journal of Social Values* 87, 88-89.
[89] Freiberg, *The Tools of Regulation*, p 79.
[90] Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford: Hart Publishing, 2004), p 111.
[91] Ibid.
[92] Ibid p 75.

because it is exercising public power.[93] It should also be accountable for the quality and fairness of its substantive decisions.[94]

The ETRA provides a legislative framework for the exercise of the VIT's powers: it defines the scope of those powers and also establishes some of the procedural requirements that govern the decision-making processes of hearing panels. The others derive primarily from the common law, including general principles of administrative law. These require: '[f]irstly that fair procedures should be followed in the performance of public functions, secondly that public functionaries should observe legal limits on their powers and thirdly that they should respect the rights of individuals.'[95]

The concept of fair procedure is encapsulated in the two principles of natural justice - the fair hearing rule and the rule against bias.[96] Two demands are made in this context:[97] firstly, was the teacher given 'an opportunity to show why adverse action should not be taken before a sufficient opportunity to say everything that can be said in his favour'; and secondly, was the decision-maker 'a one 'whose mind is open to persuasion, or free from bias'?[98] These fundamental principles are reflected in the statutory scheme. The Act contains some procedures which reflect the rules of natural justice (for example, it requires teachers to be provided with notice of hearings) and also states explicitly that hearing panels are bound by the rules of natural justice.[99] It also gives some effect to the rule against bias in that it excludes a person who has undertaken the investigation of a matter to be member of a hearing panel in respect of that matter.[100]

The concept of legal limits concerns matters of substance; that public functionaries should act consistently with relevant laws, that they should resolve relevant issues of fact within

[93] Administrative Review Council, *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* (2008), p 12.
[94] Joanna Bird, Regulating the Regulators: Accountability of Australian Regulators' (2011) 35 *Melbourne University Law Review* 742.
[95] Peter Cane, *Administrative Law* (Oxford, Oxford University Press, 2004), pp 213-214.
[96] Ibid.
[97] *Lewenberg and White v Legal Aid (Vic)* (2005) (2005) 22 VAR 354.
[98] John Forbes, *Justice in Tribunals*, (Sydney: The Federation Press, 2010), p 104.
[99] ETRA, s 2.6.48(d).
[100] ETRA, s 2.6.43(3)(a).

tolerable margins of error, and that they should exercise their powers 'rationally' and 'for the purposes for which those powers were conferred'[101]

In addition, 'respect for individual rights also requires that public functionaries should not disappoint legitimate expectations, and that they should respect fundamental human rights.'[102]

The regulatory context for the establishment of a statutory licensing regime for teachers received detailed consideration in a New South Wales Ministerial Discussion Paper in the context of its establishment of a similar teacher registration system in New South Wales.[103] The paper acknowledged that the proposal required demonstration that the benefits to the community outweighed the costs (including those arising from the restriction of competition) and identified a number of specific advantages to be gained by from implementing a registration system. These included 'rais[ing] the status of the teaching profession by assuring the community about the qualifications, quality and standards of those who teach the young people of New South Wales.[104]

The issue of student safety is important and arguably self-evident. However, the rationale of improving the standing of the profession arguably warrants more attention. This is a significant issue in the operation of the ETRA regime and is discussed more fully in Chapter 3 below. The King Review observed that professional standing appeared to have been a particular concern when the VIT was established and commented that:

> At the time VIT was established, it appears there was a philosophy that teaching was in some way different from other professions. This distinction was reflected in some of the legislative provisions and in the emphasis on advocacy on behalf of the profession. This philosophy may have been a result of the prevailing environment, in which teachers in the government system held a perception that the reputation of the profession had been diminished.[105]

In its view, this was no longer the case in 2008.[106]

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[101] Ibid.
[102] Ibid.
[103] NSW Department of Training and Education Co-ordination 'The Establishment of a Teacher Registration Authority in New South Wales', Ministerial Discussion Paper, August 1997.
[104] Ibid, p 7.
[105] King Review, p 25.
[106] Ibid.

ETRA and human rights

Regimes such as the ETRA raise issues of human rights in relation to both children and teachers. Three international instruments will be noted, followed by a brief consideration of the Victorian Human Rights Charter.

There are three international human rights instruments of direct relevance. Each of these is appended to the Australian Human Rights Act, giving the Australian Human Rights Commission jurisdiction in relation to them (although they do not create binding rights under Australian law).

The Commission's powers as set out in s 11(f) include a power to inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

> (i) where the Commission considers it appropriate to do so -- to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
> (ii) where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement -- to report to the Minister in relation to the inquiry.

The first of these is the United Nations Convention on the Rights of the Child, which was ratified by Australia in 1990.[107] This convention includes in Article 3 requirements for the best interests of the child to be a primary consideration including by administrative authorities or legislative bodies and for 'institutions, services and facilities responsible for the care or protection of children [to] conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision'. It also includes in Article 34 a requirement for state parties to 'to protect the child from all forms of sexual exploitation and sexual abuse'.

Arguably in relation to schools the key issue is one of protecting the physical and emotional safety of children and ensuring that they are protected from sexual abuse. As noted by Farrell,

[107] This Convention is reproduced in Schedule 3 of the *Australian Human Rights Act 1986* (Cth).

'[t]he advent of child abuse as a discrete social phenomenon and the identification of educational institutions as possible sites of child abuse have foregrounded child protection as a premier policy issue for teachers of children and young people.[108] This thesis accepts as its starting point that child protection is paramount and a key consideration to be taken into account in assessing the ETRA regime.

A second instrument, which is primarily of relevance to teachers, is ILO 111, the Convention Concerning Discrimination of Employment and Occupation.[109] This requires signatories to 'promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination'. ILO 111 does not include criminal records within its specified grounds for discrimination but it leaves scope for signatories to add other grounds. Australia, which is a signatory to the convention has added a ground based on criminal record via the Human Rights and Equal Opportunity Commission Regulations 1989 (Cth).

As explained on the Commission's website,

> It is not discrimination if a person's criminal record means that he or she is unable to perform the *inherent requirements* of a particular job. This must be determined on a case-by-case basis, according to the nature of the job and the nature of the criminal record.[110]

This is discussed further below in this chapter.

The third and final instrument is the International Covenant for Civil and Political Rights (ICCPR). Australia agreed to be bound by the ICCPR on 13 August 1980.[111] A key article of relevance to teachers is Article 17, which provides that:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

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[108] Ann Farrell, 'Legislative Responsibility for Child Protection and Human Rights in Queensland' (2001) 6 *Australia and New Zealand Journal of Law and Education* 15, citing Mary Helfer, Ruth Kempe and Richard Krugman, *The Battered Child* (Chicago: University of Chicago Press, 1974).
[109] This Convention is reproduced in Schedule of the Australian Human Rights Act 1986 (Cth).
[110] Australian Human Rights Commission, *Discrimination in Employment on the Basis of Criminal Record* accessed at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/discrimination-employment-basis-criminal-record>.
[111] This Convention is reproduced in Schedule 2 of the *Australian Human Rights Act 1986* (Cth).

The right to privacy is also contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic), as discussed below at pp 27-30.

These rights will be discussed further below in Chapters 6 and 7.

Rights under the Victorian Charter of Human Rights and Responsibilities

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) parallels the ICCPR and embodies a number of rights relevant here. First is the right to privacy. This applies to Victorian public authorities, including the VIT and its hearing panels, which are required to consider the rights contained in that Act when making their decisions and to act in a manner compatible with those rights. However, the rights themselves are not directly enforceable, although it is open for individuals to raise a human rights argument along with existing remedies or legal proceedings.

The right to privacy and reputation is contained in s 13. This provides that:

> A person has the right—
> (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
> (b) not to have his or her reputation unlawfully attacked.

It should be noted the right to privacy in s 13(a) is not an absolute one. It allows for interference provided that it is neither unlawful nor arbitrary. The term 'arbitrary' is found also in the broadly similar right in Article 17 of the ICCPR and has been interpreted in that context as meaning reasonable in the particular circumstances.[112]

There is case law from the UK, in relation to a similarly worded privacy article in Article 8 of the European Convention of Human Rights, in which the English Court of Appeal has held that disclosure of person's criminal history may breach their right to privacy. The case of *R (on the application of T) v Greater Manchester Chief Constable*[113] concerned a system of enhanced criminal record certificates which was in operation at the time. The Court held that

[112] United Nation Human Rights Committee, *General Comment No. 16*, [3]-[4].
[113] [2013] EWCA Civ 25.

this was in breach of the applicants' Article 8 rights, in part because it failed to control the disclosure of information by reference to whether it was 'relevant to the purpose of enabling employers to assess the suitability of an individual for a particular kind of work.'[114]

Another right relevant to teachers who are subject to disciplinary proceedings under the ETRA is Charter s 24, which provides that a party to a civil proceeding has the right to have the charge or proceeding decided by 'a competent, independent and impartial court or tribunal after a fair and public hearing'. This is considered further in Chapter 6 in relation to issues of procedural fairness.

Also relevant to the VIT's decision-making is s 17(2), which provides that 'every child has the right, without discrimination to such protection as is in his or her best interests'. This is the key right that needs to be balanced when considering the rights of teachers. Arguably it is very important when assessing the relevance of criminal offending to employment to consider the extent to which the prior offending may be indicative of the fact that the offender is more likely to pose a threat to the safety or welfare of children within a school. This issue is further discussed in the context of fitness to teach.

The need to balance and restrict rights is common to all human rights instruments. As noted by Debeljak, 'rights are balanced against and limited by other protected rights, and other non-protected values and communal needs'.[115] In the case of the Charter of Human Rights and Responsibilities Act, the rights provided therein are subject to a general limitation power in s 7(2). This provides that they may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society'.

The inclusion of this provision is explained in the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill as follows:

> This sub-clause reflects Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against other competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to

[114] [2013] EWCA Civ 25, [38].
[115] Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006'* (2008) 32 *Melbourne University Law Review* 422, 424.

> protect and promote human rights and the need to limit human rights in some circumstances.[116]

Section 7(2) contains a list of factors to be balanced when assessing these limits. These factors are the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Debeljak explains the decision-making process under s 7(2) as involving decisions as to whether the legislative objective is important enough to override the protected right (ie a reasonableness assessment) and whether the legislation is justifiable.

> [I]s there proportionality between the harm done by the law (the unjustified restriction to a protected right) and the benefits it is designed to achieve (the legislative objective of the rights-limiting law)? The proportionality assessment usually comes down to a question about minimum impairment.[117]

This makes clear that the required test in deciding where the ultimate balance lies is one of proportionality; it is not sufficient that the competing right is an important one - the measure that undercut the other right must also be one which impairs the other right to the least possible extent.

The rights in the Charter are not directly enforceable but may be raised along with existing remedies or legal proceedings, including proceedings for judicial review. There have been only a very small number of cases where this issue has been raised, and none to date have involved teachers.

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[116] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, p 9.
[117] Julie Debeljak, *Inquiry into the Charter of Human Rights and Responsibilities A submission as part of the Four-Year Review of the Charter of Human Rights and Responsibilities Act 2006 (Vic) for the Scrutiny of Acts and Regulations*, p 13 accessed at <http://www.law.monash.edu.au/castancentre/policywork/charter-review.pdf>.

ETRA and domestic legal frameworks

Those aspects of the ETRA regime pertaining to teachers with criminal convictions exist within a broader framework of Victorian and Commonwealth laws that govern the conduct of public bodies and employers more generally.

Information privacy laws

Privacy is an important issue for individuals who have criminal records. This is recognized implicitly in the *Privacy Act 1988* (Cth) via the inclusion of criminal history in the definition of 'sensitive information', a category that receives more protection than other types of 'personal information'. Privacy issues featured in a number of the submissions to the King review.[118] There are two key laws that are relevant to Victorian teachers.

The *Information Privacy Act 2000* (Vic) applies to Victorian Government agencies, local government and statutory bodies, including Victoria Police and the VIT. It requires that 'sensitive information' such as criminal history information, must generally be collected only with the consent of the person concerned. It also precludes the use and disclosure of identifiable personal information that is inconsistent with the purpose for which the information was collected, except with the consent of the person to whom the information relates. However, these safeguards can be overridden by express statutory requirements and the ETRA requires compulsory criminal records checking. The ETRA also empowers Victoria Police to provide the VIT with 'regular reports identifying registered teachers who have matters in Victoria under police investigation, matters awaiting a court hearing or relevant criminal history information'.[119]

Spent convictions laws

The disclosure of criminal records information is also affected by the administrative spent conviction regime which governs disclosure of criminal records information by Victoria Police.[120] Spent convictions regimes have been described by Paterson and Naylor as

[118] King Review, pp 100-1. These related to the naming of teachers prior to the finalisation of hearings.
[119] ETRA s 2.6.22(1)-(3).
[120] Details of the regime are contained in the National Police Checks, Information Release Policy, Information Sheet which can be accessed at <http://www.police.vic.gov.au/content.asp?Document_ID=692>.

essentially operating 'by limiting access to information about older records relating to minor crimes, as well as limiting the convictions a person is required to reveal on questioning and about which employers can ask questions' and thereby operating 'to reduce the continuing indirect punishment resulting from some criminal records and to enhance prospects for rehabilitation'.[121]

The Victorian regime generally precludes disclosure of information relating to offences that attract a maximum penalty of more than 30 months jail if more than ten years have elapsed since the guilty finding (or 5 years in the case of offences committed while the offender was a child). This rule is subject to exceptions where there have been intervening guilty findings and in relation to disclosures for a number of specified purposes (including for the purposes of VIT decision-making). Moreover, as is apparent in some of the VIT case notes, it allows the release of criminal history information on the basis of findings of guilt (as opposed to a conviction) and also of details of matters currently under investigation or awaiting court hearings.[122]

Victoria is the only jurisdiction in Australia without a statutory spent convictions regime. Statutory regimes allow for additional protection, including duties for decision-makers to disregard spent convictions for the purposes of determining 'character and fitness to be admitted to a profession, occupation or calling.[123] It is significant in this regard that the definition for fitness to teach in the ETRA refers to 'character' as a means of determining fitness.[124] However, this additional protection may be of limited use to teachers as most such regimes contain exceptions for occupations involving working with 'vulnerable' people, including children.[125]

Anti-discrimination laws

[121] Paterson and Naylor, op cit, at p 939.
[122] It is also spelt out in the Victoria Police, Information Release Policy in relation to National Police Certificate (December 2015), which can be accessed at <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=38447>.
[123] *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld), s 9; *Criminal Records (Spent Convictions) Act 1992* (NT), s 11 (c)(ii); *Spent Convictions Act 2000* (ACT), s 16(c)(ii).
[124] *Education and Training Act 2006* (Vic), s 2.6.1.
[125] Arie Freiberg, *Tools of Regulation*, p 154, eg see aged care service, and teaching.

The VIT's decision-making is also affected by anti-discrimination laws. Employment in Victorian schools is governed by the *Equal Opportunity Act 2010* (Vic), but this does not prohibit discrimination on the grounds of irrelevant criminal record or spent convictions. (In contrast, the Tasmanian and Northern Territory laws contain a general prohibition of discrimination on the grounds of a criminal record,[126] while the Australian Capital Territory and Western Australia laws prohibit discrimination on the grounds of spent convictions.) At the time when the Victorian equal opportunity regime was under review, it was recommended that it should deal with discrimination on the grounds of criminal record,[127] but that recommendation was not implemented. This may be because of 'a general reluctance to extend anti-discrimination protection to an attribute which is perceived to be self-induced and morally blameworthy in contrast to the other forms of attributes such as sex or gender'.[128]

The *Anti-Discrimination Act 1992* (NT) contains a broad definition of 'irrelevant criminal record'. This includes information about a spent conviction and a record relating to arrest, interrogation or criminal proceedings which did not result in a guilty finding (or resulted in a guilty finding in circumstances where that finding was later quashed or the person was pardoned) or 'the circumstances relating to the offence for which the person was found guilty are not directly relevant to the situation in which the discrimination arises'.[129] However it permits discrimination on the grounds of irrelevant criminal record in the area of work where the work 'principally involves the care, instruction or supervision of' of specified vulnerable persons, including children, and the discrimination is 'reasonably necessary to protect [their] physical, psychological or emotional well-being, having regard to all of the relevant circumstances of the case including the person's actions'.[130]

In the case of the *Anti-Discrimination Act 1998* (Tas), the definition of 'irrelevant criminal record' is narrower in that it does not refer to spent convictions.[131] It permits discrimination on the ground of irrelevant criminal record 'in relation to the education, training or care of

[126] *Human Rights and Equal Opportunity Commission Act 1986* (Cth), s 3; *Anti- Discrimination Act 1992* (NT), s 19; *Anti-Discrimination Act 1998* (Tas), s 16.
[127] Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Final Report* (State of Victoria, Department of Justice, 2008) <www.humanrightscommission.vic.gov.au>.
[128] Moira Paterson, 'Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison' [2011] *New Zealand Law Review* 69, 72.
[129] *Anti-Discrimination Act 1992* (NT), s 4.
[130] *Anti-Discrimination Act 1992* (NT), s 37.
[131] *Anti-Discrimination Act 1998* (Tas), s 3.

children if it is reasonably necessary to do so in order to protect the physical, psychological or emotional wellbeing of children having regard to the relevant circumstances'.[132]

Thesis structure

The remaining chapters examine the operation of the ETRA in light of these broad principles. As the ETRA distinguishes between and deals differently with teachers who have committed specified offences, Chapter 2 begins with an analysis of its operation in relation to this group using the case study of Andrew Phillips to highlight the problems of regime which allows for no discretions or right of appeal.

Chapters 3 to 7 then examine the operation of the ETRA in relation to teachers who have committed other types of criminal offences. Chapter 3 parallels Chapter 2, providing an overview of the ETRA procedures for disciplining teachers found guilty of other offences. It explains that a teacher may face a formal hearing panel either as a result of being convicted of a criminal offence or because of some other lesser criminal conduct that forms the basis for an allegation of misconduct or lack of fitness to teach and uses the case study of Tara Sutton to highlight the potential unfairness that may result from the exercise of these procedures. It is followed in Chapter 4 with a discussion of the concept of fitness to teach and how issues of misconduct and fitness for registration have been interpreted at common law.

Chapter 5 continues with a discussion of issues relating to the nexus between criminal offending and employment and what they mean for teachers. It begins by discussing the role of the teacher and its appropriate bounds and then discusses the implications that flow from the adoption of a broad or narrow view of its scope. It also explores the approaches taken to this issue by VIT hearing panels via their reported decisions relating to teachers with criminal convictions.

Chapters 6 and 7 then follow with a discussion of the issues of procedural fairness and other fairness issues, respectively, which arise from the reported decisions of VIT hearing panels in relation to teachers with criminal records.

[132] *Anti-Discrimination Act 1998* (Tas), s 50.

Chapter 8 concludes with recommendations for reforms to the ETRA regime that address the problems identified. These build on some of the reforms suggested in the King review but with a more detailed focus on the VIT's disciplinary powers and with additional insights gleaned from a sustained analysis and review of the decisions of VIT hearing panels, including those decided following the limited legislative amendments that resulted from that review.

Conclusion

This chapter lays the groundwork for this thesis by outlining the thesis question and key themes for its discussion and providing an overview of the context in which the ETRA regime and its provisions relating to teachers with criminal convictions exist and the key components or themes that will frame the analysis of the thesis question. It takes as its starting point that criminal offending is potentially relevant to a person's suitability for employment/continuing employment as a teacher but that decision-making should be individualised, based on fair procedures and provide fair outcomes that are justifiable having regard to the nexus between the offending and the teacher's suitability to perform the inherent requirements of their job, including the safe and appropriate supervision of children. These matters will be further explored in the following chapters.

CHAPTER 2 – TEACHERS WITH CONVICTIONS REQUIRING AUTOMATIC DEREGISTRATION

Introduction

The ETRA provides a disciplinary regime that generally requires both an investigation and having an appearance before a formal hearing panel before a teacher is deregistered. However, in the case of specified 'sexual offences' there is automatic deregistration and no right of appeal. This chapter focuses on this aspect of the ETRA regime using the case study of Andrew Phillips to highlight the potential unfairness which it may create.

The relevant provisions in the ETRA

Any registered teacher who is found guilty in respect of specified 'sexual offences' is required to be deregistered by the VIT.[133] The VIT also has power to suspend the registration of teachers charged with such offences pending the outcome of the hearing.[134]

It also contains provisions which operate in parallel with the disciplinary powers of the Department of Education and Early Childhood Development in relation to teachers employed in government schools. A Victorian Government teacher who has been found guilty of a 'sexual offence' is subject to automatic dismissal under s 2.4.58. Similarly, s 2.4.7 provides that a person is ineligible for employment if they have at any time, in Victoria or elsewhere, been convicted or found guilty of a sexual offence.

The expression 'sexual offence' is defined in s 1.1.3 with reference to specific offences under the *Crimes Act 1958* (Vic), including attempts to commit those offences. The offences specified fall into two groups: general sexual offences and offences involving children.

The general offences specified consist of rape, sexual assault[135], assault with intent to rape, [136]incest,[137] the administration of drugs for the purposes of non-consensual sexual

[133] ETRA, s 2.6.29.
[134] ETRA, s 2.6.27.
[135] *Crimes Act 1958* (Vic), s 40.
[136] *Crimes Act 1958* (Vic), s 43.
[137] *Crimes Act 1958* (Vic), s 44.

penetration,[138] abduction or detention for the purposes of marriage or sexual penetration,[139] and procuring sexual penetration by threats or fraud and bestiality[140]. The offences relating to children are more broad ranging: they encompass offences involving sexual penetration of children under 10 and children between 10 and 16, specified Victorian offences involving children under 18 (ie indecent assault,[141] persistent sexual abuse of child under the age of 16,[142] sexual penetration of child under 16,[143] indecent act with child under the age of 16;[144] grooming for sexual conduct with child under the age of 16,[145] failure by person in authority to protect child from sexual offences,[146] sexual penetration of 16 or 17 year old child,[147] abduction or detention,[148] procuring sexual penetration by threats or fraud,[149] and bestiality)[150] and specified Commonwealth offences (ie trafficking in children, domestic trafficking in children, use of a carriage service to send child pornography material, using a carriage service for child abuse material, possessing, controlling, producing, supplying or obtaining child abuse material through a carriage service, using a carriage service to procure persons under 16 years of age and using a carriage service to 'groom' persons under 16 years of age), attempts to commit any of the other offences specified[151] and any offences committed in Victoria or elsewhere which have or include in their necessary elements the same elements as those which constitute the other offences referred to in the definition.[152]

The definition of 'sexual offence' in the ETRA also includes 'any other offence, whether committed in Victoria or elsewhere' where the necessary elements of which consist of or include elements which constitute the specified offences in Victoria.

[138] *Crimes Act 1958* (Vic), s 53.
[139] *Crimes Act 1958* (Vic), s 55.
[140] *Crimes Act 1958* (Vic), s 59.
[141] *Crimes Act 1958* (Vic), s 47.
[142] *Crimes Act 1958* (Vic), s 47A.
[143] *Crimes Act 1958* (Vic), s 45.
[144] *Crimes Act 1958* (Vic), s 47.
[145] *Crimes Act 1958* (Vic), s 49B.
[146] *Crimes Act 1958* (Vic), s 49C.
[147] *Crimes Act 1958* (Vic), s 48.
[148] *Crimes Act 1958* (Vic), s 55.
[149] *Crimes Act 1958* (Vic), s 57.
[150] *Crimes Act 1958* (Vic), s 59.
[151] See para (e) for the definition of 'sexual offence' in the ETRA, s 1.1.3.
[152] See para (f) for the definition of 'sexual offence' in the ETRA, s 1.1.3.

Case study: Andrew Phillips

There is limited information available about the Victorian teachers who are automatically deregistered. The VIT's register of disciplinary action currently lists 85 individuals, with entries stating that: 'The teacher's registration has ceased and the teacher disqualified from teaching in a school, because the teacher has been convicted or found guilty of a sexual offence'.[153]

While there is no further information available about the individuals on the list, there is one teacher - Andrew Phillips - whose circumstances are well known because of the media attention surrounding his forced resignation and subsequent deregistration. The case of Andrew Phillips highlights the defects of the provisions which relate to the employment as teachers of persons who have at some time, been found guilty of sexual offences involving children, including offences which predate their appointment as teachers. The following outline of his circumstances is based on newspaper reports generated at the time.

Andrew Phillips was a 33 year old qualified mathematics teacher with five years of teaching experience. His teaching career came to an abrupt end when he was called in February 2005 to be given the message that he would be sacked unless he resigned from his job.

Prior to commencing a new teaching position at Orbost Secondary College Andrew gave consent to have a compulsory criminal record check. That check revealed that he no longer had permission to teach due to the operation of s 2.6.29(2) of the *Victorian Institute of Teaching Act 2001* (Vic), which stated:

> A person who has obtained the permission of the Institute to teach in a school ceases to have that permission if the person, in Victoria or elsewhere, is convicted or found guilty of a sexual offence involving a minor.

Andrew resigned because he had been found guilty in 1992 of a child sex offence that occurred when Phillips was 20 and his girlfriend was 2 months short of 16 years old. At the time Phillips was not a teacher, and he was charged on the basis of a complaint, not by the girl or her family, but by a third party. The offence arose from his fondling of the girl's

[153] This register can be accessed at <http://www.vit.vic.edu.au/media/documents/imported-files/pc/Victorian-Institute-of-Teaching-RoDA.pdf/_recache>.

breasts. Phillips had pleaded guilty to the charge after receiving advice that doing so would not affect his future job prospects and that no conviction would be recorded against him. He was found guilty without conviction and received a Good Behaviour Bond.[154] This sentence is arguably indicative that his offending was regarded by the court as being very minor in nature.

Phillips' forced dismissal and deregistration was subsequently described by Orbost Secondary College principal John Brazier as the worst miscarriage of justice in his 35 years of teaching. Brazier also commented that 'retrospective legislation supporting 'double jeopardy' was not what he would expect of 'governments in the 21st century'.[155]

It is arguable that s 2.6.29(2) of the *Victorian Institute of Teaching Act 2001* (Vic) operated with retrospective effect to Phillips because it did not exist at the time that he pleaded guilty to the offence, but nevertheless operated to deprive him of his livelihood because he did so. Retrospective legislation is open to criticisms on the basis that it is fundamentally unfair. As explained by Palmer and Sampford:[156]

> The most important argument against retrospective laws is that they defeat the expectations of citizens formed in reliance on the existing state of law. … A stable framework of rules allows citizens to plan their affairs or to make what Rawls refers to as 'plans of life'.[157] The provision of such a framework respects human autonomy and dignity by making it possible for persons to make choices and thus exercise some control over their future.[158]

Palmer and Sampford argue that retrospective laws are unjust, and comment that this is essentially a claim for procedural justice. In other words, retrospectivity is unjust and inconsistent with the concept of the rule of law because it denies a 'person's capacity to make an informed choice about how to conduct his or her affairs'.[159]

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[154] Chee Chee Leung, 'A police check led Andrew Phillips to court as he fights to win back his job' *The Age*, 25 June 2005.
[155] Ibid.
[156] Andrew Palmer and Charles Sampford, 'Retrospective Legislation in Australia: Looking back at the 1980s' (1994) 22 *Federal Law Review* 217.
[157] Citing James Rawls, *A Theory of Justice* (1973), pp 407-416.
[158] Palmer and Sampford, op cit, p 229.
[159] *Bell v Police* [2012] SASC 188 [30].

The retrospective nature of this amendment was noted by the Victorian Scrutiny of Acts and Regulations Committee. However it commented that:

> [T]here is a distinction to be made between legislation having a prior effect on past events and legislation basing future action on past events. The former form of legislation may be regarded as objectionable and may constitute, in appropriate circumstances, a trespass to rights and freedoms, whereas in the latter case the legislation has future operation only, even if the conduct on which it depended had taken place in the past.[160]

This distinction finds support in case law and has been justified on the basis that:

> [T]he mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it.[161]

In *Robertson v City of Nunawading* [1973] VR 819 the Full Court of the Victorian Supreme Court commented in respect of the presumption against retrospective operation that:

> It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribed for the future, and it does no more than that… The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way 'as to impair an existing right or obligation' or 'as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events'.[162]

It is arguable here the ETRA did in fact affect impair an existing right - ie Andrew Phillips' right to continue in the job to which he had validly been appointed. It is also arguable that it is especially unfair in a situation such as this because Phillips had pleaded guilty on the understanding that no conviction would be recorded and that the guilty plea would therefore have no adverse effect on his ability to find employment. It is possible that he might have chosen to plead not guilty and defend the charge (with the possibility that he would have been

[160] Victorian Scrutiny of Legislation Committee, *Alert Digest*, No. 7 of 2003, 7 October 2003, p 4.
[161] Francis Bennion, *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008), p 317.
[162] *Robertson v City of Nunawading* [1973] VR 819, 824.

found not guilty) had he realised that a guilty plea would forever preclude him from working in his profession of choice. This arguably goes to the heart of the rationale for the general rule against retrospectivity, as discussed above - ie to Phillips' capacity to make an informed choice about how to conduct his or her affairs in terms of deciding how to plead.

The defects illustrated by the Phillips case study

The case of Andrew Phillips illustrates three problematic features of s 2.6.29:

- There is no discretion and no provision for exclusion if the offending is at the lower level of scale;
- The provision applies to findings of guilt, not just to convictions; and
- There is no right of appeal from the cancellation or registration.

Lack of discretion

The lack of discretion is significant given that what is in issue is a teacher's livelihood and that not all forms offending are of equal seriousness even within the context of single category of offence. While it is clearly arguable that a conviction for a sexual offence involving children raises legitimate questions as to whether the offender poses a risk to the safety and welfare of children and to the reputation of the profession, it does not necessarily follow that this will always be the case. Take, for example, a young teacher who is belatedly charged and found guilty of using a carriage service to send child pornography material because when aged 17 he sent a friend of a photograph of his naked 17 year old girlfriend. It is difficult to see that this one incident makes him an unacceptable risk to the safety or welfare of children or the reputation of the profession. However, the VIT would have no option but to deregister him as soon as it became aware of the conviction.

Two cases from Queensland illustrate how the existence of discretion allows for different outcomes based on the decision-maker's assessment of the nature and context of the offence. These cases related to males who had committed indecent acts with an eleven year old[163] and a thirteen year old,[164] respectively.

[163] *Re AAF* [2006] QCST 6.
[164] *Burgess v Board of Teacher Registration Queensland* [2003] QDC 159.

The first case concerned a decision to issue a negative assessment under the Queensland equivalent of the Victorian Working with Children regime. The applicable law provided inter alia that the decision-maker should issue a negative assessment in respect of a person convicted of a serious offence unless satisfied that the case was an exceptional one in which it would not harm the best interests of children to issue a positive notice.[165] In upholding the applicant's appeal against a decision to issue him with negative order, the Children Services Tribunal accepted medical and other evidence of rehabilitation since the offence occurred. It commented that:

> AAF was a person of high quality who at the age of 27 or 28 succumbed to committing the abhorrent child-related offences in a breach of trust situation over a 6 month period. He then some 23 years ago desisted from that behaviour, felt ashamed and remorseful, and set about ensuring that there would be no re-occurrence. In this endeavour he succeeded. There has been no suggestion of a resumption of that behaviour. Predictably this state of affairs will continue. All the accepted evidence supports this contention.[166]

The second case concerned a decision by the Board of Teacher Registration Queensland to deregister a teacher in part based on a carnal knowledge offence committed some 23 years prior to hearing but also based on other misbehaviour that had occurred in the interim. The Queensland District Court rejected the appeal and commented that the conduct of the teacher with a 13 year old student was disgraceful and showed unfitness to be a teacher at that time.[167] However, what was significant also was that there had been continuity in inappropriate behaviour in the 23 years up to the hearing before the Board. Moreover, this inappropriate behaviour was similar in nature in that it all concerned the touching of females - teachers, pupils, and parents.

> The continuity of this inappropriate behaviour resulted in a body of evidence adverse to Mr. Burgess and which was of considerable weight on the question of his fitness to be a teacher.[168]

Findings of guilt

A second problem relates to the criterion of guilt in s 2.4.58. The distinction between a finding of guilt and the recording of a conviction is an important one, having regard to the

[165] *Children Services Tribunal Act 2000* (Qld), s 102(4).
[166] *Re AAF* [2006] QCST 6 at [79].
[167] *Burgess v Board of Teacher Registration Queensland* [2003] QDC 159 at [76].
[168] Ibid.

underlying rationale for the sentencing regime applied by judges and magistrates in relation to criminal offending.

As noted by Paterson and Naylor, 'a non-conviction disposition is a specific sentencing decision, recognising the judge's assessment of the low level of seriousness of the offence and expressly intended to mitigate the impact of a formal record on a person's future'.[169]

The *Sentencing Act 1991* (Vic) governs sentencing by Victorian courts. It delimits the purposes for which sentences may be imposed and requires courts in sentencing offenders to have regard to four criteria; the maximum penalty prescribed for the offence; current sentencing practices; the nature and gravity of the offence; and the offender's culpability and degree of responsibility for the offence.[170] It also sets out in s 7 the various sentencing options available where a court finds a person guilty of an offence, including some options where there is a choice as to whether or not to record a conviction. In the case of the latter it contains a list of factor that courts are required to consider in deciding whether or not to record a conviction.

It is significant that the list of factors required to be considered in deciding whether or not to record a conviction include the impact of recording a conviction on 'the offender's economic or social well-being or on his or her employment prospects'.[171] It is also significant that 'a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose', unless otherwise provided by legislation. It is arguable that these indicate a clear intention that decisions concerning employability should not be based on guilty findings where there is no conviction recorded. Nonetheless, the ETRA requires deregistration even where there has been no conviction recorded.

No appeal

Finally a right of appeal provides an important safeguard to ensure that the VIT has acted correctly in deciding to deregister a teacher. In its absence the only remedy available is an

[169] Moira Paterson and Bronwyn Naylor 'Australian Spent Convictions Reform: A Contextual Analysis' (2011) 34 *University of New South Wales Law Journal* 938, 954.
[170] *Sentencing Act 1991* (Vic), s 5(2).
[171] *Sentencing Act 1991* (Vic), s 8(1)(c).

application for judicial review under the *Administrative Law Act 1978* (Vic) or under the Rules of the Victorian Supreme Court.

It should be noted that the automatic deregistration of teachers for sexual offences is a comparatively new development in Victoria and that there are regimes in other states aimed at protecting children which allow for the exercise of discretion in relation to deregistration for sexual offences.

Section 2.6.29 contains the same wording as was previously contained in s 25 of the *Victorian Institute of Teachers Act 2001* (Vic). However, this wording differs from that originally presented to Parliament in the Bill which introduced the requirement for deregistration in respect of sexual offences.

Background: the development of the process for deregistration

The requirement for the automatic dismissal of teachers with prior convictions for child sex offences was not an aspect of the Victorian Institute of Teaching Act as originally enacted. When the new regime was first proposed it contained provision for the discretionary grant of exemptions, and it was noted in the Second Reading speech that:

> The Secretary, in respect of employment in the teaching service, and the Victorian Institute of Teaching in respect of registration will have the right to grant an exemption to a teacher who is disqualified owing to a conviction for a sexual offence against a child.[172]

Minister Kosky explained that it was expected that the exemption would be used very sparingly and commented that:

> [T]he only situation that the government can presently envisage in which it might be used is in the case of a person who before they became a teacher, had at say the age of 18 or 19, a consensual relationship with a 15-year-old. That technically would be an offence, but extenuating and subsequent circumstances (for example the subsequent marriage or cohabitation of the parties), might justify granting an exemption.[173]

[172] The Hon Lynne Kosky, The Hon Minister for Education, Education Legislation (Miscellaneous Amendments) Bill, *Victorian Hansard Online*, 17 September 2003, pp 487-488.
[173] *Victorian Hansard Online*, 17 September 2003, pp 487-8.

It is noteworthy that this example comes quite close to describing the Phillips case. However, it met with reservations by the Opposition, which asked that more time be given to allow consideration of the Bill. Opposition education spokesman, Mr Victor Perton commented:

> That is a very difficult moral question. We know that has been raised in respect of a member of Parliament in another jurisdiction. The seriousness of these sorts of offences is something that will need to go beyond merely the normal consultation. ….. It is only very recently that the former Governor-General was in a matter of great controversy after having made comments in respect of the same circumstances.[174]

A media storm arose out of an interview with the former Governor-General Dr Peter Hollingworth during which he spoke of complaints against a former bishop, who as an assistant priest, had engaged in sexual intercourse with a 15 year-old girl. Dr Hollingworth inferred that the girl may have initiated the intercourse. For example, an editorial in the Australian commented that 'It was a stunningly stupid thing to say, both for what it demonstrated about Dr Hollingworth's understanding - or lack of it - about how adults can sexually manipulate the young, and for his inability to anticipate the community outrage it generated'.[175]

The removal of this discretion resulted from amendments by the *Education Legislation (Miscellaneous Amendments) Act 2003* (Vic), which was enacted in response to concerns about paedophiles working in schools.[176] Minister Kosky explained the rationale for this amending legislation in the following terms in her Second Reading speech:

> [A] degree of trust is needed between parents, teachers and students. The trust referred to is the trust that every parent must have in his or her child's teacher to look after the child and to care for the child. That trust enables parents to send their child to school knowing that his or her child will be well looked after. [177]

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[174] Victor Perton MP, Debate, Education Legislation (Miscellaneous Amendments) Bill, *Victorian Hansard Online*, 17 September 2003, p 488.
[175] Editorial, 'Controversial Hollingworth Must Go Now', *The Australian*, 3 May 2003 accessed at <http://australianpolitics.com/words/daily/archives/00000270.shtml>.
[176] Trishna Reimers, 'Uproar grows over teacher's forced resignation' *Green Left Weekly*, 4 May 2005, Issue 625.
[177] The Hon Lynne Kosky, Minister for Education, Education Legislation (Miscellaneous Amendments) Bill, Victorian *Hansard Online*, 17 September 2003, p 487.

> This government accepts the responsibilities which flow from that trust, and quite separately is also committed to protecting all children from abuse. The measures in this bill are in accordance with the government's commitment to protecting children.[178]

It would seem that these changes resulted from pressure by the opposition and others with a concern about paedophiles. Labor MP Lindsay Tanner commented that the change had 'been driven by the State Liberal Party, initially the legislation sensibly did have discretion provided. The State Liberal Party, the Opposition kicked up a song and dance and obviously was winding up to start accusing the Bracks Government of being soft on paedophiles.'[179] Likewise, then Police Commissioner Christine Nixon was also of the view that the discretion was removed on the basis of 'political pressure'.[180]

More generally, it may be surmised that the changes were fuelled by public concerns about sexual offenders and crime more generally. As noted in a recent report,

> Sex offenders are particularly demonised in the popular press by epithets such as 'fiends' or 'monsters' and the term 'penal populism' has been coined to describe the way in which politicians tap into public concerns about crime for their political advantage.[181]

The political aspect of the government's decision to make the change is made clear in comments by Mr Hall MP recorded in the Hansard. Mr Hall commented that he knew Andrew Phillips personally and had a lot of sympathy for this position, noting that he had a highly held reputation. However, Hall supported retaining the lack of discretion in the Act on the basis that his constituency as a whole would want him to do so.[182]

In contrast, the Queensland Government elected to take a different approach when it amended the *Education (Queensland College of Teachers) Act 2005* (Qld) in 2011. The Act now includes in s 56(4)(c) provision for an person excluded from teaching due to the commission of prohibited offence to apply to the Queensland Civil and Administrative Tribunal for an

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[178] *Victorian Hansard Online*, 17 September 2003, p 487.
[179] Quoted in Ben Knight, 'Bracks stands firm on sacking of teacher', *The World Today*, 29 March 2005 accessed at <http://www.abc.net.au/worldtoday/content/2005/s1333475.htm>.
[180] Quoted in Nick McKenzie 'Vic working with children laws inflexible: police commissioner, *ABC Local Radio*, 18 March 2005 accessed at <http://www.abc.net.au/pm/content/2005/s1326962.htm>.
[181] Arie Freiberg, Hugh Donnelly and Karen Gelb, 'Sentencing for Child Sexual Abuse in Institutional Contexts' Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, July 2015, p 17, citing John Pratt, *Governing the Dangerous* (The Federation Press, Sydney, *2007*).
[182] Victorian Legislative Council, *Hansard*, 13 April 2013, p 1237.

eligibility declaration that the person is not an excluded person.[183] Its rationale was explained by the Hon Cameron Dick MP as follows:

> [It] is intended to allow consideration of matters such as a so-called 'Romeo and Juliet' situation where, for example, a 17 year old male is convicted of unlawful carnal knowledge of his then 15 year old girlfriend and at the time of the application of the eligibility declaration there is no evidence of further … offending.[184]

The rationale for total denial of employment based on criminal records involving sexual offences is based on assumptions that sex offenders pose a unique risk to the community and present a high risk of reoffending. While it may true that that there are certain categories of paedophiles who have high rates of recidivism, the available evidence suggests that sexual offenders as a group are less rather than more likely to reoffend that individuals convicted of other offences.[185]

The recent report prepared for the Royal Commission into Institutional Responses to Child Sexual Abuse summarises the relevant research as follows:

> Despite the common view that all sex offenders will inevitably reoffend, the evidence debunks this myth. Research based on official reports of offending and self-reports of offenders consistently shows that sex offenders typically have lower rates of recidivism than other kinds of offenders, and that these rates vary for different sub-groups of sex offender.[186]

It is also significant that the various offences listed in ETRA are not all sexual in nature and that some of these offences are capable of capturing activities that are not regarded as abhorrent by general members of the community. It is arguably both inappropriate and unfair to treat all persons found guilty of sexual offences as falling into a single group who cannot be trusted and who are likely to reoffend in the future.

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[183] See Part 1A.
[184] *Queensland Parliamentary Debates*, 2 August 2011, p 2237 cited in Kelli Longworth, 'Cancellation of teacher registration upon conviction of a serious offence under the Education and Training Legislation Amendment Bill 2011 (Qld)', *Research Brief 2011/No.18*, September 2011.
[185] See Karen Gelb, 'Recidivism of Sex Offenders', *Research Paper*, Sentencing Advisory Council, January 2007) <http://sentencingcouncil.vic.gov.au/landing/publications>.
[186] Arie Freiberg, Hugh Donnelly and Karen Gelb, 'Sentencing for Child Sexual Abuse inInstitutional Contexts' *Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*, July 2015, p 165.

As noted by Tilbury:

> Sexual offences, particularly those committed by children, vary according to their level of seriousness. Those involving sexual exploration, consensual sex with peers, and 'sexting' do not necessarily predict sexual offending as adults…[187]

Tilbury also makes the point that child sexual offenders have been found to have diverse criminal histories and that it is therefore simplistic to assess risk of child sexual offending based solely on the prior commission of a specific sexual offence. She suggests that what is required is a more nuanced approach that takes into account a range of factors including 'the person's age and life circumstances, their relationship with the victim, and legal and moral constructs around particular crimes at different times in history'.[188]

The King Review briefly considered this aspect of the legislation when it conducted its review in 2007. It referred to the proposal by the VIT that the Act should be amended to confer a right of appeal to the VCAT along the lines of that provided in the WWCA and a similar right in the case of refusal of registration based on commission of a sexual offence and endorsed this proposal in its recommendations.[189]

The WWCA creates a compulsory checking requirement for individuals who may come into contact with children in either paid or volunteer work. It prevents them from working with children if they are deemed to pose a threat or risk to child safety based on the nature of any offences they have committed, as outlined in Chapter 1. Registration under the ETRA regime provides teachers with exemption from the requirements of the WWCA but allows for consideration of broader consideration of offences.

The WWCA contains a nuanced regime which provides different consequences for different categories of offence (Categories A, B and C). There is no power to provide assessment as suitable for Category A sexual offences, but there is a right of override by Victorian Civil and Administrative Tribunal (VCAT) where it is satisfied that the person poses no risk.

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[187] Clare Tilbury, 'Working with children checks: time to step back?' (2014) 49 *Australian Journal of Social Values* 87, 94.
[188] Ibid, 95.
[189] King Review, rec 28(ix).

The latter power is contained in s 26A of the WWCA, which provides that the VCAT must not exercise this discretion to require the giving of an assessment notice unless it is satisfied that doing so would not pose an unjustifiable threat to the safety of children having regard to specified matters including whether a finding of guilt or a conviction was recorded. Other relevant factors include the nature and gravity of the offence and its relevance to child-related work, the period of time since the applicant committed the offence, the sentence imposed, the ages of the applicant and any victim when the crime was committed, and the applicant's behaviour since he or she committed the offence.

Section 26 also contains further requirements in (2A) which were added to it as a result of amendments made in 2012. These require the VCAT must also be satisfied that: 'a reasonable person would allow his or her child to have direct contact with the applicant that was not directly supervised by another person while the applicant was engaged in any type of child-related work' and 'the applicant's engagement in any type of child-related work would not pose an unjustifiable risk to the safety of children'.

The King Review's recommendation for a right of appeal was rejected by the government which responded that:

> Acceptance of this recommendation would represent a significant policy change in relation to the way the VIT is empowered to deal with teachers who have committed a sexual offence. Teachers hold a unique position of trust in their relationship with children and young people, and it is appropriate to apply the highest standards of professional conduct to both registration and employment processes for teachers'. The government did not support any change.[190]

It remains unclear why the Victorian Government has chosen to take this stance which is at odds with that taken in all other Australian jurisdictions other than Western Australia.

[190] Department of Education and Early Childhood Development, *The Response of the Victorian Government to the review of the VIT*, July 2009, p 22 accessed at <http://www.education.vic.gov.au/about/programs/archive/pages/vitreview.aspx>.

A comparative perspective

Other Australian legislation regulating teachers

All Australian jurisdictions have some provision for discretion or for appeal, other than Western Australia. Three provide for automatic cancellation of a teacher's registration on the grounds that they have committed specific offences are Queensland, the Northern Territory and Western Australia. The first two have specific ameliorating provisions.

As discussed above, Queensland provides for automatic deregistration but makes allowance for eligibility declarations that permit a teacher to be reregistered. The *Education (Queensland College of Teachers) Act 2005* (Qld) requires the college to cancel a teacher's registration if they are convicted of a serious offence as defined in the *Working with Children (Risk Management and Screening) Act 2000* (Qld) or becomes a relevant disqualified person within the meaning of that Act.[191] There is no appeal available in relation to the cancellation of the teacher's registration on this basis and it is generally the case that the teacher can never be granted registration or permission to teach. However, this is subject to exception if the conviction of the teacher for the serious offence is overturned on appeal, the decision or order of the court resulting in the teacher becoming a relevant excluded person is overturned on appeal or was not made in relation to a conviction for a serious offence, or an eligibility declaration is issued to the teacher.[192]

The Northern Territory likewise provides for a measure of discretion. The *Teacher Registration (Northern Territory) Act 2010* (NT) states that a teacher ceases to be registered on being found guilty of a sexual offence and that the Board, on becoming aware that a teacher has been found guilty of a sexual offence, must note in the register that the teacher's registration is cancelled and must notify the teacher accordingly.[193] However, it also provides that a teacher whose registration is revoked on this basis may request that the Board hold an inquiry into the matter. In that case, the Board may appoint an inquiry committee into the

[191] *Education (Queensland College of Teachers) Act 2005* (Qld), s 56 and definitions in the Dictionary in Sch 3.
[192] A teacher whose registration is cancelled can apply for an eligibility declaration under s12E. The College must refuse to grant the eligibility application unless the college is satisfied it is an exceptional case in which it would not harm the best interests of children to issue the eligibility declaration: s 12F(1).
[193] *Teacher Registration (Northern Territory) Act 2010* (NT), s 69.

matter if it considers that the circumstances of the offence may not necessarily give rise to a conclusion that the person is no longer a fit and proper person. On completion of this inquiry, the Board must take into account its recommendation and determine whether or not to rescind the cancellation or revocation.[194]

Western Australia is more akin to Victoria in that the *Teacher Registration Act 2012* (WA) does not allow any element of discretion. The Teacher Registration Board of Western Australia is required to cancel a teacher's registration if the teacher is no longer entitled to be registered; a teacher is not entitled to be registered if, inter alia they are convicted or found guilty of a sexual offence involving a child, including child pornography.[195] The Board has no discretion concerning cancellation but must reinstate a teacher's registration if it becomes aware that a relevant conviction or finding in respect of that teacher has been quashed or overturned on appeal.[196] There is also provision for automatic loss of registration if a teacher is issued with a negative notice or an interim negative notice under the *Working with Children (Criminal Record Checking) Act 2004* (WA),[197] although the Board must reinstate the registration of a teacher that has been cancelled on this basis, if it becomes aware the negative notice has been cancelled under the *Working With Children (Criminal Record Checking) Act 2004* (WA) in respect of that teacher.[198] The Act does not provide for any right of appeal in respect of a decision by the Board to cancel a teacher's registration on either of these two bases.

The position in other jurisdictions is more flexible. For example, the *Teachers Registration and Standards Act 2004* (SA) does not contain any provision specifying that a teacher will lose their registration based on commission of specific offences. It empowers the South Australian Teachers Registration Board to disqualify the teacher from being registered as a teacher permanently.[199] This is subject to appeal to the Administrative and Disciplinary Division of the District Court.[200]

[194] See *Teacher Registration (Northern Territory) Act 2010* (NT), s 70.
[195] *Teacher Registration Act 2012* (WA), s 27(1) and (2)(a).
[196] *Teacher Registration Act 2012* (WA), s 27(3)(a).
[197] *Teacher Registration Act 2012* (WA), s 27(1) and (2)(b).
[198] *Teacher Registration Act 2012* (WA), s 27(3)(b).
[199] *Teachers Registration and Standards Act 2004* (SA) s 35(2)(d).
[200] *Teachers Registration and Standards Act 2004* (SA) s 49.

In Tasmania there is no provision for automatic cancellation of a teacher's licence, but the Teachers Registration Board has power to impose a range of sanctions, without first conducting any inquiry,[201] in relation to any teacher who is convicted of a 'prescribed offence' (ie any offence in respect of which a sentence of imprisonment may be imposed).[202] These sanctions include cancellation of registration (but not the imposition of any time limits on reregistration). This is subject to a right of review by the Magistrates' Court (Administrative Appeals Division).[203]

The approach taken in the Australian Capital Territory is quite different. The ACT Teacher Quality Institute has a general power to suspend or cancel a teacher's registration if it believes on reasonable grounds that suspension or cancellation is necessary under the *Teacher Quality Institute Act 2010* (ACT).[204] There is no requirement for an inquiry or hearing and no guidance provided as to matters to be considered. There is also no provision for automatic cancellation where a teacher has committed specified offences. However, eligibility for initial registration and renewal of registration is dependent on registration under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT).

The position in New South Wales differs in that it provides for school based accreditation (rather than registration). The Board of Studies, Teaching and Educational Standards may (but is not compelled to) revoke a teacher's accreditation in specific circumstances.[205] These include where the person does not hold a working with children check clearance under the *Child Protection (Working with Children) Act 2012* (NSW).[206] There is also provision for the Board to revoke a teacher's clearance if the person is found guilty of a prescribed 'serious offence'[207] or is found guilty more than once in the 5-year period immediately prior to the revocation of the clearance of a prescribed non-serious offence that would reflect adversely on a teacher's professional standing or integrity or suitability or competence to teach.[208] However, the regulations do not currently prescribe any serious or non-serious offences. Based on these comparisons it is arguable that there are other ways of ensuring that

[201] *Teachers Registration Act 2000* (Tas), s18A.
[202] *Teachers Registration Act 2000* (Tas), s 3.
[203] *Teachers Registration Act 2000* (Tas), s 29.
[204] *Teacher Quality Institute Act 2010* (ACT), s 63.
[205] *Teacher Accreditation Act 2004* (NSW), s 24.
[206] *Teacher Accreditation Act 2004* (NSW), s 24(2)(a).
[207] *Teacher Accreditation Act 2004* (NSW), s 24(2)(b).
[208] *Teacher Accreditation Act 2004* (NSW), s 24(2)(c).

individuals who are likely to pose a threat to children based on an assessment of their prior offending can be dealt with.

The Victorian Working With Children Regime

As discussed in Chapter 1, the approach taken in the ETRA differs from that in the WWCA, which provides scope for the exercise of an override power by the VCAT. The reported decisions of the VCAT show that there have been a significant number of cases in which the VCAT has been requested to exercise this power (decisions over the period 2011-2016 are listed in Appendix 1).

The VCAT's override power hinges on it being satisfied that giving an assessment notice would not pose an unjustifiable risk to the safety of children. This expression is also used in relation to decision-making in respect of Category B applicants under s 13(2) of the WWCA. Its meaning in the latter context was considered by Kyrou J in In *LKQ v Secretary of the Department of Justice*.[209] In his view, it did not require satisfaction that the giving of an assessment notice would not pose any risk to the safety of children; what was required was an assessment of whether any risk was unjustifiable.[210] That would depend on the circumstances of each case, having regard to the matters specified in the Act.[211] Furthermore, it was apparent from the reference to 'protecting children from sexual or physical harm' in s 1(1) of the Act that the expression meant 'sexual or physical safety of children'.[212]

While the VCAT has refused to exercise its override power in the majority of these cases, there are several cases in which it has directed to the Secretary to give the applicant an assessment notice.

One example of a case where the VCAT directed the Secretary to the give the applicant an assessment notice was *TSL v Secretary to Department of Justice (Occupational and Business Regulation)*.[213] This concerned a man who when he was aged 19 was found guilty of four counts of sexual penetration with a child aged between 10 and 16. One of the victims was a

[209] *Maleckas ('LKQ') v Secretary of the Department of Justice* [2011] VSC 227.
[210] Ibid, [43(d)].
[211] Ibid, [43(e)].
[212] Ibid, [43(f)].
[213] [2012] VCAT 792 (12 June 2012).

14 year old girl with whom TSL had an 11 month relationship when he was 18 and 19 and the other was a friend of the first victim. Deputy President Dwyer commented that the offences reflected poorly on TSL's character at the time those offences were committed. However, he noted that the sentencing court saw fit not to convict TSL, but to instead release him on an adjournment, and that this implied that the court 'considered the matter to be at the lesser end of the scale of seriousness for offences of this nature'. He also noted that 'the offences occurred 18 years ago in very different family circumstances to those that now prevail, when TSL was a young, emotionally immature and somewhat socially isolated adult'. He also concluded based on expert evidence that TSL was in a low risk category compared to other male sexual offenders and that the risk of him reoffending was low to very low.

A second example is the case of *FKX v Secretary to the Department of Justice (Review and Regulation)*,[214] which concerned a man who had pleaded guilty to charge of indecent assault in respect of offending that took place when he was 12 or 13 and involved fondling the genitals of a boy aged between 5 and 7. Deputy President Dwyer noted that there was some ambiguity concerning what had taken place, the offences had taken place when the man was a child even though he was an adult at the time he was charged and he had received a sentence of 6-month Good Behaviour Bond, without conviction. While he noted that the disparity in ages between perpetrator and victim could be a matter of concern in assessing his risk of reoffending, Deputy President Dwyer was satisfied on the basis of evidence provided by a psychologist and other evidence to the effect that FKX's behaviour has been exemplary during the 21 years since his offending and that he was '33 years old and, by all accounts, a mature and intelligent adult, about to be married and hoping to start a family, in gainful employment, and with a strong social network of friends and family'. He accordingly concluded that FKX did not pose an unjustifiable risk to the safety of children, and that it was in the public interest that he be granted an assessment notice.

These decisions are illustrative of the flexibility of the override power and the way in which it can be used to achieve fairness in circumstances where the applicant no longer poses an unjustifiable risk to children. At the same time, the fact that many applications are rejected

[214] [2015] VCAT 404.

indicates that the hurdle is not an easy one to overcome, which is arguably appropriate having regard to the significance which should be attached to the protection of children.

Policy analysis

As noted by a former Victorian Privacy Commissioner in a 2006 report on controlled disclosure of criminal record data, laws of this type are frequently enacted in a context where there has been 'prominent media coverage of worst cases for which the measures may be appropriate' and they are appropriately directed at what may be described as serious offending'.[215] Unfairness results from the unfair application of these laws to individuals who have committed lesser offences and/or offences for which convictions were not recorded with the specific intention of avoiding the impact a criminal record might have on their prospects for employment. This effectively ensures 'that individuals suffer the impact the court had attempted to avert'.[216]

Adopting an approach whereby specific offences result in automatic loss of registration is also problematic because it assumes that any person who has committed a sexual offence is automatically a danger to children or subject to a character flaw which makes them unsuitable ever to teach. However, as noted by the Victorian Law Reform Commission in the context of its report on Sex Offenders Registration, the view that 'all child sex offenders are people with similar behavioural patterns who are all highly likely to re-offend' is an inaccurate one.[217]

To be valid this approach would need to be informed by data which shows that convictions for offences of the type specified for automatic deregistration are reliable predictors of future offending. The currently available data on recidivism of sexual offenders does not establish this. While it confirms that there is a sub-group of child sex offenders who pose a substantial and continuing threat to the safety of children, it is not true that all child sex offenders are

[215] Office of the Victorian Privacy Commissioner, *Controlled disclosure of criminal record data*, June 2006, p 4 accessed at <http://www.privacy.vic.gov.au/privacy/web2.nsf/files/report-02.06-controlled-disclosure-of-criminal-record-data/$file/report_06_06.pdf>.
[216] Ibid.
[217] VLRC, *Sex Offenders Registration: Final Report* (2014) at [5.20]. The VLRC referred to a number of submissions to this effect including a submission by a leading forensic psychiatrist and researcher in this area to the effect that the 'Victorian Register has been flooded with people who are unlikely to re-offend'.

either paedophiles or compulsive recidivists.[218] In reality, the rates vary and some subgroups have higher rates of recidivism than others. For example, recidivism and risk to children in general is much lower for those who target victims within their families and also for those who target female victims.[219]

It also arguable that the nature and context of offending is relevant: for example, prior to 2014 sexting (ie sending sexually explicit photographs or messages via mobile phone) currently attracted convictions for offences which may fall within the categories that attract automatic deregistration. However, there is clear evidence that this is a practice is not uncommon among younger people;[220] it follows therefore that it is unlikely to be predictive of further sexual offending or reflective or character defects that make a person permanently unsuitable to be a teacher.[221]

It is also important to bear in mind that social mores are subject to change and it is possible that activities which currently fall within the scope of the automatic deregistration requirements may cease to do so in the future. As previously discussed, that is now occurring in respect of sexting. Specific legislative changes followed recommendations made in a report by the former Victorian Law Reform Committee in the report of its inquiry into sexting.[222]

The *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) creates two new summary offences that address problematic aspects of sexting: these relate to intentional distribution of an intimate image without the consent of the subject where that distribution is contrary to community standards of acceptable conduct; and threatening to distribute an intimate image of another person depicted in the image, and the distribution would be

[218] Kelly Richardson, 'Misperceptions about child sex offenders' *Trends & issues in crime and criminal justice*, Australian Institute of Criminology, 2011, p 2.
[219] Ibid, 4-5.
[220] See, for example, Amanda Lenhart, *Teens and Sexting*, Pew Internet & American Life Project, 2009 accessed at <http://ncdsv.org/images/PewInternet_TeensAndSexting_12-2009.pdf>.
[221] See further April Thomas and Elizabeth Cauffman, 'Youth Sexting as Child Pornography? Developmental Science supports less harsh sanctions for juvenile sexters' (2014) 17 *New Criminal Law Review: An International and Interdisciplinary Journal* 631.
[222] Law Reform Committee, *Inquiry into Sexting*, May 2013 accessed at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/isexting/LRC_Sexting_Final_Report.pdf>.

contrary to community standards of acceptable conduct.[223] At the same time, it has introduced four defences to the child pornography offences that address non-predatory and non-exploitative sexting on the part of minors (with the consequence that these behaviours may no longer trigger automatic loss of registration), this does not affect the status of persons who have already been convicted of child pornography offences arising from non-predatory and non-exploitative sexting.[224] This may also be an issue if other laws that fall within the category of specified 'Sexual Offences' are altered in the future.

The need for legislative amendment to reflect changed social values became apparent in relation to individuals who had been convicted in respect of consensual homosexual activities at a time in the past such activities were prohibited. This led to the enactment of the *Sentencing Amendment (Historical Homosexual Convictions Expungement) Act 2014* (Vic). However, legislation of this type is highly unusual and occurred in a context where there was bipartisan acceptance that 'consensual sexual acts between adult men should never have been a crime'.[225]

It should also be noted that the Victorian changes to child pornography laws[226] do not affect Commonwealth laws that may also apply in relation to certain aspects of sexting, and may still trigger automatic deregistration, including the offences of 'Accessing, transmitting, publishing or soliciting child pornography material using a carriage service'[227] and 'Possessing, controlling, producing, supplying or obtaining child pornography material for use through a carriage service'.[228] However, these are subject to a form of safeguard in that the consent of the Attorney-General is required to commence proceedings for a child pornography offence under the *Criminal Code Act 1995* (Cth) where the defendant was under the age of 18 at the time he or she allegedly engaged in the conduct constituting the offence.[229] This safeguard was introduced as result of a recommendation by the Senate's Legal and Constitutional Affairs Legislation Committee. The Committee had reservations about the desirability of sexting but agreed with the argument that young people engaged in

[223] See *Summary Offences Act 1966* (Vic), ss 41DA and 41DB.
[224] See *Crimes Act 1958* (Vic), s 70AAA.
[225] See *Sentencing Amendment (Historical Homosexual Convictions Expungement) Bill 2014 Second Reading*, Victorian Legislative Assembly, Hansard, p 3352.
[226] *Crimes Act 1958* (Vic), ss 68, 69, 70, 70AAA, 70AAAB, 70 AAAC, s 70 AAAD and 70 AAAE.
[227] *Criminal Code Act 1995* (Cth), s 474.19.
[228] *Criminal Code Act 1995* (Cth), s 474.20.
[229] *Criminal Code Act 1995* (Cth), s 474.19.

such behaviour should not be exposed to the grave consequences and stigma that attach to allegations of, and convictions for, child sexual offences.[230]

Despite the existence of this requirement, the Victorian Law Reform Committee recommended that the Victorian Government advocate to the Standing Council on Law and Justice that the Commonwealth (and also other States and Territories) amend their criminal legislation to provide defences to child pornography offences, consistent with the new Victorian defences.[231] It also recommended that following the commencement of the amended defences 'Victoria Police and the Victorian Office of Public Prosecutions adopt an express policy that they will not prosecute Commonwealth child pornography offences where an accused person would have a valid defence to child pornography charges under Victorian legislation'.[232] The Victorian Government agreed to advocate to the Standing Committee as recommended.[233] It also agreed to work with the Office of Public Prosecutions and Victoria Police to develop a prosecution policy along the lines recommended. It is unclear whether it has yet given effect to either of these commitments.

Conclusion

There are many valid reasons why the current regime for automatic deregistration of individuals who have been found or pleaded guilty to specified 'Sexual Offences' is both unfair and out of proportion to the harm which it seeks to avoid.

A comparison with other Australian jurisdictions shows that there are alternative solutions available for addressing the need to ensure, as far as possible, that children are not placed at risk by teachers with a predilection towards sexual offending. Moreover, there does not appear to be any evidence that the lack of automatic deregistration procedures has created any

[230] Legal and Constitutional Affairs Legislation Committee, *Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 [Provisions]*, Parliament of the Commonwealth of Australia, 2010, [3.55].
[231] Ibid, p 146, rec 7. The new defences are contained in the *Crimes Act 1958* (Vic), s 70AAA(1)-(4) and operate in relation to the child pornography offences in ss 69-71. The same exceptions have also been introduced into the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Vic) in relation to the publication and transmissions of child pornography.
[232] Ibid, rec 8.
[233] Parliament of Victoria, *Victorian Government Response to the Law Reform Committee Inquiry into Sexting*, 10 December 2013, p 7, accessed at <http://www.parliament.vic.gov.au/images/stories/Govt_Response_Sexting_Inquiry.pdf>.

issues in states such as South Australia and Tasmania, and it is significant that states which have made changes to their registration regimes in recent years have elected not to follow the harsh Victorian approach.

It is arguable that any requirement for automatic deregistration should be subject to a discretionary appeal power by an external review body, as in Queensland. The VCAT would be the obvious choice to exercise this function.

It is also important that this should not be a once and for all decision: it may be that a decision-maker is not in a position to conclude that the teacher is fit to teach due to the short time that has passed since the offending has occurred but that it may be in position to do so when the teacher is able to demonstrate that he or she has maintained a clean record over a more substantial period of time.

CHAPTER 3 – TEACHERS WITH CONVICTIONS FOR OTHER OFFENCES

Introduction

The process for dealing with teachers who are found guilty of offences, other than those dealt with in Chapter 2, are more complex and form the basis for the analysis in this chapter and Chapters 4 to 6.

As noted in Chapter 1, the VIT regime is based on the regulatory model that was used in the health sector in 1999 to govern medical practitioners and nurses. That model was replaced soon afterwards by a new model via the *Health Professions Registration Act 2005* (Vic). The latter was used as reference point by the King Review in its assessment of the ETRA regime because 'it was seen by a number of stakeholders to be 'a good practice model'.[234] However, the 2005 health profession model itself has been amended since that time and replaced with a new law based on an agreed national model for regulating health professionals.[235]

The ETRA confers on the VIT a set of disciplinary procedures, which begin with an inquiry by the VIT. The VIT is required to conduct an inquiry into a teacher's fitness to teach if he or she has been found guilty or been convicted of an indictable criminal offence. It may also conduct an inquiry into the behaviour of a teacher who has been convicted of a lesser offence, should it receive a complaint that provides evidence that the teacher has engaged in misconduct or serious misconduct or is unfit to teach,[236] or if it receives notifications by the DEECD[237] that it has taken action against a teacher based on allegations of serious misconduct or lack of fitness to teach (or any other action that may be relevant to the teacher's fitness to teach).[238]

[234] King Review, p i.
[235] *Health Practitioner Regulation National Model (Victoria) Act 2009* (Vic).
[236] *Education Training and Reform Act 2006* (Vic), s. 2.6.29BA(1)(b)(ii) and (iii). It also has power to investigate a complaint that the teacher is seriously incompetent. Incompetence is not a ground that follows from conviction but it may add to the case against a teacher who has been convicted of a criminal offence.
[237] See *Education Training and Reform Act 2006* (Vic), s 2.6.31.
[238] *Education Training and Reform Act 2006* (Vic), s 2.6.29BA(1)(a).

An inquiry by the VIT may result in a number of different consequences, including the requirement for a formal hearing.[239] A formal hearing panel must make findings about whether or not the teacher, whether by act or omission, either has engaged in misconduct or serious misconduct or is not fit to teach.[240] If it decides against a teacher in relation to any of these criteria, a formal hearing panel has the discretion to impose a range of penalties.[241] These range from minor penalties such as cautioning or reprimanding the teacher or imposing conditions, limitations or restrictions on the teacher's registration, to cancelling a teacher's registration. If a panel decides to cancel a teacher's registration, it may also disqualify the teacher from applying for registration for a specified period.

A teacher whose registration is cancelled by the VIT or who receives some other form of negative determination (including a caution or reprimand or imposition of a condition, limitation or restriction on his or her licence) may apply for review of that decision by the Victorian Civil and Administrative Tribunal (VCAT).[242] That application must be made within 3 months after the day on which the VIT provides the teacher with notification of its determination.[243]

The adoption of a model used to regulate a different profession was explicable in part by the fact that Victoria was the first state to adopt such an approach for teachers. By the time that the ETRA regime was reviewed by the King Review, there were bodies with similar (although by no means identical) function in Queensland, Western Australia and New South Wales. However, as noted in the King Review, the responsibilities of the regulatory bodies in the other remaining states and the Northern Territory were principally confined to registration.[244] The position today is different again.

A comparative overview of teacher discipline regimes in other parts of Australia

A comparison with regimes in other parts of Australia demonstrates a large number of commonalities of approach but also a number of differences. Some features of these regimes

[239] *Education Training and Reform Act 2006* (Vic), s 2.6.34(1)(c).
[240] *Education Training and Reform Act 2006* (Vic), s 2.6.45A(1)(c).
[241] *Education Training and Reform Act 2006* (Vic), s 2.6.45A(2).
[242] *Education Training and Reform Act 2006* (Vic), s 2.6.55(1).
[243] *Education Training and Reform Act 2006* (Vic), s 2.6.55(2).
[244] King Review, p 18.

have already been discussed in Chapter 2 in relation to the processes for dealing with sexual offences. This analysis considers these regimes more generally.

Interrelationship with Working With Children Regime

One aspect where there are important differences relates to interrelationships with WWC regimes. There are some states where possessing a valid WWC permit is a precondition for initial registration and where loss of permit will result in loss of registration. In Queensland, the Queensland College of Teachers must cancel a person's registration if they become a relevant excluded person under the Queensland WWC regime.[245] Similarly, the Western Australian Board of Teaching must cancel a teacher's registration if a negative notice or an interim negative notice has been issued to the teacher under the *Working With Children (Criminal Record Checking) Act 2004* (WA).[246]

By contrast in Victoria, s 30(1) of the WWCA provides that: 'A person who is a registered teacher or registered early childhood teacher under the Education and Training Reform Act 2006 is exempt from a working with children check'.

Discretionary power to cancel registration

Another point of difference relates to the extent to which teacher's registration bodies have discretionary powers to cancel registration or accreditation based on criminal offending or misconduct more generally. While most other jurisdictions follow the Victorian approach of conferring such powers on the regulatory body, Queensland and Western Australia take a different approach, and confer the ultimate power on an administrative tribunal.

The powers of the ACT Teacher Quality Institute are the most general. The Institute has power to cancel a person's registration or permit to teach if it believes on reasonable grounds that suspension or cancellation is necessary for the *Teacher Quality Institute Act 2010* (ACT).[247] There is a right of appeal to the ACT Civil and Administrative Tribunal.[248]

[245] *Education (Queensland College of Teachers) Act 2005* (Qld), s 56. They are, however, entitled to be reregistered if the decision or order resulting in the teacher becoming a relevant excluded person is overturned on appeal and was not made in relation to a conviction for a serious offence.
[246] *Teacher Registration Act 2012* (WA), s 70(2)(b).
[247] *Teacher Quality Institute Act 2010* (ACT), s 63(b).
[248] *Teacher Quality Institute Act 2010* (ACT), s 90.

The powers of the Tasmanian Teacher Registration Board are likewise broad. It has power to cancel a teacher's registration if a person is found guilty of a 'prescribed offence'.[249] An offence qualifies as a prescribed offence if it is one in respect of which a sentence of imprisonment may be imposed (whether or not such sentence is imposed).[250]

The South Australian Teachers Registration Board has power either based on a complaint by the Registrar or of its own motion, to hold an inquiry to determine whether conduct of a teacher constitutes 'proper cause for disciplinary action.' If, after conducting an inquiry the Board is satisfied on the balance of probabilities that there is proper cause for disciplinary action, it may take one or more of a number of disciplinary actions. These include cancelling the teacher's registration with immediate effect or effect to be at a future specified date or disqualifying the teacher from being registered as a teacher 'permanently or for a specified period or until the fulfilment of specified conditions or until further order'.[251] There is a right of appeal to the Administrative and Disciplinary Division of the South Australian District Court.[252]

The approach taken in New South Wales is quite different. The New South Wales Teacher Accreditation Authority has the power to revoke a teacher's accreditation in a number of specified circumstances. These include where he or she is found guilty more than once in the 5-year period immediately prior to the revocation of a prescribed non-serious offence of a class of prescribed offences that involves an act or conduct that would reflect adversely on a teacher's professional standing or integrity or suitability or competence to teach.[253] It may also revoke a teacher's accreditation if it is satisfied that the person has been dismissed from employment as a teacher because of serious misconduct or has been included in the list of persons maintained by the Director-General under section 7(1)(e) of the *Teaching Service Act 1980* (NSW) as a person not to be employed in the Teaching Service. The latter ground is important because it ties the cancellation of the accreditation decision directly to dismissal and gives precedence to the latter (in the sense that revocation of accreditation follows as a

[249] *Teachers Registration Act 2000* (Tas), s 18A.
[250] *Teachers Registration Act 2000* (Tas), s 3.
[251] *Teachers Registration and Standards Act 2004* (SA), s 35.
[252] *Teachers Registration and Standards Act 2004* (SA), s 49.
[253] *Teacher Accreditation Act 2004* (NSW), s 24(b). At the time of writing there were no offences prescribed.

direct result). A decision by the Authority to revoke a teacher's accreditation is subject to administrative review by the New South Wales Civil and Administrative Tribunal.[254]

The procedure in the Northern Territory differs again. The Board is required to hold an inquiry in a number or circumstances, including where a person has been found guilty of an indictable offence other than a sexual offence[255] or where it otherwise becomes aware of a matter that, in its opinion, calls into question whether they are a fit and proper person to teach.[256] Based on the report of the inquiry, it then has discretion to make a number of decisions, including a decision to disqualify the person from registration for a specified period.[257] The Act specifies procedures for the conduct of inquiry proceedings,[258] but not for the decision-making of the Board, which is based on the report of the inquiry. Decisions by the Board are subject to merits based review by the Northern Territory Local Court.[259]

Queensland and Western Australia stand out in having regulatory bodies that do not have discretionary powers to cancel a teacher's registration (although they are required to revoke a teacher's registration if he or she has committed a specified offence, as discussed in Chapter 2).

The Queensland College of Teachers has the power to take disciplinary action against a teacher if he or she has committed a 'serious offence',[260] which is defined as a serious offence within the meaning of s 167 of the *Working with Children Act 2005* (Qld).[261] Its disciplinary powers do not extend to cancelling a teacher's registration, but it has the power to refer the matter to the Queensland Civil and Administrative Tribunal (QCAT) in specified circumstances (including where it believes that cancellation is warranted).[262] If the QCAT decides a ground for disciplinary action against the relevant teacher has been established it may impose a range of penalties, including cancelling the teacher's registration or permission

[254] *Teacher Accreditation Act 2004* (NSW), s 27.
[255] *Teacher Registration (Northern Territory) Act (NT) 2004* (NT), s 50(2)(a).
[256] *Teacher Registration (Northern Territory) Act (NT) 2004* (NT), s 50(2)(b).
[257] *Teacher Registration (Northern Territory) Act (NT) 2004* (NT), s 64(1)(d).
[258] *Teacher Registration (Northern Territory) Act (NT) 2004* (NT), s 62.
[259] *Teacher Registration (Northern Territory) Act (NT) 2004* (NT), s 74B.
[260] *Education (Queensland College of Teachers) Act 2005* (Qld), s 92(1)(b).
[261] See *Education (Queensland College of Teachers) Act 2005* (Qld), s 6 and the dictionary in Schedule 3.
[262] *Education (Queensland College of Teachers) Act 2005* (Qld), s 123(2)(b).

to teach. In addition, if it cancels the teacher's registration or permission to teach, it may make an order prohibiting the teacher from reapplying for registration or permission to teach either for a stated period or indefinitely.[263]

If the Western Australian Teachers Registration Board is notified that a registered teacher has committed a criminal offence,[264] it may adopt a number of responses, including formulating a complaint which forms the basis for an inquiry and decision by the Board or making an interim disciplinary order which must then be referred to the Western Australian Administrative Tribunal. If the matter proceeds by way of a complaint, a disciplinary committee must conduct an inquiry. It does not have power to cancel a teacher's registration but may refer the matter to the Western Australian Administrative Tribunal, which has the power to order the cancellation of the person's registration as a teacher and, it does so, to order that the person is disqualified from applying for registration as a teacher for a specified period of time.

ETRA Hearings

The ETRA provides for three types of hearings, namely informal, medical and formal. Each is briefly described below. They are not mutually exclusive, for example, an informal hearing may be followed by a formal one. However an important point of difference in the context of this thesis is that a teacher may only be deregistered following a formal hearing.

The Informal Hearing

The VIT may determine to hold an informal hearing to consider a teacher's conduct, competence or continued fitness to teach, or ability practice as a teacher. Informal hearings are held by a panel appointed from a pool of approved persons.[265] Each panel must consist of at least three persons, including a Chairperson (who must be a member or former member of the VIT Council) and a registered teacher.[266] Teachers have no right to legal representation at

[263] *Education (Queensland College of Teachers) Act 2005*(Qld), s 160(2)(j).
[264] *Teacher Registration Act 2012* (WA), s 45.
[265] See *Education Training and Reform Act 2006* (Vic), ss 2.6.35F and 2.6.36.
[266] See *Education Training and Reform Act 2006* (Vic), s 2.6.37.

the hearing but have the option to elect to have their case considered instead at a formal hearing.[267]

If an informal hearing panel finds that a teacher has engaged in misconduct,[268] it may make a range of possible determinations. If it seems that some form of medical impairment is likely it may refer the matter to a medical panel. Alternatively, it may decide to caution or reprimand the teacher, to impose conditions on the teacher's registration, to require the teacher to undertake further education and training or to require the teacher to undergo counselling. The panel may also decide to refer the matter to a formal hearing.[269]

The Medical Hearing

The provision for medical hearings[270] is a new development which has only been in place since 1 January 2011. It is potentially relevant to individuals who have committed crimes since some convictions arise from medical problems including psychiatric conditions and drug addiction. An individual may be referred directly to a medical hearing by the VIT or may be referred to it by an informal or formal hearing panel.

Medical panels must be composed of three or more persons, including a person who has been admitted to legal practice in Victoria for not less than five years, a person registered under the Health Practitioner Regulation National Law to practice in the medical profession or in the psychology profession, and a registered teacher. Their hearings differ from those of informal hearing panels in that the teacher has a right to legal representation at the hearing.[271]

If a medical tribunal finds that the ability of the teacher has been impaired, it may either impose a condition on the teacher's registration or suspend that registration for a specified period and subject to any conditions specified. The conditions it may impose are as follows: requiring the teacher to undergo counselling, to attend a health practitioner for further treatment, to work under the supervision of another registered teacher or to undertake further

[267] See *Education Training and Reform Act 2006* (Vic), s 2.6.38(d).
[268] See *Education Training and Reform Act 2006* (Vic), 2.6.40(1)(a).
[269] See *Education Training and Reform Act 2006* (Vic), s 2.6.40(2).
[270] *Education Training and Reform Act 2006* (Vic), s 2.6.41A.
[271] *Education Training and Reform Act 2006* (Vic), s 2.6.41D(c).

education and training for a specified period.[272] Alternatively, if it finds that the ability of the teacher has not been affected the panel may determine that no further action is to be taken.[273]

The Formal Hearing

A teacher may be referred directly to a formal hearing panel by the VIT[274] or indirectly via an informal hearing or medical hearing panel.[275] A formal hearing panel must consist of at least three persons, of whom two must be teachers.[276] A formal hearing can lead to a decision to deregister the teacher.

Because formal hearings can result in more serious consequences than other forms of hearings there are more detailed notice requirements. A notice of the hearing must state inter alia the nature of the hearing and the complaint or allegations made and list possible findings as well as providing notification that there is a right to review the panel's determinations.[277]

There are also more detailed procedures relating to the conduct of hearings. The teacher is entitled to be present, to make submissions and to be represented.[278] Panel hearings are in general required to be open to the public but the panel may determine that proceedings should be closed if there is evidence of intimate, personal or financial matters are being considered[279] (and in that case the identity of any witness giving evidence is not to be published)[280]. If the hearing arises out of a complaint, the identity of the complainant is not to be published or broadcast but the complainant is entitled to be present if the proceedings are open to the public.[281] Finally, the panel may determine that any information that might enable the teacher who is the subject of the hearing to be identified prior to the making of a final determination must not be published if the panel considers it necessary to do so to avoid prejudicing the administration of justice or for any other reason in the interests of justice.[282]

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[272] *Education Training and Reform Act 2006* (Vic), s 2.6.41E(3).
[273] *Education Training and Reform Act 2006* (Vic), s 2.6.41E(4).
[274] *Education Training and Reform Act 2006* (Vic), s 2.6.42(a).
[275] *Education Training and Reform Act 2006* (Vic), s 2.6.42(b).
[276] *Education Training and Reform Act 2006* (Vic), s 2.6.43(1)(a) and (b).
[277] *Education Training and Reform Act 2006* (Vic), s 2.6.44(c).
[278] *Education Training and Reform Act 2006* (Vic), s 2.6.45(b).
[279] *Education Training and Reform Act 2006* (Vic), s 2.6.45(d).
[280] *Education Training and Reform Act 2006* (Vic), s 2.6.45(e).
[281] *Education Training and Reform Act 2006* (Vic), s 2.6.45(d).
[282] *Education Training and Reform Act 2006* (Vic), s 2.6.45(f).

Procedures at formal hearings are left to the discretion of panels,[283] although they must be conducted with as little formality and technicality as the requirements of the Act and proper consideration of the matter permit.[284] A formal hearing panel is not bound by the rules of evidence and may inform itself in any way it thinks fit.[285] It is, however, is bound by the rules of natural justice.[286] The requirements of natural justice are further considered in Chapter 6.

Determinations made by a hearing panel come into operation on its making or at the time stated in the determination[287] and a determination of a hearing panel has effect as if it were a determination of the Institute.[288]

If following an inquiry the VIT finds that the teacher has engaged in misconduct or serious misconduct or is otherwise unfit to teach , it may make a range of determinations, including suspending or cancelling the registration of the teacher and also disqualifying the teacher from applying for re registration within a specified period.[289]

The VIT has issued a policy statement on criminal records, but this document is not publicly available, although its content can be gleaned from the reported decision of the hearing panel in *Re RGA*.[290] This document is further discussed in Chapter 7.

Case study: Tara Sutton

The powers of the VIT formal hearing are therefore very substantial and can lead to loss of employment.

The case of Tara Sutton[291] highlights the potential injustice that can occur where a teacher is investigated and subjected to an adverse finding in absence of legal support and assistance.

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[283] *Education Training and Reform Act 2006* (Vic), s 2.6.48(a).
[284] *Education Training and Reform Act 2006* (Vic), s 2.6.48(b).
[285] *Education Training and Reform Act 2006* (Vic), s 2.6.48(c).
[286] *Education Training and Reform Act 2006* (Vic), s 2.6.48(d).
[287] *Education Training and Reform Act 2006* (Vic), s 2.6.49(1).
[288] *Education Training and Reform Act 2006* (Vic), s 2.6.49(2).
[289] *Education Training and Reform Act 2006* (Vic), s 2.6.46(2)(j) and (k).
[290] *Re RGA*, VIT, No 137, 22 March 2013.
[291] *Re Sutton*, VIT, No 097, 24 February 2010.

The facts

Tara Sutton was registered as a secondary teacher in 2004. In 2008 she was required to attend a formal hearing arising from criminal convictions for drug-related offences for which she was tried and convicted in the Magistrates' Court on 26 June 2008.

Those charges and the sanctions imposed were in brief as follows:

- One charge of attempting to traffic a drug of dependence: the Magistrates' Court recorded a finding of guilt without recording a conviction and imposed a 12 month Community Based Order. Sutton was also required to attend a Community Corrections Centre to undergo assessment and treatment of her addiction or to submit to appropriate assessment and treatment, as directed by the Regional Manager.[292]
- One charge of cultivating a narcotic plant - cannabis: the court again recorded a finding of guilt without recording a conviction and placed Sutton on a Community Based Order.[293]
- One charge of possessing a drug of dependence; the court recorded a finding of guilt without recording a conviction and fined Sutton $300 with a stay to allow time to pay to 24 July as part of an aggregate order.[294]

It is arguable these aggregated sentences are reflective both of the court's view that her offending was of a minor nature and its desire to ensure her rehabilitation.

Sutton's offending arose in circumstance where she had not been working following a car accident. Her offences were therefore not committed while she was employed as a teacher. In addition, her evidence to the VIT formal hearing panel disclosed a number of extenuating circumstances. These included the fact that she acquired her addiction at a time where she had ongoing pain from severe injuries sustained in the car accident in which she suffered a broken back and neck: when she had been diagnosed with depression following the suicide of

[292] Trafficking in a drug of dependence *Drugs, Poisons and Controlled Substances Act 1981*, s 71AC (maximum penalty level 4 imprisonment - 15 years maximum).
[293] *Drugs, Poisons and Controlled Substances Act 1981* (Vic), s 72B (maximum penalty level 4 imprisonment - 15 years maximum).
[294] Possession of substance, material, documents or equipment for trafficking in a drug of dependence, *Drugs, Poisons and Controlled Substances Act 1981* (Vic) s 71A (maximum penalty level 5 imprisonment - 10 years maximum).

a Year 8 student and when she was experiencing problems in her relationship with a man who was her main support and caregiver but had later become abusive towards her. Sutton gave evidence that she had smoked cannabis for pain relief.

The procedural background to the formal hearing was briefly as follows. On 28 April 2008, Tara's employer (DEECD) sent a letter to the VIT notifying it that it had taken action against her. The DEECD advised the VIT that her employment had been terminated following advice that she had been charged with these indictable offences. As the date of her dismissal predated that of her court appearance, it had clearly taken place prior to the matter being heard in court.

Notification of her dismissal was required under s 2.6.31 of the ETRA, which states that the DEECD must notify the VIT if it has taken action against a registered teacher in response to specific allegations, including allegations that a teacher has engaged in serious misconduct or in unfit to teach.

The matter was referred to the Disciplinary Proceedings Committee (DPC) of the VIT on 19 November 2008. The DPC decided to refer the matter for an investigation and information about her offending was sought from the Magistrates' Court and Victoria Police.

In the meantime, Sutton's registration had expired on 19 June 2009 due to her failure to renew it. Under s 2.46.7 the VIT has discretion to conduct or continue to conduct an inquiry into the conduct or activities of a person who was a registered teacher who has ceased to be registered, if the conduct occurred a time when the person was a registered teacher. On 22 July the Committee decided to continue with the inquiry and referred the matter to a formal hearing.

Tara Sutton's formal hearing was conducted on 24 February 2010 by a VIT panel, consisting of Jane O'Shannessy (Chair), Terry Hayes (a registered teacher) and Alina Jones (a non-teacher panel member). Tara Sutton attended the hearing and represented herself; the fact that she did not have legal assistance is extraordinary given what was potentially at stake and the fact that she was clearly anxious to resume her job.

On 4 March 2010 the hearing panel decided to cancel her registration from 4 March 2010.

Cannabis and the Criminal Law

It is illegal to use, grow, or sell cannabis in Australia; however the penalties for cannabis offences are different in each state and territory.[295] These range from a $50 fine to conviction for an indictable criminal offence carrying a substantial jail sentence.

Possession of cannabis is not generally regarded as a serious crime and attracts the lowest sanctions. It has been largely decriminalised in number of parts of the world. In Victoria a police officer may give a caution and offer a person the opportunity to attend a cannabis education program if they are caught with more than 50 grams of cannabis.[296] Furthermore, s 73(1)(a) of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) provides a very low fine of 5 penalty points.

Cultivation and trafficking (including attempted trafficking) are regarded as more serious but are commonly associated with addiction, as they provide a means for addicts to afford or fund their drugs. Marijuana is regulated in part because it is acknowledged to be addictive. It is also acknowledged to provide pain relief in some circumstances where other medications are ineffective or cause unacceptable side effects.

Commentary: the panel decision

Sutton had tabled glowing references from her treating and support team at the hearing to the effect that she had worked hard to achieve a more stable lifestyle. However, the formal hearing panel highlighted one sentence from her medical practitioner.

> As is often the case of arrests made in settings like hers, the real issue is her ongoing personal use of cannabis, as a potential teacher of school pupils. The teacher has had longstanding problems in reducing her cannabis intake, linked to high levels of craving and environments which precipitate and supported her use of the drug.[297]

In the practitioner's view, whilst Sutton had made significant progress, her personal use of cannabis was of concern.

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[295] National Cannabis prevention and information centre, fact sheet-accessed at <ncpic.org.au>.
[296] Ibid.
[297] *Re Sutton*, VIT No 097, 24 February 2010.

The panel cited a comment in its earlier decision in *Re Davidson*[298] to the effect 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'. It used this as the basis of its justification for cancelling Sutton's registration. However, the panel failed to note that the decision in Davidson had been successfully appealed to the VCAT[299] and the VCAT had been critical of the manner in which the VIT reached its decision.[300]

Analysis

Arguably the outcome in Sutton's case involved a discriminatory loss of employment based on an irrelevant criminal record. The offences related to conduct when she was not working as a teacher and for which there were extenuating circumstances. Although the offence of attempted trafficking is a serious one, it is significant that all of Sutton's offending was regarded by the trial court as sufficiently trivial to justify a finding of guilt without recording a conviction and a sentence consisting of Community Based Orders and very low level fines**.** As explained in Chapter 1, a decision of a court to impose a penalty without recording a conviction is arguably reflective of a desire that the accused is not prejudiced in relation to future employment prospects, as spelt out in s 8 of the Sentencing Act.

While the hearing panel did keep in mind that the object of the proceedings was to protect students, rather than to punish teachers for their conduct, it arguably attached too little significance to the circumstances of her offending and the approach taken by the sentencing Magistrate, which clearly emphasised the goal of rehabilitation. The outcome for Sutton was very punitive given the circumstances. It is likely that having a lawyer would have assisted her in better preparing for the hearing, for example, by advising that her practitioner's letter was not helpful to her case and that she would have been well advised to obtain additional evidence to rebut it. It is also arguable that Sutton was perhaps too candid when being questioned and this reflected a lack of understanding of the continuing import of her addiction.

[298] *Re Davidson*, VIT No 010, 6 December 2004.
[299] *Davidson v VIT* [2007] VCAT 920.
[300] Ibid, [186]-[190].

Under the ETRA framework a government teacher who is found guilty of a criminal offence is subject to two different consequences. The first relates to their employment relationship with the DEECD and the second to their registration as teacher. Teachers who have committed a criminal offence may be disciplined (including having his or her employment terminated) and be subject to consequences outlined above in relation to their registration as a teacher with the VIT. The two are not directly linked so it is conceivable that a teacher might lose their job but retain their registration. However, a teacher who loses his or her registration is unemployable as a teacher.

In Sutton's case her criminal convictions first attracted consequences in terms of her employment. Section 2.4.60(1)(c) of the ETRA provides that the Secretary to the DEECD, after investigation, may take action against an employee who during his or her period of service is convicted or found guilty of a criminal offence punishable by imprisonment or a fine. Section 2.4.60(2) further provides that in considering the fitness of an employee to discharge his or her duties, consideration may be given to any relevant matters including his or her character and any conduct in which he or she has engaged (whether before or after becoming an employee. It seems that Sutton's employment had been terminated prior to her referral to the VIT, although it is unclear to what extent the Department considered the factors required in s 2.40.6(2). It should be noted that there were a range of actions of varying degrees of severity open to the Department under s 2.4.61, including suspension and impositions of conditions, but that it chose the most severe and terminated her employment.

The VIT similarly took a harsh approach and cancelled her registration. While it did not impose any time limit on her ability to reapply for registration, it recommended that before she did so she should:

- make a sustained and successful attempt to remain free from drugs; and
- clearly understand the Victorian Teaching Code of Ethics and Code of Conduct, especially in relation to the teacher as a role model in the community.

Sutton had a right of appeal to the VCAT under s 2.6.55 but did not lodge any appeal. The fact that she was unrepresented at the hearing and had been unemployed for some time suggests that she may have been unable to afford the necessary legal advice to avail herself of

this right. It could be hypothesised, based on other hearings, that if she had been legally assisted or taken her case to VCAT she might have achieved a better outcome.

Outcome

Unlike Phillips, Tara Sutton only recently attracted attention from the media.[301] Even then it was fleeting only.

> The Victorian Institute was less kind to Tara Sutton, after she was found guilty of growing marijuana and attempting to traffic a drug of dependence.[302]

However, her case highlights the fact that the system can operate harshly especially when a teacher is unrepresented.

It is relevant to note that not long prior to the Sutton case the VIT had been criticised by the VCAT concerning the manner in which it conducts a hearing in which a teacher was deregistered (although not because of a criminal conviction). Anthony Davidson successfully appealed his deregistration and in her reasons for decision Harbison J made a number of adverse comments about the way in which the case had been investigated.[303] Her Honour was critical in particular about the way in which the VIT's investigations had been handled, including the way in which they had taken evidence from witnesses, the fact that they contained objectionable hearsay and grossly unfair opinion evidence and highly prejudicial material. Her Honour also commented that failures to have regard to the principles of natural justice had led to uncertainty and unfairness.

Her Honour found that the manner in which statements had been obtained and presented to the Tribunal had been disorganised in the extreme. Further, the conduct of the defence had been greatly hampered by a lack of particularity of charges and the presentation of much material not strictly relevant to the charges. It commented that witness statements were incomplete and that they referred to hand written notes, typed notes and statements to the Investigator without providing any clear information as to the circumstances of creation of

[301] Hamish Heard, 'Teachers are growing hash, forging medical notes and harassing colleagues,' *Sunday Herald Sun*, 7 August 2011.
[302] Ibid.
[303] *Davidson v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 920.

those documents. In addition, the documents presenting the events relied on were out of chronological order and notes had gone missing, although they had presumably been in the possession of the Institute's investigators at some time. Also photocopies of notes deleted vital words. Harbison J noted that the VIT and the formal hearing panel were bound by the rules of evidence in their investigations and decision-making and that failing to have regard to the principles of natural justice can lead to unfairness.[304]

The issue of procedural unfairness will be considered further in Chapter 6. Some of these matters were already of concern to the King Review, which identified fairness as one of the hallmarks of effective regulation. In its view, 'the regulator should maintain an acceptable balance between protection of consumer rights and interests, and those of the regulated teaching professionals' and should uphold natural justice in relation to its disciplinary function'.[305] Its report mentioned a complaint to the effect the VIT had:

> '… conducted itself in a wholly unsatisfactory manner for the following reasons…causing unnecessary delays, failing to particularise allegations, no transparency in causing unnecessary delays, failing to particularise allegations, no transparency in the decision to proceed to a formal hearing, bringing charges that have nothing to do with the VIT's mandate or the legislative test including relying almost entirely upon hearsay and grossly unfair opinions, failing to brief Counsel until the very last minute, abandoning the majority of allegations against [the teacher] one (1) business day before the hearing commenced, not providing documents filed by [me] with the VIT to the Panel for its consideration prior to the case commencing thereby unfairly not allowing the Panel to consider any portion of [the] case before the hearing…'[306]

It is difficult to assess the extent to which many of these issues continue to be a problem based on the published decisions of VIT hearing panels. However, it is clear that delay continues to be an issue, as discussed in Chapter 6.

[304] *Davidson v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 920 (30 May 2007) [185]-[190].
[305] King Review, p 4.
[306] Ibid, p 97.

The King Review

The 2008 King Review[307] considered a wide range of matters, including the VIT's effectiveness in achieving its objectives and the most appropriate structures for meeting those objectives. It found that, while the VIT had worked hard on the administration of its disciplinary function, that there had been occasions where its processes lacked desired levels of natural justice and transparency. It also noted that there was confusion and overlap between the disciplinary roles of the VIT and the department and that these led to uncertainty and lengthy delays. These issues are further considered in subsequent chapters, in particular Chapters 6 and 7.

More generally, the King Review commented that: 'The legislation governing the operation of VIT in the area of disciplinary proceedings, and their relationship to registration, is not consistent with recent public policy in several major respects'.[308] Using the Health Professions Registration Act as an example of a better model it felt there was scope to reconsider a number of major policy issues.

One of these issues, subsequently dealt with via the 2011 reforms to the ETRA, related to the means by which persons were appointed to the hearing panels. At the time of the King Review, panel members were appointed by the VIT. The Review commented that 'it is not usually the case that a person can find themselves on a hearing panel with significant influence over the livelihood of a professional without there having been some public process leading up to their appointment'.[309] It noted a more appropriate and useful process involved appointment of panel members to a pool through the Governor in Council, on the recommendation of the Minister, as was the case under the HPRA.[310] This recommendation was accepted by the government and it is now the case that hearing panels are formed from members of a pool appointed by the Governor.[311]

[307] The review was conducted by Frank King, who was an ex Deputy Secretary Treasury and Finance.
[308] King Review, p 108.
[309] Ibid, p 105.
[310] Ibid.
[311] ETRA, s 2.6.6A.

The King Review also referred to the 'the potential contribution of legally qualified persons and of consumers or non-professionals to disciplinary processes'.[312] These points were reflected in a recommendation that 'hearing panels should include legally qualified personnel and community representatives where natural justice and community standards are at issue.[313] This recommendation was not accepted by the government.[314]

The King Review also discussed the 'transfer of deregistration matters to VCAT, as the original place of hearing'.[315] While this was not further explained, it is clear that the review envisaged a continuing disciplinary hearings function for the VIT, but only in relation to matters which could be dealt with by lesser penalties (not involving deregistration) as is the case in Queensland and Western Australia. The rationale for this distinction is that decisions that have the potential to deprive teachers of their livelihoods are more appropriately made by bodies such as independent Tribunals that include legally qualified members with an awareness of natural justice issues. This idea was not reflected in any specific recommendation and was not taken up by the government.

At the time when the Review was conducted a decision to deregister a teacher involved permanent deregistration. The King Review noted that recent VCAT decisions[316] had suggested that the hearing panels should have the power to cancel a teacher's registration for a specified period and that it was unfair that the teacher's registration was cancelled indefinitely.[317] It accordingly recommended that hearing panels (if still authorised to deregister) should be given the power to cancel a teacher's registration for a definite period. This recommendation was accepted and is reflected in the existing powers of formal hearings powers. As described above, these formal hearings may decide to cancel a teacher's registration and also impose a time limit on applying for registration. It is implicit in this new regime that the power to deregister is not indefinite and cannot be made so (ie that they must

[312] Ibid, p 108.
[313] Ibid, p 29, rec 28(vi).
[314] Victoria, Department of Education and Early Childhood Development, *The Response of the Victorian Government to the Review of the Victorian Institute of Teaching*, July 2009, p 21 accessed at <https://www.google.com.au/?gws_rd=ssl#q=government+response+to+VIT+review>.
[315] Ibid.
[316] The review did not specify the decisions but they presumably include *Re Davidson* as discussed above.
[317] King Review, p 99.

set a time limit). The current position in Victoria is generally consistent with that in other Australian jurisdictions, as outlined above.

A further issue which received brief consideration was the interrelationship between the ETRA and the Victorian WWC regime. The King Review made a number of recommendations to bring the ETRA regime more into line with processes used in the WWC regime, including its processes for ongoing monitoring of holders of WWC permits. Its recommendation[318] that the VIT establish a real time monitoring of criminal record checks with Victoria Police has been accepted and implemented.

The King Review also raised the question as to whether there might be efficiencies if the criminal record history checking process were to be centralised within the Department of Justice and noted that outsourcing this function would allow the VIT to focus on other core functions.[319] It did not, however, question whether it was appropriate for the VIT to impose different and broader criteria to those applied under the WWC process. This is significant because the WWC regime is focused solely on the interests of children, whereas the ETRA regime embodies wider criteria that include reputational damage to the profession. There is real question as to whether it is appropriate for teachers to be deprived of their livelihoods on this broader basis and whether there would be merit in following the approach in Queensland which adopts the WWC definition of serious offence in the Education (Queensland College of Teachers) Act, as discussed above. This issue is further discussed in relation to the criterion of fitness to teach in Chapter 4.

Conclusion

The existence of an investigation and hearings process is an important aspect of the VIT's professional conduct function as it applies to teachers with criminal records. While the availability of discretion in relation to cancellation for offences other than sexual offences is important and compares favourably with the position in relation to sexual offences, it is also important to ensure that the decision-making process is a fair one given that what is potentially at stake is the livelihood of a qualified registered teacher. Leaving the ultimate

[318] Ibid, p 40, rec 5(i).
[319] Ibid, p 38.

power to cancel registration with the VIT is arguably problematic to the extent that its procedures are inconsistent with fairness.

The Tara Sutton case study highlights the potential for unfairness in this process, both in a substantive sense and also in terms of matters of procedure. The King Review also highlighted a number of problematic issues, of which only some have been rectified. At the same time a comparison of the regimes in other parts of Australia suggests that there are some key points of difference that are worthy of further exploration. These issues are further considered in the following chapters.

CHAPTER 4 – FITNESS TO TEACH

Introduction

As explained in Chapter 3, teachers with criminal convictions in respect of offences other than 'sexual offences' as defined in the ETRA, may be subject to loss of registration based on decisions by formal hearing panels of the VIT. This chapter establishes the legal context for this decision-making, which is based on findings concerning a teacher's 'fitness to teach'. It explains its relevance within the ETRA and then explores the way in which issues of this type have been approached in relevant case law and also how it interrelates with requirements in the Code of Conduct developed by the VIT.

The ETRA regime and the significance of fitness to teach

Under the ETRA a formal hearing panel may determine to take one or more the actions specified in s 2.6.46(h). These range from cautioning or reprimanding the teacher and imposing conditions, limitations or restrictions on the registration of the teacher through to suspension or cancellation of a teacher's registration and even disqualifying the teacher from applying for registration within a specified period. The ability to impose a disciplinary action under s 2.6.46(h) is dependent on making one or more of the determinations specified in s 2.6.46(2).

In the case of a teacher who has been found guilty in Victoria of an indictable offence (or of an offence elsewhere, which would if committed in Victoria be an indictable offence), it is necessary for the tribunal to consider not only the fact of the guilty finding but also if the teacher is not fit to teach. In other words, what is critical is the question of fitness to teach.

In the case of a teacher who has committed a lesser, non-indictable offence, the issue to be determined is not the fact of the conviction but whether conduct that formed the basis for the offence has the consequence that the teacher is 'not fit to teach'[320] or guilty of either 'misconduct' or 'serious misconduct'.[321] While this is not specifically prescribed in the ETRA, the approach taken is that loss of registration will generally follow only from a finding that the teacher is unfit to teach; if a teacher commits 'misconduct' or even 'serious

[320] ETRA s 2.6.46(2)(a).
[321] ETRA s 2.6.46(2)(c).

misconduct' but also if the teacher is found fit to teach they will attract a lesser penalty. Therefore what is again critical is the question of fitness to teach.

The terms 'misconduct' and 'fitness to teach' were originally not defined in the ETRA. However, definitions were inserted into s 2.6.1 via amendments made by the *Education and Training Reform Amendment Act 2010* (Vic).[322] It is important therefore to differentiate the approaches taken to these terms by VIT panels before and after the inclusion of these statutory definitions.

The term 'misconduct' is defined with reference to a teacher's conduct in connection with the practice of teaching and includes 'conduct of the teacher occurring in connection with the practice of teaching that is of a lesser standard than a member of the public or members of the teaching profession are entitled to expect from a reasonably proficient teacher'. It also includes the contravention of, or failure to comply with a condition imposed on the registration of the teacher by or under Part 2.6 and breach of an agreement made under the ETRA between a teacher and the VIT. Serious misconduct means 'a complaint involving a registered teacher's ability to practise as a teacher being seriously detrimentally affected or likely to be seriously detrimentally affected because of an impairment'.[323]

'Fitness to teach' is defined in relation to a person as meaning 'whether the character, reputation and conduct of a person are such that the person should be allowed to teach in a school'.[324] It should be noted that this is very broad as it involves an assessment of character and reputation as well as conduct and is not explicitly tied to conduct in connection with teaching.

Loss of registration based on misconduct

In assessing the ETRA regime it is relevant first to consider its broader context as an aspect of government licensing regulation.

[322] These amendments commenced on 1 January 2011.
[323] ETRA, s 2.6.33(1)(a).
[324] ETRA, s 2.6.1.

It is a common feature of occupational licensing regimes, especially those governing professions, that they provide for disciplinary proceedings which may result in loss of registration based on misconduct that makes a person unfit to continue to be registered. It has been estimated in Victoria that there are about 40 Acts with licensing provisions containing a 'fit and proper person' test and 20 set conditions relating to 'character'.[325]

Authorisation (also described as the conferral of protected rights)[326] is an important aspect of government regulation that concerns the power of the state to authorise, permit, allow, recognise or legitimate a particular activity, status or premises.[327] Freiberg argues that it is one of the oldest and most pervasive forms of government regulation.[328] However the theory relating to licensing is complex, and contains economic, political and legal elements.[329] Licensing is an aspect of government authorisation. Occupational licensing has been described as a process whereby 'entry into an occupation requires the permission of the government, and the state requires some demonstration of a minimum degree of competency'.[330] It generally involves the enactment of legislation by the state, which has ultimate authority to allow specific conduct, enacting laws that control the entry of people into a profession or other occupation, mandate the standards required of them and prevent people who do not meeting those standards from exercising their skills as members of that profession or occupation by suspending or cancelling their authorisation.[331]

As explained by Freiberg, licensing regimes can serve a variety of different purposes according to the circumstances.[332] These may include probity, consumer protection, minimisation or prevention of harm and market enhancement.

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[325] Consumer Affairs Victoria, 2006, p 15.
[326] See Robert Baldwin and Martin Cave, *Understanding Regulation: Theory Strategy and Practice* (Oxford: Oxford University Press, 1999) p 34.
[327] Arie Freiberg, *The Tools of Regulation* (Sydney: Federation Press, 2010), p 141.
[328] Ibid.
[329] Sidney Carroll and Robert Gaston, 'Occupational Restrictions and Quality of Service Received: Some Evidence' (1981) 47 *Southern Economic Journal* 959-76; Morris Kleiner and Alan Krueger 'The Prevalence and Effects of Occupational Licensing' (2010) 48 *British Journal of Industrial Relations* 676-687; John Hood, 'Does Occupational Licensing Protect Consumers?' The Freeman Foundation for Economic Education, 1 November 1992.
[330] Morris Kleiner, 'Occupational Licensing' (2000) 14(4) *Journal of Economic Perspectives* 189, 191.
[331] Arie Freiberg. 'Reconceptualizing Sanctions' (1987) 25 *Criminology 223*, 238.
[332] Arie Freiberg, *The Tools of Regulation*, pp 144-145.

Probity is concerned with moral attributes such as honesty. Where probity is important it is not uncommon to perform background checks of the person applying to be registered in order to identify persons who lack the necessary attributes. Registration may be denied to a person who has a criminal record, or whose character is considered unsatisfactory for other reasons.[333]

Consumer protection may require probity but it is also concerned with issues such as professional competence. An important rationale for licensing is to provide consumers with some element of quality assurance in relation to the services provided by registered members of the profession or occupation. As explained by Freiberg, the authorising tool of regulation is one of the most significant tools used to establish a climate of trust. The licence may be regarded as a 'token' of trust issued by the government and other bodies, which enables people to go about their daily lives without the need to verify the qualifications of the people they deal with each day'.[334]

Harm minimisation is likewise related to probity as well as to consumer protection. It is typically a significant consideration where consumers are in a position of vulnerability (for example, children, people in care and people in unequal power relationships). Finally, market enhancement is more concerned with the interests of members of the profession and in the broader interest of the community in ensuring a viable market of the services regulated. In general terms there will be an enhanced market if the occupation enjoys a high reputation and a good level of consumer confidence.

The elements and structures of occupational licensing regimes tend to vary, but in essence they include a regulatory body with responsibility for notification or prior approval of registration, a set of standards to govern the issuing (and taking away) of licences and mechanisms for their enforcement, including cancelling, suspending or removing licences and the imposition of criminal or civil sanctions for working in that occupation without a licence.

The ALRC has commented that:

[333] Ibid, p 145.
[334] Ibid, p 141.

> The essential feature of licensing regimes is the creation of a specific relationship between the regulator and the licence-holder, so that the licence-holder's conduct is restrained not only by rules of general application but by the conditions of the licence, and the relationship created by the licence. Rights, duties and causes of action arise out of the relationship itself.[335]

Occupational licences are provisions for 'registration' that attach to an individual, are non-transferable and are generally based on qualifications which are reasonably proximate to the conduct of a trade, profession or recognisable occupational grouping.[336] Registration under the ETRA is in effect a 'licence to teach' and it protects both the profession of teaching and the public from persons who do not meet these requirements and who may be unsuitable persons to practise as teachers.[337] This translates to a person having an approved qualification, fitness to be a teacher, competence in communicating and speaking in English and being able to produce evidence to satisfy the standards of professional practice.[338]

Registration has been defined as 'an arrangement under which individuals are required to list their names in an official register if they engage in certain kinds of activities'.[339] Usually there is a fee attached to the registration. Registration is often used in combination with other form of authorisation such as meeting some minimum standards.[340]

The functions of the Victorian Institute of Teaching as contained in s 2.6.3 of the ETRA include granting registration or permission to teach,[341] issuing certificates of registration to those teachers who are registered to, or have permission to teach in schools in Victoria[342] and to maintain a register of teachers who are registered to, or have permission to teach in schools in Victoria.[343]

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[335] ALRC, *Protection of Human Genetic Information*, Discussion Paper 66, 2002, 332-333.
[336] Arie Freiberg, *The Tools of Regulation*, p 144.
[337] FJ and JM King & Associates, *Review of the Victorian Institute of Teaching*, Department of Education and Early Childhood Development, 2008, p 27.
[338] *Education Training and Reform Act 2006* (Vic), s 2.6.8(a), (b), (b)(i), (b)(ii) and (c).
[339] Freiberg, *The Tools of Regulation*, pp 150-151, citing Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) 144.
[340] Freiberg (2010), p 151.
[341] *Education Training and Reform Act 2006* (Vic), s 2.6.3(e).
[342] *Education Training and Reform Act 2006* (Vic), s 2.6.3(f).
[343] *Education Training and Reform Act 2006* (Vic), s 2.6.3(g).

Further, the Institute may refuse to grant registration to an applicant on any one or more of the following grounds:[344] character,[345] sexual offence,[346] criminal record,[347] cancellation of a registration in another state of Australia or another country,[348] if the applicant is seriously incompetent,[349] or the applicant has not produced evidence which satisfies the Institute of his or her fitness to teach.[350] The Institute may impose any condition, limitation or restriction it thinks appropriate on the registration of a teacher under this section, including a condition that the teacher provides information about criminal records within the period specified by the Institute.[351] Other forms of registration included in the legislation are provisional registration,[352] non-practising registration[353] and interim registration.[354]

Approaches taken by the courts

As noted earlier, it is commonplace for licensing regimes to provide for disciplinary proceedings which may result in denial or loss of registration based on misconduct that makes them unfit to continue to be registered. The criteria used vary in terms of their language but include requirements such as that the applicant or licensee must be 'fit and proper', 'suitable', or of 'good fame and character'.[355]

It is relevant therefore to consider how the courts have approached the issue of what is relevant to assessments of 'character' and how this should be weighted to evaluate a person's 'fitness' for an occupation.

High Court decisions

This issue has received detailed consideration by the High Court in three important cases concerning legal practitioners.

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[344] *Education Training and Reform Act 2006* (Vic), s 2.6.9(1)(a)-(f).
[345] *Education Training and Reform Act 2006* (Vic), s 2.6.9(a).
[346] *Education Training and Reform Act 2006* (Vic), s 2.6.9(b).
[347] *Education Training and Reform Act 2006* (Vic), s 2.6.9(c).
[348] *Education Training and Reform Act 2006* (Vic), s 2.6.9(d).
[349] *Education Training and Reform Act 2006* (Vic), s 2.6.9(e).
[350] *Education Training and Reform Act 2006* (Vic), s 2.6.9(f).
[351] *Education Training and Reform Act 2006* (Vic), s 2.6.9(3).
[352] *Education Training and Reform Act 2006* (Vic), s 2.6.10(1)-(5).
[353] *Education Training and Reform Act 2006* (Vic), s 2.6.11(1)-(4).
[354] *Education Training and Reform Act 2006* (Vic), s 2.6.12(1)-(3).
[355] Francesca Bartlett and Linda Haller, 'Disclosing Lawyers: Questioning Law and Process in the Admission of Australian Lawyers' (2013) 41 *Federal Law Review* 227, 230.

The first is *Ziems v Prothonotary of the Supreme Court of NSW*,[356] which concerned an appeal by a barrister against his removal from the bar roll following his conviction and imprisonment for manslaughter. The Full Court of the High Court by a majority (Fullagar, Kitto, and Taylor JJ: Dixon CJ and McTiernan JJ dissenting) allowed the appeal, and instead ordered that he be suspended from practice only during the continuance of his imprisonment. The appeal to the High Court related to a decision of the Supreme Court to disbar Ziems on the basis that his conviction was itself incongruous with holding himself out as a fit and proper person to practise. Despite the fact that there were extenuating factors, the Supreme Court considered that it was not appropriate to look behind the conviction.

The background to this matter was an unusual one involving 'drunken sailors, innocent maidens, gallant barristers, fisticuffs, blood, carnage on the roads, prosecutorial misconduct, and 2 years′ imprisonment with hard labour for the barrister for drink driving'.[357] It involved a lawyer who had been charged and convicted of manslaughter in relation to an incident in which his car struck a motorcycle, killing the rider. The accident occurred shortly following an incident in which he was savagely and brutally bashed in a beating involving 'a dozen or twenty blows' following his intervention into a seaman's bad behaviour, which had included damaging property and insulting two girls. The police arrived and arrested the seaman after a violent struggle which left the barrister with blood pouring from his nose, his bloodied spectacles off and his clothes covered in blood.

The High Court was required to consider whether the appellant was a fit and proper person based on his conviction and a key aspect of the majority's decision was that it was prepared to go behind the conviction itself and to look at the circumstances of the offending. This was made clear in the judgment of Dixon CJ, who commented that while the fact of the conviction and sentence was itself a matter of great importance, he did agree that 'all the circumstances lying behind them should be taken into consideration before determining that the appellant should not remain a member of the Bar'.[358] In a similar vein, McTiernan J stated

[356] *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279; [1957] HCA 46.
[357] Stephen Warne, 'Ziems v Prothonotary of the Supreme Court of NSW' *The Australian Professional Liability Blog*, 15 June 2010 accessed at <http://lawyerslawyer.net/2010/06/15/ziems-v-prothonotary-of-the-supreme-court-of-nsw/>.
[358] 97 CLR 279, 283.

that the weight of the appellant's convictions might be seriously affected by circumstances attending it, and that it had to be permissible to look at the conduct of the trial. He also commented that it was 'on what the man did' that the case had to be decided, and the court was bound to ascertain, as far as it could on the material available, 'the real facts of the case'.[359]

The decision in *Ziems* is also important for its consideration of the requirements to be a fit and proper person in the case of a barrister. While the court ultimately decided not to permanently disbar Ziems, the case established a very high standard which was described as follows by Dixon J:

> When a barrister is justly convicted of a serious crime and imprisoned the law has pronounced a judgment upon him which must ordinarily mean the loss by him of the standing before the court and the public which, as it seems to me, should belong to those to whom are entrusted the privileges, duties and responsibilities of an advocate.[360]

However, it is important to note that this was justified by reference to 'the peculiar position and functions of a barrister'[361] and that fact that it 'carries exceptional privileges and exceptional obligations'. It follows therefore that the same high standard is not necessarily required for other professions which lack similar privileges and obligations; the correct standard is to be judged by their own position and functions.

Finally, the case also contains useful discussion of the significance of distinctions between personal and professional misconduct. In the decision at first instance to disbar Ziems the Supreme Court had commented that the personal and the professional sides of his life could not be dissociated. While agreeing that personal misconduct could provide a ground for disbarring a lawyer, Fullagar J in the High Court argued that the comment went too far if it was read literally. In his view, 'the whole approach of a court to a case of personal misconduct must surely be very different from its approach to a case of professional misconduct. Generally speaking, the latter must have a much more direct bearing on the question of a man's fitness to practise than the former'.[362]

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[359] Ibid, 287.
[360] Ibid, 286.
[361] Ibid, 298.
[362] Ibid, 290.

A second important case is *NSW Bar Association v Evatt,*[363] which concerned a barrister who had been suspended for two years following a finding that he was guilty of professional misconduct. The conduct related to knowingly being a party to and actively assisting in and facilitating 'a systematic course of action whereby two solicitors charged extortionate and grossly excessive sums as costs to lay clients' and charging fees as counsel which were excessive and which he knew would be paid in part from the excessive amounts charged by the solicitors.[364]

In this case, the High Court overturned the barrister's suspension and ordered instead that he be disbarred. It noted that the evidence against him 'demonstrated unfitness to be a member of the Bar' as opposed to 'some isolated or passing departure from proper professional standards amounting to something less than proved unfitness' and that he had failed to understand the error of his ways.[365]

The case is significant because the High Court held that the New South Wales Supreme Court had erred in assuming that 'the exercise of its disciplinary powers was, to some extent, a punishment for wrongdoing' and that it was therefore appropriate for it to show mercy 'towards a young man who had not understood the error of his ways'.[366] It commented that the court's power to discipline a barrister was 'entirely protective' and involved no element of punishment, notwithstanding that its exercise might involve a great deprivation to the person disciplined.[367]

In 1981, over a decade later, Evatt was restored to the Roll of Barristers, as he had discharged the heavy onus of proving fitness.[368]

The third case, *A Solicitor v The Council of the Law Society of New South Wales,*[369] concerned a solicitor who had been convicted in February 1998 on four counts of aggravated

[363] (1968) 117 CLR 177.
[364] Ibid, 177, citing the findings of the New South Wales Supreme Court.
[365] Ibid, 184.
[366] Ibid, 184.
[367] Ibid, 184.
[368] Re *Evatt*; Ex Parte *NSW Bar Association* (1967) 67 SR (NSW) 236, per Street CJ, Moffitt and Hope JJ.
[369] (2004) 216 CLR 253.

indecent assault involving his step children under the age of 16 years. He was initially sentenced to three months imprisonment, but on appeal the sentence was fully suspended after he agreed to enter a three year Good Behaviour Bond. The New South Wales Court of Appeal found that the solicitor was guilty of professional misconduct for two reasons: first, because of the conduct for which he was convicted in 1998; and second, because he failed to disclose to the Law Society of NSW, the professional licensing body, that he had later been charged with further offences (in respect of which he was later found not guilty).

The High Court concluded that the Court of Appeal had been correct in declaring that the failure to disclose the further charges amounted to professional misconduct. It commented that it was no excuse that the appellant believed in his own innocence and that his convictions were ultimately quashed. In its view the appellant's duty of candour in his dealings with the Law Society was a professional duty and '[f]rankness required the disclosure of the convictions and sentence, even if he regarded them as unjust, and hoped (or even expected) that they would be overturned on appeal'.[370] It also commented that the appellant's duty of candour in his dealings with the Law Society was a professional duty, and that its breach was therefore correctly characterised as professional misconduct.[371]

On the other hand, it held that the Court of Appeal's declaration relating to the 1998 convictions was 'open to more serious challenge' given that 'did not occur in the course of the practice of his profession, and it had no connexion with such practice'. The Court followed the approach taken in *Ziems v Prothonotary of the Supreme Court of NSW*[372] that there is 'a real distinction between professional misconduct, and purely personal misconduct on the part of a professional, although there are cases in which the distinction may be difficult to apply'.[373] While it acknowledged that the appellant's conduct involved a form of breach of the trust reposed him by the mother of the children he had molested, it concluded that 'the nature of the trust, and the circumstances of the breach, were so remote from anything to do

[370] *A Solicitor v Council of the Law Society* (2004) 216 CLR 253, [30].
[371] In *Weaver v Law Society of New South Wales* (1979) 142 CLR 201 the High Court upheld a declaration that a solicitor who gave false evidence in the course of disciplinary proceedings was guilty of professional misconduct.
[372] (1957) 97 CLR 279.
[373] Ibid, [5] per Fullagar J.

with professional practice that the characterisation of the appellant's personal misconduct as professional misconduct was erroneous'.[374]

In further considering the conduct of the appellant, the High Court noted that the Court of Appeal had characterised the appellant's conduct differently and more severely than the sentencing judge. Whereas the latter had treated the four offences as 'isolated' (in sense that 'they represented one brief and uncharacteristic episode of behaviour, explained by the unusual pressures that bore upon the appellant at the time'), the former had commented that was 'not the case of an isolated offence followed by the taking of steps to ensure it would not be repeated'.

The High Court therefore left standing the finding of professional misconduct in relation to the lack of candour, and the facts the conduct resulting in the 1998 charges but set aside the order that his name should be removed from the Roll of Legal Practitioners. A significant aspect of this case was that the High Court was willing to take into account the rehabilitative focus of the sentencing judge's reasoning and commented that this was important to the question of the appellant's later fitness to practise. It should be noted that this comes close to undercutting the view expressed in *Evatt* that it was irrelevant to have regard to factors such as mercy in determining fitness to practise. However, the focus is different in that it ties the issue of rehabilitation to the appellant's current fitness to practice.

It is also significant that the High Court seemed to attach less significance than the New South Wales Court of Appeal to the issue of damage to the reputation of the profession. The latter had justified its decision in part on the basis that: 'The reputation and standing of the legal profession must be upheld…the legal profession cannot permit the public to gain the impression that it condones or tolerates or belittles the committing by its members of any serious crime'.[375] However, this aspect was not discussed in the High Court's judgment. It has therefore been suggested that it treated issues of reputation as irrelevant to the determination of individual disciplinary cases.[376]

[374] *A Solicitor v Council of the NSW Law Society* (2004) *216 CLR* 253, [3].
[375] *Council of the Law Society of NSW v A Solicitor* [2002] NSWCA 62 [80].
[376] Bartlett and Haller, op cit, p 215.

Other relevant case law

Most case law relating to loss of occupational licensing on the grounds of misconduct or character relates to professions other than teaching and arguably needs to be treated with caution for that reason. However, there are also two decisions relating to teachers, of which one is an appeal from a decision of the VIT made in relation to misconduct that did not involve criminal offending.

The first decision, *Burgess v Board of Teacher Registration Queensland*[377] concerned an appeal against a decision by the Board to cancel a teacher's registration on the basis of a criminal conviction that had occurred many years before but at a time when Burgess was a teacher. He had been found guilty of two counts of unlawful carnal knowledge of a 13 year old girl, but no conviction was recorded and he was simply required to enter into a recognizance for the sum of $500 to be of good behaviour for a period of 3 years. This conviction was initially unknown to the Board as legislation in force at that time did not require disclosure of a criminal offence if no conviction had been recorded. The Board's decision to cancel Burgess's registration was made in part also on the basis of more recent misconduct, including sexual harassment of teachers and others and inappropriate behaviour with students.

In upholding the Board's decision the Queensland District Court noted that there had been 'continuity in inappropriate behaviour from 1977 up to the hearing before the Board' and that there was a similarity in this misbehaviour 'in that it all concerned the touching of females - teachers, pupils, and parents'.[378] It commented that '[a]ny behaviour found to be inappropriate for a teacher is relevant to the ultimate question of fitness to be a teacher, even though the events may have happened many years earlier and that the inappropriate behaviour in this case was of such a nature that the Board was entitled to rely on it 'even though some events happened a very long time ago'.[379]

[377] [2003] QDC 159.
[378] Ibid, [76].
[379] Ibid.

The Court also expressed the view that Burgess's conduct with a 13 year old pupil 'was disgraceful and showed unfitness to be a teacher at that time' and that his sexual harassment of two teachers was 'unacceptable'.[380]

The second is *Davidson v VIT*.[381] This concerned a teacher whose registration was cancelled on the basis of a series of inappropriate behaviours arising from his interactions (and over familiarity) with students.

In considering this behaviour the VCAT first considered the issue of the appropriate benchmark to be used in assessing Davidson's behaviour. It commented that the appropriate standard was not that of the school where he was teaching but rather that of the teaching profession at large. It cited in support a statement from *Allinson v General Medical Council*[382] (a case concerning a doctor) which used as a test whether the conduct in question 'would reasonably be regarded as disgraceful or dishonourable by his professional brethren of good repute and competency'.[383]

The VCAT then went on to consider the meaning of 'serious misconduct' and 'fitness to teach' which were not defined in the ETRA at the time of the decision.

In the case of the 'serious misconduct' it referred to the test in *Parr v Nurses Board of Victoria*.[384] This emphasised that to be serious the misconduct must not have been trivial, or of momentary effect and 'must be a departure, in a substantial manner, from the standards which might be reasonably expected of a [person in the relevant profession]' and one that was 'blameworthy and deserving of more than passing censure'.[385]

It then considered the nature of the interrelationship between serious misconduct and lack of fitness to teach and commented 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

[380] Ibid.
[381] [2007] VCAT 920.
[382] (1891-4) All ER 768.
[383] *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750.
[384] Unreported, VCAT, 2 December 1998.
[385] Citing the comments of Kellam J.

> 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.[386]

This is significant because it suggests that a single act is unlikely to make a teacher unfit to teach.

The VCAT also endorsed the approach taken by the Queensland District Court in *Burgess* that any behaviour found to be inappropriate for a teacher is relevant to the ultimate question of fitness to teach irrespective of the fact that it may have occurred many years previously and that the weight to be attached to it was ultimately a matter for the registration authority.

The significance of the VIT Code of Conduct

A further issue of relevance to the question of fitness to teach is the status and relevance of the VIT Code of Conduct,[387] which was introduced in 2008 following consultation with teachers and the community. This has been described as being shaped by the values articulated in the Victorian Teaching Profession Code of Ethics and codifying what was already common practice within the teaching profession.[388]

The Code of Ethics is aspirational in nature and seeks to articulate ethical responsibilities that arise from the unique position of teachers, especially in relation to trust and influence and emphasises the requirements for integrity, respect and responsibility. The Code of Conduct deals with professional conduct and sets out requirements relating to three different relationships - with students; parents, guardians, caregivers, families and communities; and

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[386] *Davidson v VIT* 2007] VCAT 920, [169].
[387] This is a short aspirational document, based on three values identified by teachers as underpinning their profession: personal and professional integrity, respect and responsibility and can be accessed at <http://www.vit.vic.edu.au/conduct/victorian-teaching-profession-code-of-conduct/Pages/development-of-the-code.aspx>.
[388] See Victorian Institute of Teaching,' Development of the Code' at <www.vit.vic.edu.au/conduct/victorian-teaching-profession-code-of-conduct/Pages/development-of-the-code.aspx>.

colleagues. It also contains in s 2 principles relating to personal conduct and in s 3 principles relating to professional competence.

As explained by Forster,[389] '[c]odes of conduct and codes of ethics are traditionally different;[390] the former regulates behaviour whilst the latter tends to be more aspirational'.[391] A code of ethics is a short statement setting out broad ethical aspirations whereas a code conduct is more detailed and sets out the behaviour expected of teachers in specific situations.

The clearly aspirational nature of a code of ethics means that there can be little issue that it is not intended to be used, and also inappropriate for use, as a basis for disciplinary sanctions. Its function has been described as being to 'articulate a profession's special obligations to society in which it holds a position of trust and relative autonomy over a specialised area of knowledge and practice'.[392]

The position is, however, different in the case of a more lengthy code of conduct which is designed to 'to ensure adherence to standards of professionalism and enforce disciplinary action'. For example this is the case in New South Wales where breaches of codes of conduct are deemed to be misconduct and may lead to disciplinary action.[393]

However, it is important to note that the Victorian Code of Conduct states explicitly that it is not intended as a 'disciplinary tool'. It purposes are instead to:

- promote adherence to the values teachers see as underpinning their profession
- provide a set of principles which will guide teachers in their everyday conduct and assist them to solve ethical dilemmas
- affirm the public accountability of the teaching profession
- promote public confidence in the teaching profession

[389] Daniella Forster 'Codes of Ethics in Australian Education: Towards a National Perspective' (2012) 37 *Australian Journal of Teacher Education*.
[390] Ibid, citing Shirley Van Nuland, *Teacher codes: Learning from experience*, UNESCO, 20.
[391] Ibid, 1.
[392] Ibid.
[393] NSW Department of Education and Communities, *The Code of Conduct*, June 2004, [7.5] accessed at <https://www.det.nsw.edu.au/policies/staff/ethical_behav/conduct/Code_guide.pdf>.

This means that it is essentially an aspirational document rather than one which serves to enforce disciplinary action (as is the case in New South Wales).

It contains three sections which deal respectively with professional conduct, personal conduct and professional competence. The professional conduct section is the longest and deals with relationships with students, with parents (guardians, caregivers), families and communities and with colleagues. It is of limited relevance to criminal offending except to the extent that it involves offences that are clearly job-related - for example, assaulting a child during a class. Section 2, which deals with personal conduct, is much shorter. It contains a single principle to the effect that the personal conduct of a teacher will have an impact on the rights of individuals, professional standing of that teacher and on the profession as a whole.

The Code states explicitly that it is not intended to be used for disciplinary purposes and it follows that it cannot appropriately form the basis for deregistration (or other disciplinary action). Arguably this is problematic from a regulatory perspective as it would make sense for the code to provide guidance to teachers and VIT hearing panels as to the relationship between conduct and fitness to teach.

The King Review of the VIT noted stakeholder feedback to the effect that:

> There are inconsistencies between the Code of Conduct, VIT Standards of Professional Practice and disciplinary processes developed by VIT and DEECD:
> *…the development of the teacher Code of Conduct and the Standards of Professional Practice for entry and continuing membership have been open to some questionable inconsistencies. There appears to be conflict within the processes of the Department and VIT, where members are subject to cases of double jeopardy in relation to conduct, competence and fitness to teach and the sanctions imposed. This needs some immediate attention, clarification and rectification…*[394]

The commentary about double jeopardy relates to the fact that a teacher in a government school is subject to disciplinary proceedings both from DEECD and deregistration by the VIT.

[394] King Review, p 83.

Conclusion

This chapter has explained the centrality of the concept of ‘fitness to teach’ to the decision-making by the VIT as to whether or not a teacher convicted of a criminal offence should be subject to deregistration. It has also highlighted the flexibility of the approaches taken to this issue in relevant case law, including key decisions of the High Court. Finally it has also highlighted the curious position of the Code of Conduct which spells out both the personal and professional conduct required of teachers but has not been designed and is not intended to be used to guide decision-making in relation to fitness to teach. There now follows a discussion of the relevance of differing conceptions of the teacher’s role and how these are reflected in the reported decisions of formal hearing panels.

CHAPTER 5 – DIFFERING CONCEPTIONS OF THE TEACHER'S ROLE AND THE RELEVANCE OF PERSONAL MISCONDUCT

Introduction

The regulatory framework governing teachers with criminal records is framed by assumptions about the nexus between criminal offending and fitness to teach and more generally about the nature and scope of the role of the teacher.

These assumptions raise important issues from the perspective of the rationales of criminal sentencing and the rights of individuals not to be discriminated against on the basis of criminal records that are irrelevant to their jobs. They also raise important policy issues in terms of employees' rights to privacy and the appropriate boundaries between work and private life.

This chapter explores issues relating to the nexus between criminal offending and employment and what they mean for teachers. It begins by discussing the role of the teacher and its appropriate bounds and then discusses the implications that flow from the adoption of a broad or narrow view of its scope. This makes an important difference to the interpretation of the concept of fitness to teach, and the second part of the chapter explores approaches taken by VIT hearing panels via their reported decisions relating to teachers with criminal convictions. These decisions are analysed using three broad categories of offending: drug offences, crimes involving dishonesty and crimes involving offences against the person.

Criminal offending and employment

A criminal record is recognised as an attribute that warrants protection against discrimination, as discussed in Chapter 1. To determine whether or not there has been actionable discrimination in the context of employment arguably depends on whether there is a nexus between the criminal record which is taken into account and the particular position or promotion for which the individual is applying. This requires consideration of the inherent requirements of the position and the offence or offences that have been committed. For example, a conviction for theft is directly relevant in relation to a position such as that of

cashier which involves control over money but arguably irrelevant to a position such as a train driver.

This issue has been considered by Naylor et al in the light of a continuing trend towards criminal record checking (including legal requirements for employers to conduct checks or to otherwise vet employees on character grounds).[395] They argue in favour of a model based on restricting the information that is available for decision-making by employers and for the adoption of a 'centralised system for the selective disclosure of criminal record information' that is 'based on the disclosure of only those convictions relevant to a specific category of employment'.[396]

It is arguable that the link between teachers' offending and their position as teachers should also play a significant role in determining whether or not a teacher who has committed a criminal offence remains fit to teach. However, it would seem that there is lack of consensus concerning the key attributes of the teacher's role.

The role of the teacher and its appropriate bounds

There are two aspects of the role of teacher that warrant discussion. The first is the extent to which it does or should extend beyond the classroom, and the second is the extent to which it requires a teacher to have special moral characteristics or requirements of good character.

At one end of the spectrum is a broad or conservative view. This attaches considerable significance to the teacher as role model. This is explained by Fulmer[397] on the basis of the uniqueness of the teacher's role in 'the shaping of young minds',[398] which requires them to 'serve as good example for their young charges'.[399] This has the consequence that they are

[395] See, for example, Bronwyn Naylor, Moira Paterson and Marilyn Pittard, 'In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks' (2008) 32 *Melbourne University Law Review* 171.
[396] Ibid, pp 186-7.
[397] James Fulmer 'Dismissing the 'Immoral' Teacher for Conduct Outside the Workplace - Do Current Laws Protect the Interests of Both School Authorities and Teachers?' (2002) *Journal of Law and Education* 271, 276.
[398] Citing *Rogliano v Fayetter Cirty Board of Education* 347 SE 2d 220, 226 (W Va, 1986).
[399] Citing *Faulkner v New Bern-Craven City Board of Education* 316 SE 2d 281, 291 (NC, 1984).

regarded as exemplars, 'whose words and actions are likely to be followed'[400] by the students in their care. It follows therefore that a teacher is expected to play a pivotal role in shaping not just the learning of students but also their moral development. Having a criminal record is therefore of itself an issue.

At the other end of the spectrum is a narrow and more liberal view of education which views the role of teacher as being defined by classroom and educational activities. This view attaches less significance to the role of teacher as role model, except to the extent that it is directly related to teaching activities.

While the broad view has become more prevalent, in part at least because of changing expectations about the role of schools, it is arguable that the expansion of the role of teachers itself needs to be reassessed, as it has negative implications for both children and teachers. There was a time when expectations of teachers were relatively uncomplicated. In the last century the teaching profession shared the same high public respect that was attributed to post masters, station masters, lawyers, doctors and parliamentarians.[401] It followed therefore that their fitness to teach was beyond question and there was no perceived need for detailed checks or disciplinary processes. Moreover, even when the issue of fitness surfaced, the main emphasis was on the teacher's obligation to protect the physical (as opposed to the mental or intellectual) welfare of children.

Whereas the role of the teacher was once very class-room focused, it has expanded as schools have been asked to take on a much broader role than education per se. Evidence obtained by the Ministerial Council for Education, Employment Training and Youth Affairs confirms that Australian teachers work within the broad definition of the role of teaching. Teachers are performing beyond their training - in sport, drama, music clubs, school excursions and camps, counselling, IT, mentoring, supervision of trainees, literacy and numeracy

[400] Citing *Board of Trustees of the Compton Junior College District of Los Angeles County v Stubbfield* 94 *California Reporter* 318, 321 (Cal Ct App, 1971).
[401] Gerard Nash, *The legal liability and responsibility of teachers in schools*, VCTA Publishing, 1984. p 1.

specialisation and behaviour management.[402] The teacher's role can be a complex admixture.[403]

In the comprehensive study conducted for the Ministerial Council teachers commonly cited changes they have observed in the home, neighbourhood and community life of their students. These issues raised complex questions and reveal the interrelationships with the broader societal expectations. These included among others, the impact of 'consumer society' on children's families, changing relations including authority patterns between generations, less parental supervision of homework, homelessness, domestic violence, drug abuse, devaluing of education, greater awareness of rights and increased litigation.[404] However, teachers themselves reported that their own fundamental requirement was time to teach, to be face to face with their students.[405]

A comparative study on the teaching of mathematics in different countries highlights some of the educational implications of different institutional cultures.[406] Pepin points out that the tasks of teachers in England 'encompassed the whole child (academically as well as morally) and they were responsible for the academic as well as the pastoral side of schooling'[407] and further comments that this created a climate 'where the pastoral care and other non-teaching responsibilities became at least as important as the preparation and teaching of the subject'.[408] In her view this made it 'less likely for teachers to reflect on the processes involved in teaching and learning; there were simply too many other things to think about'.[409] In contrast, she describes the role of the French teacher as focused on preparing their lesson 'in such a way that learning experiences were as mind-training as possible for pupils.

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[402] Malcolm Skilbeck and Helen Connell, *Teachers for the Future: The Changing Nature of Society and Related Issues for the Teaching Workforce*, A Report to the Teacher Quality Educational Leadership Taskforce for the Ministerial Council for Education, Employment and Training and Youth Affairs, September 2004, p 33.
[403] Skilbeck and Connell provide the following list: classroom organiser of students' learning and assessor of learning, curriculum planner and adaptor, behaviour manager, image or role model, if not paragon, values educator, religious educator, social worker, health worker, emotional support person, school-home liaison, risk manager, administrator, active, responsible member of school community with a variety of duties beyond the classroom, community presence: see p 35.
[404] Ibid, p 18.
[405] Ibid, p 36
[406] Pepin Birgit, 'Mobility of Mathematics Teachers across England, France and Germany' (Paper presented to the European Conference for Educational Research, Slovenia, 17-20 September 1998).
[407] Ibid at 4. Cultural traditions and systemic features.
[408] Ibid.
[409] Ibid.

Acceptance of a broader role for teachers has implications for teachers in terms of assumptions as to what constitutes a fit and proper person sufficient to gain teacher registration in the 21st century. For example, Stewart[410] argues that in Australia teachers are expected to socialise students in certain ways and by association need to be exemplars, 'modelling appropriate behavior themselves'.[411] He argues that teachers are open to closer scrutiny in both professional and personal lives than might be the case in other professions. They are expected to exhibit character traits adequate to justify parents and professional colleagues trust in them. In their private lives too teachers are expected to adhere to appropriate moral values, that in the eyes of the community make them fit and proper persons to teach children.[412]

Rayner likewise argues that 'a teacher is not a run of the mill public servant and that it is reasonable to expect a teacher to model behaviour both during school and after hours.'[413] She further states that teachers are in that exceptional situation, due to the trust they are expected to generate, which makes it necessary to set the bar for their behaviour higher than for the average public servant in a clerical position.[414]

The broader implications for privacy

The implications of this approach for out of hours activities is summarised in the following extract from a submission by the Victorian Education Department to the Victorian Law Reform Commission:

> In the teaching profession, off duty personal conduct may amount to misconduct. The reason for this is that a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, it may demonstrate that the teacher lacks good

[410] Douglas Stewart, 'Teachers as Exemplars: An Australian Perspective' (2006) *Educational and Urban Society* 345.
[411] Ibid, p 349.
[412] Ibid.
[413] Lee Rayner, 'So You Think You Can Dance on the Tables on a Saturday Night?' *Proceedings of the ANZELA Conference*: The Teaching Profession Over Regulated?' 226.
[414] Ibid.

> character and is unfit to practise as a teacher, there may be a loss of trust and public confidence in the teacher and the public school system.[415]

It is arguable that this approach ignores the human rights of teachers, and especially their right to privacy. As stated in the preamble to the Australian Privacy Charter,

> a free and democratic society requires respect for the autonomy of individuals, and limits on the power of both state and private organisations to intrude on that autonomy. Privacy is a key value which underpins human dignity and other key values such as freedom of association and freedom of speech. Privacy is a basic human right and the reasonable expectation of every person.[416]

The notion that individuals should be answerable for activities that have no direct relationship to their employment arguably reduces their personal autonomy by subjecting them to control in relation to their private activities. This undermines what Ron McCallum has described as the 'home space' that is vital to wholesomeness of community life in a democratic society.[417] Furthermore, as pointed out by Finkin, there are social benefits resulting from employees' capacity to engage in leisure activities of their choosing. These arise from producing a society 'composed of persons who are and who understand themselves to be free'.[418]

In considering the issue of dismissal in relation to out-of-hours activities Mantouvalou identifies five key reasons why privacy should be treated as an important consideration in the context of decisions to dismiss employees.[419] These are that privacy may promote human dignity; leads to freedom of action; is a necessary precondition for individual autonomy and human flourishing; is essential for interpersonal relations, creating moral capital for love, friendship and trust to flourish; and is important for sexual intimacy.

Mantouvalou acknowledges that criminal activities are never private; they are of interest to the public. But she argues that the criminal character of any activity is not necessarily

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[415] Cited in Stuart Piddocke, Romulo F. Magsino, Michael E. Manley-Casimir, *Teachers in Trouble: An Exploration of the Normative Character of Teaching* (Toronto: University of Toronto Press, 1997), p 125.

[416] David Banisar and Simon Davies, *Privacy and Human Rights: An International Survey of Privacy Laws and Practice*, Privacy International (1995) p 5.

[417] Ron McCallum, *Employer Controls over Private Life* (1990) pp 6-7.

[418] Matthew W Finkin, 'Life Away From Work' (2006) 66 *Louisianna Law Review 945*, 954-5.

[419] Virginia Mantouvalou, 'Life After Work: Privacy and Dismissal' *LSE Law, Society and Economy Working Papers* 5/2008, 11.

apposite to fairness in dismissal. Crime may be directly relevant to the nature of the job (for example, theft in the case of a cashier employed by a supermarket or possession of child pornography in the case of a childcare worker). However, in other situations a criminal conviction may be irrelevant. She argues therefore that a criminal conviction is not a safe criterion because it may frequently be unrelated to a person's employment and warns that activities are sometimes wrongly criminalised, providing a further reason why they should be investigated with caution in cases of dismissal.[420]

Mantouvalou concludes by noting two important points: firstly that courts and tribunals are insufficiently appreciative of privacy - a value that ought to be cherished deeply when exploring a person's life outside work; and, secondly, that employers and society often show prejudice in relation to sex-related activities, and reach decisions based on the moral beliefs of decision-makers, rather than on the capacity of the person to perform the relevant employment.[421]

This issue is considered from a philosophical perspective by Menkel-Medow.[422] She suggests that moral judgments should be tailored to the demands of a given occupation, including its duties and responsibilities to particular constituencies. She comments that 'different functions and occupational statuses may call for different standards of judgment, a sort of situational occupational morality'. This points to the need for "some 'nexus' of the personal behavior to the professional role",[423] as is reflected in the relevant United States case law: 'The touchstone of all scrutiny of private life in the occupational sector has always been the relevance or nexus of private action to job performance.'[424]

Menkel-Medow queries whether it is necessary to require 'diminished privacy' for public officials based upon their occupations and whether certain types of workers such as teachers

[420] Ibid, 26.
[421] Ibid.
[422] Carrie Menkel-Meadow, 'Private Lives and Professional Responsibilities? The Relationship of Personal Morality to Lawyering and Professional Ethics' Georgetown Public Law Research Paper No. 288806; NYLS Clinical Research Institute Paper No. 09/10 #26 (2000), available at <SSRN:http://ssrn.com/abstract=288806> or <http://dx.doi.org/10.2139/ssrn.288806>.
[423] Ibid, p 9.
[424] Ibid, p 12, citing *Schware v Bd. of Bar Examiners of NM*, 353 U.S. 232, 239 (1957); see also Judith Lichtenberg, *Sex, Character, Politics and the Press*) Report From the Center For Philosophy and Public Policy 12 (1987).

should be entitled to less privacy than others.[425] In considering this issue, she points out that workers in stressful jobs, including teachers, 'may be especially in need of private solace, friendship, trust, love and renewal in order to accomplish their jobs' and that '[r]enewal may not come to all in conventional family life'.[426] She further highlights the practical difficulties of determining the private acts for which specific professionals should be held accountable and questions whether what she describes as private moral transgressions, such as violent crime, should permanently disqualify individuals from holding important occupations 'especially when our theories of causation and individual responsibility seem so subject to change (ie genetic bases of alcoholism, learned child abuse, etc.)'.[427]

She also makes the important point that: 'Predictions in advance of how particular people will behave later is notoriously unreliable, particularly when experts disagree about how predictive and stable 'character' is,[428] especially in an age of the 'postmodern' self.[429]

Human Rights

The United Kingdom (UK), which is a member of the European Union (EU), has enacted the Human Rights Act 1998 which has been designed to incorporate into UK law the rights in the European Convention on Human Rights and requires courts and tribunals to interpret legislation consistently with the rights in the Convention, including the right to privacy in Article 8 of the Convention. While it is directed only at public bodies, it has been influential in shaping case law and the development of what a privacy-protective cause of action recently described by the English Court of Appeal as 'the tort of misuse of private information'.[430]

Article 8, which is titled 'the right to respect for private and family life', and is equivalent to s 13 in the Victorian Charter, provides as follows:

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[425] Ibid, p 10.
[426] Ibid, p 11 and fn 57.
[427] Ibid, p 17.
[428] Citing as an example David Rosenhan, 'Moral Character*'* (1975) 27 *Stanford Law Review* 925.
[429] Citing as examples Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (1992); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1991) (both discussing variability of the modern human 'self') and, more generally, Mary Joe Frug, *Post-Modern Legal Feminism* (1992); Duncan Kennedy, *Sexy Dressing, Etc.* (1993).
[430] *Google v Vidal-Hall* [2014] EWHC 13.

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[431]

Given that privacy receives human rights protection in the United Kingdom, there have been a number of cases in which employees have been dismissed as a result of private (non work-related conduct) have sought to challenge their dismissals on human rights related grounds. One such case which involved dismissal based on criminal offending was *X v Y*.[432] This concerned a man, who had received a police caution in respect of an act of gross indecency in a public place. He was dismissed from his employment with a charity which provided assistance to young offenders when they were informed about the caution. In dismissing his action, the court commented in respect of his offending that:

> The applicant's conduct did not take place in his private life nor was it within the scope of application of the right to respect for it. It happened in a place to which the public had, and were permitted to have, access; it was a criminal offence, which is normally a matter of legitimate concern to the public; a criminal offence is not a purely private matter…[433]

It accordingly concluded that he was not entitled to privacy protection under Article 8 because the matter in issue was of a public (as opposed to private) nature.

However, that approach is arguably open to criticism on the basis that an activity that qualifies as public for the purposes of the criminal law should not automatically do so for the purposes of employment law. In other words, what is called for is 'recognition that the context of the employment relation requires a different conception of the public/private distinction'.[434]

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[431] This wording is very similar to that found in the rights to privacy in Article 17 of the ICCPR and s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
[432] *X v Y* [2004] ICR 1634.
[433][Ibid at 1648-9, [52].
[434] Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 *Modern Law Review* 619, 623-4.

The public/private distinction is problematic as there is case law which makes clear that activities conducted in public or of a public nature can still qualify for privacy protection. For example, in *Campbell v MGN*[435] the House of Lords upheld Model Noami Campbell's claim for damages in respect of published photographs showing her coming out of a Narcotics Anonymous meeting even though the photographs were taken in a public place. The Court held that information in the photographs was confidential because of its privacy-sensitive nature.

As pointed out by Mantouvalou, the type of approach taken in *X v Y* is 'insufficiently attentive to the complexities of the interaction between work and private life, [leading] to incomplete protection of the right to private life in dismissal'.[436] A useful way of considering this issue, which she suggests, involves further consideration of the public/private distinctions that are commonly used to justify dismissals based on criminal offending that has no direct nexus with the workplace.

Criminal convictions are generally regarded as public for the purposes of the criminal law. However, it does not follow that what is regarded as public (and therefore not worthy of privacy protection) should be the same in the different context of the employment relationship (or, in the case of the ETRA, for the relationship between registered teachers and their regulatory body).[437] What is in issue in the employment context is what Mantouvalou describes as domination by the employer.[438] Domination based on a failure to recognise the privacy dimension of conduct that is unrelated to an employee's work is arguably unfair and fails to accords sufficient weight to the important values of dignity and autonomy that underlie privacy.

The rationales for privacy protection are varied but there is general agreement that privacy is important to protect autonomy and dignity and the ability to exercise control in relation to one's personal information is a critical feature. For example, the privacy principles that

[435] [2004] UKHL 22; [2004] 2 AC 457.
[436] Virginia Mantouvalou 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912, 921.
[437] See further Hugh Collins, 'The Protection of Civil Liberties in the Workplace' (2006) 69 *Modern Law Review* 619, 623.
[438] Mantouvalou, 'Human Rights and Unfair Dismissal', p 914.

underlie most information privacy laws are designed to provide individuals with a measure of control over the handling of their personal information.[439]

Privacy is no absolute right and needs to be balanced with competing rights including the rights of the employer (or underlying objectives of a scheme that regulates the employment relationship). It follows that it is appropriate for the employer or regulator to take into account conduct that is relevant to the employee's work, which affects the business/professional interests of the employer/regulator or which poses a risk to the rights and freedoms of others including their safety. However, it is arguably unfair to deprive an individual of their likelihood simply on the basis that all criminal conduct is inherently public in nature and therefore relevant to dismissal or loss of registration.

The approaches taken in VIT determinations

The approaches taken to this issue are analysed below based on the 49 decisions of VIT formal hearings panels which form the basis of this thesis.[440] These decisions fall into three broad categories; crimes relating to drugs, dishonesty and violence as outlined in Appendix 2. It should be noted that assessments of fitness to teach are based on a range of matters including the nature and seriousness of the offending and the extent to which the teacher has redeemed themselves since the offending, including the level of insight shown into the significance of their offending and the extent to which they have availed themselves of appropriate treatments where relevant (for example, in cases where the offending has resulted from some form of addiction or lack of emotional control). The analysis below focuses on the ways in which the panels have characterised the teachers' criminal offending and its interrelationship with the requirement of fitness to teach.

Drug cases

Drug offences vary from the minor such as possessing small quantities of cannabis, through to the more serious such as trafficking large quantities of prohibited drugs. To the extent that

[439] Moira Paterson, 'Criminal Records, Spent Convictions and Privacy: A *Trans-Tasman* Comparison' [2011] *New Zealand Law Review* 69, 79.
[440] These are all the reported decisions to date involving teachers charged with indictable offences. In the case of three of the teachers there have been two separate determinations. These are not included in this count.

they are reflective of addiction, they may also be commonly associated with other offences arising from activities undertaken to fund a drug habit.

Drug taking is an issue of concern to parents, but it is directly relevant to a teacher's ability to work only to the extent that it impacts on their performance or is known by children (thereby potentially undermining any anti-drugs messages from the school). To the extent that it involves personal use, it is not generally regarded as a heinous offence. For example the National Drug Strategy Household Survey conducted in 2013 by the Australian Institute of Health and Welfare found that:

> for all drugs except cannabis, most support was for referral to treatment or an education program, while for cannabis the most popular action was a caution, warning or no action and this rose in 2013 (from 38% to 42%).[441]

This group of decisions involving drug convictions was the smallest; in each of the cases considered the teachers' offences were unrelated to their professional duties, occurring in their personal time. There was no evidence presented that their drug taking had impacted on their work or that their students were aware that they were taking drugs. This lack of nexus with professional duties was generally treated as a relevant factor, although the hearing panels stressed that personal conduct might be relevant to the extent that it was indicative of a serious character defect or damaging to public perceptions of the profession.

In *Re AED,*[442] which concerned a teacher who was found guilty of three different sets of offences over a two year period (including offences of using and possession of heroin, taking it into a prison, receiving stolen goods and handling stolen goods), the hearing panel commented that in the case of 'personal misconduct' its role was to analyse the conduct to 'see whether it demonstrates some character defect that illustrates that the person is not fit to teach and thus their registration should be cancelled'[443] It also stated that the conduct did not have to arise during a professional relationship but could occur at any time. If the conduct revealed 'a character defect incompatible with the standards set for teachers' this might, in its

[441] These results can be accessed at<http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs-2013/ch9/>.
[442] *Re AED*, VIT No 015, 3 March 2005.
[443] Ibid, p 4, citing *Hughes and Vale Pty Ltd v The State of New South Wales (No 2)* (1955) 93 CLR 127.

view, indicate a lack of fitness to teach.[444] However, despite this, the panel was prepared to take into account 'the lack of any evidence to suggest that the teacher was unable to carry out her professional duties' as a relevant factor in concluding that her behaviour would not be viewed as 'disgraceful or dishonourable' and concluded that she was fit to teach.[445]

Likewise, in *Re JS*,[446] which concerned a teacher who had convictions for cultivating, using and possessing cannabis, the hearing panel concluded that the teacher's activities amounted to misconduct in that it did not meet the required standards of conduct for a teacher. It noted that, while her misconduct was personal, in that it was not connected to her professional practice, 'it could damage the respect and confidence of the teaching profession in the eyes of the general public'.[447] The panel nevertheless concluded that she should be deemed fit to teach as it believed that she could be trusted to perform the duties and responsibilities of a teacher in the future, and that her misconduct did not indicate a tendency to 'violence, dishonesty, corruption or exploitation' and had no significance for her future professional practice.

The case for treating a past drugs-based conviction as irrelevant is arguably stronger where it occurs at a time when the individual was not a teacher. This has been acknowledged by hearing panels although it has not always been given sufficient weight to result in a favourable outcome.

In *Re Crawley*[448] the convictions in question included one old conviction, which came to light after the introduction of criminal records checking, and the hearing panel identified as a factor in the teacher's favour that none of his criminal record related to a period of time when he was teaching. Crawley's offences included convictions for possession of cannabis, ecstasy and amphetamines at a time which predated his commencement as a teacher. The hearing panel ultimately decided that he was unfit to teach (without explaining specifically why), although it decided to impose conditions on his registration rather than cancelling it.[449] In

[444] Ibid, p 4.
[445] Ibid, p 11.
[446] *Re JS*, VIT No 018, 12 April 2005.
[447] Ibid, p 7.
[448] *Re Crawley*, VIT No 070, 9 September 2008.
[449] The teacher failed to comply with the conditions and his registration was later cancelled: see *Re Crawley*, VIT No 070, 9 September 2008.

reaching this decision it noted that the offending related to the teacher's personal life at times when he was not employed as a teacher.

The case of *Re Sutton,*[450] discussed above in Chapter 3, likewise concerned convictions that took place during a period when the teacher has ceased employment as a teacher and had allowed her registration to lapse. The hearing panel treated as a relevant factor favouring the teacher that the offences related to her 'personal life at a time when she was not employed as a teacher'. However, it went on to find that she was unfit to teach on the basis of her admission that she was not fully recovered from her addiction.

A similar approach was taken by the hearing panel in *Re Runciman.*[451] The panel found against Mr Runciman, who had been convicted of trafficking methamphetamine, despite the fact that his offending occurred during a period when he had ceased to be employed as a teacher (due to the expiry of his contract). Mr Runciman differed from the other teachers in this category in that his offending was unrelated to a personal drug habit, although it occurred at a low point in his life when he had separated from his wife and was experiencing financial difficulties, In concluding that he was unfit to teach, the hearing panel referred to 'the seriousness of the offence, and its responsibility to ensure the protection of the public interest and the reputation of the profession'.[452] The hearing panel did not specifically refer, or appear to attach significance, to the fact that the relevant offending occurred at a point in time when the teacher was no longer working as a teacher.

In summary, the majority of decisions seem to have adopted a broad view (ie that offending involving personal use even at a time when the teacher is not employed as teacher raises issues of fitness to teach). However, their outcomes are consistent with the view that drug offences involving personal use should be regarded both as less serious and less likely to make a teacher unfit to teach, at least to the extent that the teacher has taken steps to overcome their addiction. It is notable that the fact a conviction has occurred at a time when the teacher is not working as a teacher has generally been regarded as irrelevant (and not as factor supporting a finding of fitness to teach), except where it is a very old one that predates the teacher's initial registration.

[450] *Re Sutton*, VIT, No 097, 24 February 2010.
[451] *Re Runciman*, VIT, No 120, 27 June 2012.
[452] Ibid, p 6.

Dishonesty cases

Dishonesty offences are arguably relevant to employment to the extent that they cast doubt on person's honesty and the extent to which they can be entrusted with money or property. To the extent that they are generally known, they may also impact on a teacher's ability to teach students about ethical behaviour. However, they are arguably less relevant to employment as a teacher than offences involving sexual offences or violence, especially to the extent that they do not involve the school or members of the school community, because they do not put students or other members of the school community at physical risk.

The offences in this category which the formed the basis for decision-making by VIT hearing panels covered some that were work-related, although none related directly to the classroom or teaching aspect of their professional work as teachers. These involved offences involving forgery of medical certificates and thefts from schools.

There were also others involving offences that were clearly not work-related and which involved personal misconduct of varying degrees of seriousness, ranging from shoplifting to making false documents and blackmail.

Work related offences

Most of the teachers in this category had committed offences which had some link to their employment or school; these fell into two main groups - medical certificate fraud and stealing from their schools. In each of them the main focus of the hearing panels was on the nature of the offending (and whether it would be considered 'disgraceful or dishonourable' by other teachers), rather than where it occurred. However, the outcomes were more favourable in those cases where the offending was less clearly related to the teacher's professional duties.

Medical certificate fraud

There were six cases involving the use of fraudulent medical certificates. This conduct does not relate to a teacher's classroom activities but is nevertheless connected with a teacher's employment as it involves obtaining financial advantage from the employer (in the form of

pay for work that has not been performed).[453] However, none of the hearing panels appeared to attach significance to the work relationship.

Re AC,[454] the earliest decision, related to a teacher who had committed medical certificate fraud and also a number of more serious offences relating to obtaining four credit cards by deception. The hearing panel's statement of reasons contains a brief discussion of fitness to teach, including a reference to the formulation used in *Allinson v General Medical Council of* 'conduct: which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competence'. It also noted that conduct that gave rise to an inquiry of this type might 'indicate a character defect incompatible with a self-respecting profession'.[455] The panel further commented that the term 'fit and proper person' is intended to cover conduct other than dishonesty and included 'significant impropriety, lack of integrity or bad faith'.[456] At the same time it noted that it was necessary for it to consider the degree of remoteness of the conduct in question from professional practice, referring to *Re A Solicitor v The Council of the Law Society of New South Wales*.[457] The panel concluded that while the teacher's actions amounted to misconduct, they were 'remote' from her duties as a teacher and did not impact on her fitness to teach.[458] This case provides a clear statement of the requirement for some nexus with a teacher's teaching duties.

In *Re Ingram*[459] the panel commented that the forging of medical certificates reflected 'attitudes and characteristics inconsistent with the moral qualities required of a teacher'.[460] The panel made no specific reference to the fact that the fraud occurred in the context of the teacher's employment. Instead, it referred (with implicit approval) to an argument by the counsel assisting the panel that cases involving dishonesty and deception were always relevant to fitness to teach because the teacher is a role model for his or her students. The panel attached significance to the ability of a teacher to 'command the respect and confidence

[453] The offence of obtaining property by deception carries a maximum penalty of 10 years: *Crimes Act 1985* (Vic), s 82.
[454] *Re AC*, VIT, No 007, 12 October 2004.
[455] Ibid, p 4.
[456] Ibid, p 5.
[457] Ibid, p 5.
[458] Ibid, p 12.
[459] *Re Ingram*, VIT, No 008, 25 October 2004.
[460] Ibid, p 8.

of the education community'[461] and reasoned that he or she would be unfit to teach if they lost that respect and confidence because of their conduct. It further commented that the teaching profession must maintain the highest standards of integrity inter alia for the reason that '[t]he education community must have confidence that those persons engaged as teachers are trustworthy and will act with integrity'.[462] The panel therefore found that the teacher's action constituted serious misconduct. However, it concluded that he remained fit to teach based on its assessment of the teacher demonstrating insight and remorse at the time of hearing.

The approach taken by the panel in *Re Robinson*[463] was broadly similar. The panel again emphasised that the offending did not need to be connected to the teacher's professional responsibilities to be indicative of lack of fitness to teach:[464] in its view its task was to assess whether the teacher's character met 'the high standards of honesty and ethical behaviour expected of a teacher' and was therefore 'worthy of the level and extent of trust placed in a teacher by the community'.[465] It found that the teacher had engaged in serious misconduct but was fit to teach because he demonstrated understanding and commitment to maintain proper standards as a member of the teaching profession.

The case of *Re Sutton*[466] is likewise reflective of a broad view of the teacher's role. The hearing panel ultimately decided 'the teacher's approach to teaching was not profoundly and irretrievably flawed and that she could be placed in a position of authority and trust with children in the future'.[467] However, it also commented that as a result of the teacher's use of fraudulent medical certificates:

> The reputation of teachers was damaged by her behaviour as well as being a serious departure from acceptable behaviour because of the disruption to the students' education, the extra cost incurred to the school, the breaking down of the mutual trust that must exist between her and her colleagues and the leadership of the school.[468]

[461] Ibid, p 3.
[462] Ibid, p 4.
[463] *Re Robinson*, VIT, No 042, 2 November 2006.
[464] Ibid, p 3.
[465] Ibid, p 4.
[466] *Re Sutton*, VIT, No 054, 24 September 2007.
[467] Ibid, p 9.
[468] Ibid, p 8.

It further commented that it was 'an inescapable part of a teacher's role to model strong moral behaviour and the teacher's behaviour undermined this'.[469]

Finally in *Re Taylor*[470] and *Re SJK*,[471] the most recent to consider medical certificate fraud, the hearing panels again did not discuss or make specific mention of the fact that the offending was work-related. In *Re Taylor* the panel concluded that teacher remained fit to teach for a number of reasons including that it was a 'one off' incident, that the teacher had shown remorse and that there were extenuating circumstances arising from traumatic personal events.[472] In *Re SJK* the panel concluded that 'that the teacher's actions were related to a fixed period of time, not of a persistent and continuing nature and that her approach to teaching was not profoundly and irretrievably flawed'.[473]

Thefts from schools

Another five cases concerned thefts from schools or from persons or bodies associated with the teacher's school.[474] In this case there is arguably a more direct relationship with a teacher's teaching duties because of the element of trust with property and money that is required for teachers to perform their duties. The key issue therefore is the extent to which there are extenuating factors and good evidence of reform. The outcomes for this category varied considerably ranging from cancellation of registration, suspension, and imposition of conditions to allowing the teacher to remain registered unconditionally.

In four of the cases the hearing panel concluded that the teacher was unfit to teach. In three of them the outcome was cancellation of registration. The fourth was more unusual resulting in suspension subject to the imposition of conditions.

Re Zineder,[475] concerned a teacher who was convicted in the County Court of the indictable offence of theft for stealing a large sum of money ($142,379.85) from her school's Parents Association, of which she was the treasurer. When assessing the evidence the hearing panel

[469] Ibid, p 8.
[470] *Re Taylor*, VIT, No 155, 25 January 2012.
[471] *Re SJK*, VIT, No 122, 24 July 2012.
[472] *Re Taylor*, p 6.
[473] *Re SJK*, p 6.
[474] Theft carries a maximum penalty of 10 years: *Crimes Act 1958* (Vic), ss 72 and 74.
[475] *Re Zineder*, VIT, No 016, 8 March 2005.

noted that her position as Treasurer was 'closely connected to her professional duties as the Principal of the School'.[476] The panel formed the view that her behaviour would be considered 'disgraceful or dishonourable by her teaching colleagues' and concluded that she was not fit to teach. In its view, she had 'failed to meet her obligations to the teaching profession and the broader education community and in so doing brought the teaching profession into disrepute'.[477] It therefore cancelled her registration.

Re Papageorgiou[478] differed in that it related to offending at previous schools. The teacher came to attention of the VIT when he was found guilty without conviction, and fined $1000 for thefts that took place at a previous school. An investigation undertaken by the VIT revealed that he had committed 18 additional thefts, primarily of money, from previous schools where he had worked.

In cancelling the teacher registration, the panel said that by showing no regard for the school community, the teacher did not display the character required to be a teacher. It commented that:

> Teachers are … required to conduct themselves appropriately, to display moral integrity and to execute their duties in an honest way. They are required to have a clear understanding of right and wrong and to ensure that they act as they duly ought to. Teachers are expected to lead and develop young people by positive example, and further students, parents and members of the education community are deserving of teachers, who in a position of power and influence, are trustworthy.[479]

The panel commented that the offending was such as to diminish trust on the part of three key stakeholder groups; parents, other teachers and the broader education Community. It further commented that parents must be able to feel confident that a teacher will provide 'a positive role model' for their children.[480] It also mentioned that members of the education community should be able to have confidence that persons employed as teachers were not only trustworthy but also 'a credit to their profession'.[481] Both the latter arguments are reflective

[476] Ibid, p 7.
[477] Ibid, p 8.
[478] *Re Papageorgiou*, VIT, No 020, 19 May 2005.
[479] Ibid, 12.
[480] Ibid, 13.
[481] Ibid, 13.

of a broad approach to the teacher's role which clearly influenced the negative outcome for the teacher whose registration was cancelled.

The third case, *Re Prodromou*,[482] differs from the others in that the teacher failed to make an appearance (as well as being unrepresented). This is significant because lack of legal representation disadvantages a teacher and may result in unfairness for reasons that are further explored in Chapter 6. The teacher came to the attention of the VIT because she was convicted of two offences relating to the theft of a stereo from her school and her sale of it to Cash Converters. However, there was also evidence presented to the panel that she had stolen various sums of money, including cash from the school canteen, money collected from parents for a sports program and money collected for school photos and has also failed to pay for items purchased from the school.

The panel concluded that the teacher's actions constituted serious misconduct and that her character was such that she was unfit to teach. In arriving at this conclusion it commented that:

> Teachers need to be able to trust one another in the sharing and care of equipment and the use of school facilities. The administration and parents need to be able to trust teachers when they are the conduit for communication and monies between parents and the school. Any serious misconduct which contributes to a breakdown of this trust has a deleterious effect on the morale of the school, undermines teacher-parent relationships and brings the profession into disrepute.[483]

While it acknowledged the difficulty of assessing her current fitness to teach given her failure to defend or explain her actions, the panel expressed its belief that: 'the evidence presented demonstrated a pattern of repeated behaviours on the teacher's part which strongly suggested her reluctance or inability to contemplate the consequences of her actions, to express remorse for them, or to seek remedies to control her behaviour'.[484] These comments suggest that the nexus of her offending to her work as a teacher was not the only factor that influenced the panel's conclusion that she was unfit to teach.

[482] *Re Prodromou*, VIT, No 055, 12 November 2007.
[483] Ibid, p 9.
[484] Ibid, p 10.

The case of *Re Neville*[485] concerned a teacher who had on a number of occasions stolen and pawned items from a previous school and had also burgled a club external to the school. These thefts took place in circumstances when the teacher was in very serious financial difficulties. The hearing panel found that his actions constituted serious misconduct and noted that they 'breached a basic trust that school communities place in teachers to ensure the effective management of school resources for the educational good of the students and not for personal gain. As such his actions reflected adversely on the good standing of teachers and ran the risk of 'bringing the profession into disrepute.'[486] The panel found difficulty concluding that the teacher was fit to teach due to the continuing and persistent nature of his offending, and it further commented that: 'the teacher should not be in a position of authority and trust with children until he has demonstrated an awareness of the importance of that trust'.[487] However, instead of cancelling his registration, the panel suspended it for a period of 4 months, and imposed conditions which, if met, would satisfy them that he was then fit to teach. The conditions imposed required the teacher to undertake 'a detailed and comprehensive study of the legal obligations of a teacher, particularly in relation to the management of school resources and the conduct and behaviour required of a teacher as outlined in the Victorian Institute of Teaching's Code of Ethics and Code of Conduct' and to provide a written report. These conditions (which were not ultimately met, resulting in his deregistration)[488] are noteworthy because they are expressly tied to his work as a teacher and also directly linked to both the Code of Ethics and Code of Conduct.

There were two further cases in which the teachers were found fit to teach, one subject to conditions and the other unconditionally.

In *Re Atkin* [489] the teacher had been convicted of two counts of theft relating to sporting equipment and money that he had appropriated from this school for which he received a Community Based Order (CBO). The panel accepted that the thefts had occurred to feed a gambling habit that arose during a stressful period in his life and that he had sought psychological help to address this and identified alternative behaviours and support systems.

[485] *Re Neville*, VIT, No 064, 14 August 2008.
[486] Ibid, p 10.
[487] Ibid, p 10.
[488] See the note on the VIT's website at <http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/disciplinary-decisions>.
[489] *Re Atkin*, VIT, No 029, 23 December 2005.

It concluded that his serious behaviour did not make him unfit to teach for a number of reasons, including the short duration of the misconduct and that fact that he had shown both remorse and insight into his misconduct.[490] However, it imposed a number of conditions on the teacher's registration, requiring him to desist from gambling for 12 months and to attend at least two counselling sessions with a psychologist.[491]

Re LKT[492] shared similar features in that the teacher's thefts from her school arose from a gambling habit and she had shown appropriate remorse. LKT was a school principal who suffered from a severe and long-standing bipolar illness. The panel commented that the principal had committed very serious offences against the school whose interests she was responsible for protecting. It also noted that the implications of her breach of trust had spread into the wider community, which demanded the highest standards of ethical behaviour and integrity from the teaching profession. It further commented that: 'teachers must be sound role models for students; they must be people in whom parents and society can have confidence'.[493]

However, despite acknowledging this as a significant breach of trust, the panel concluded that the teacher was currently fit to teach based on 'the medical opinions, the endorsement of her colleagues and most importantly the teacher's own affirmations of her intention to bring about change and reparation'.[494]

Secret Commission

The final category in this group involved soliciting a secret commission. In this case there was a very close nexus between the offending and the teacher's teaching duties as it involved a teacher offering to provide a better mark if the student paid money.

[490] Ibid, p 9.
[491] The teacher was unable to meet these conditions and later had other conditions imposed on his registration which were ultimately lifted: see the VIT webpage at <http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/disciplinary-decisions>.
[492] *Re LKT*, VIT, No 023, 20 July 2005.
[493] Ibid, p 9.
[494] Ibid.

Re Misell[495] concerned a teacher who was convicted in the County Court of the indictable offence of soliciting a secret commission. This conviction arose from the teacher's request that a former student pay the teacher a sum of money in return for a good mark in the subject 'Accounting for non-accountants'. The teacher was sentenced to a term of imprisonment of 12 months, which was wholly suspended for 2 years.

In determining to cancel the teacher's registration, the panel concluded that the teacher did not demonstrate the personal qualities required to satisfy the standards of the teaching profession and that his actions brought the teaching profession into disrepute in the eyes of the public. It also stated that he had failed the test outlined in *Sobey v. Commercial Agents Board*[496] that a person must have 'sufficient moral integrity and rectitude of character' as to permit them to be safely accredited to the public.[497] In addition, it commented that it was 'hard to imagine conduct which would undermine teaching standards or the public's confidence in the good character of teachers more than the acceptance of secret commissions for inflated academic results'.[498] This seems to acknowledge the very close nexus of the offending with the teacher's teaching duties.

Offences unrelated to a teacher's work or school

The hearing panels adopted differing approaches in relation to dishonesty offences that had no direct connection with the teacher's school.

The case of *Re O'Hara*[499] concerned a teacher who had been convicted in the Melbourne County Court of 18 counts of the indictable offence of making a false document[500] and sentenced to a term of imprisonment of 6 months wholly suspended for 24 months. (The making of the false documents related to a scheme to sell two ordinary guns as guns of great historic significance). The hearing panel commented at length as to the significance of the conviction. In its view, it was directly relevant to the teacher's professional credibility and standing as a teacher, despite the fact that it related to personal matters.

[495] *Re Misell*, VIT, No 026, 24 August 2005.
[496] (1979) 22 SASR 70.
[497] Ibid, p 76.
[498] *Re Misell*, p 9.
[499] *Re O'Hara*, VIT, No 037, 17 August 2006.
[500] *Crimes Act 1958* (Vic), s 83. This carries a maximum penalty of 10 years imprisonment.

> The level of calculated deceit, and the lengthy period of time over which the Teacher manufactured his scheme, in order to make large amounts of money by misleading prospective purchasers and by attempting to recreate modern history, are both relevant to, and in conflict with, the position of trust and academic credibility the community has extended to the Teacher as a teacher.[501]

It also expressed the view that '[h]onesty, reliability, sound judgement and integrity are inherent qualities required of teachers'[502] and concluded that the teacher was unfit to teach. Whilst the views expressed in relation to the teacher are at odds with those expressed by the VCAT when this decision was appealed,[503] it is clear from these comments that the hearing panel was cognisant of the need for there to be some nexus between the offending and the qualities called for in teachers although there was no specific discussion of teaching duties per se.

On appeal the VCAT concluded that O'Hara's registration should be cancelled due to the state of his mental health.[504] In its view, his convictions stemmed from a psychiatric condition which made him unfit to teach due to his delusional state and lack of insight into his condition. It, however, commented in respect of his offending:

> [T]here is nothing in what we have seen to suggest that he would be a danger to students, or likely to knowingly commit an act of misconduct. He appeared to us to be a genuinely caring man. Judge Kelly described him as a man of otherwise good character. His actions, we believe, have occurred as a result of his illness and not as a result of malice or greed.[505]

The approach taken by the VCAT was again arguably a narrow one in that its reasons for cancelling O'Hara's licence focused on whether he should be 'allowed to teach children'.[506]

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[501] *Re O'Hara*, VIT, pp 7-8.
[502] Ibid, p 8.
[503] See *O'Hara v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 1962.
[504] *O'Hara v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 1962.
[505] Ibid, [37].
[506] Ibid, [38].

A different approach, more consistent with that of the VCAT, was taken by the hearing panel in *Re DRH*,[507] which involved a teacher who was convicted for the offence of blackmail.[508] The teacher had been sentenced to two years imprisonment, which was wholly suspended with an operational period of three and a half years, and ordered to pay a fine of $3,000. The offence in question involved blackmailing a person with whom the teacher had had a consensual homosexual experience.

In discussing the evidence, the hearing panel agreed with the sentencing judge, that there was no evidence that the teacher was a risk to the children he taught and also noted that:

> Despite the teacher's underlying confusion regarding his sexual identity, evidence was presented that he had been able to keep his personal and professional lives totally separate. There was no suggestion in the evidence presented that the teacher's performance of his duties as a teacher was in any way affected by his actions.

Based on this approach it ultimately found him fit to teach.

A similarly narrow approach was taken in *Re LJB*[509] in relation to a teacher who had five convictions over a period of seventeen years for minor theft offences involving shoplifting.[510] She had stolen items from retail stores such as Myers, Coles, and Safeway. In assessing the evidence relating to her offending, the hearing panel noted that Counsel Assisting had submitted that her crimes of dishonesty threw doubts on her behaviour in the classroom in future. However, it attached significance to the lack of evidence to show 'that the teacher's personal problems or criminal behaviour had ever impacted on her professional life'.[511]

This case differed from the others in this category in that the hearing panel attached more explicit significance to the fact that the offending was non work-related. It commented on the division between the teacher's personal and professional life, noting that she had led an 'an exemplary professional life simultaneously with committing the offences'.[512] The hearing panel also noted that evidence that teacher was put in charge of budgets, a position of great trust and authority in a school and a position of which she never took advantage and 'the

[507] *Re DRH,* VIT, No 075, 15 October 2008 and 27 October 2009.
[508] This offence carries a maximum penalty of 15 years: see *Crimes Act 1958* (Vic), s 58.
[509] *Re LJB*, VIT, No 126, 2 October 2012.
[510] The offence of theft carries a maximum penalty of 10 years imprisonment: *Crimes Act 1958* (Vic), s 74. It is an indictable offence but triable summarily.
[511] Ibid, p 9.
[512] Ibid.

teacher could confidently be placed in a position of trust and authority with children and that her approach to teaching was exemplary'.[513] It therefore concluded that she was fit to teach.

A similar approach was taken by the hearing panel in *Re RGA*,[514] which concerned a teacher who had been convicted of 41 counts of obtaining property by deception for which he received a suspended jail sentence of 12 months.[515] In assessing the evidence and concluding that the teacher remained fit to teach the hearing panel noted evidence to the effect that his behaviour in the classroom was exemplary and that his professional deportment did not appear ever to have wavered. It accordingly stated that it had 'no fears that the teacher's performance in the classroom would not continue to be to a high standard'.[516]

In the case of a further decision in this category, *Re Kerstens*,[517] the context of the offending is less clear from the panel's statement of reasons.[518] However, it would seem that the offending occurred outside of the school context and in response to financial difficulties. The teacher was convicted of four offences of theft for which he received fines and a community based order.

In assessing the teacher's fitness to teach the hearing panel applied the test of the VCAT in *Davidson v VIT*[519] 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.

The panel rejected the view that the teacher's behaviour reflected adversely on his conduct in the classroom or that 'his whole approach to teaching and to the children in his care is

[513] Ibid, p 10.
[514] *Re RGA*, VIT, No 137, 22 March 2013.
[515] This offence carries a maximum penalty of 10 years: *Crimes Act 1958* (Vic), s 81. It is an indictable offence but triable summarily in the Magistrates' Court.
[516] Ibid, p 11.
[517] *Re Kerstens*, VIT, No 142, 11 November 2013.
[518] It is made clear on the VIT's website that the panel's statement of reasons is in precis form in order to protect the interests of some witnesses: see <http://www.vit.vic.edu.au/professional-responsibilities/disciplinary-decisions/disciplinary-decisions>.
[519] [2007] VCAT 920.

profoundly and irretrievably flawed'.[520] On the other hand, it was concerned that his offences could diminish his 'position of authority and trust' with children as they compromised his ability to provide a positive role model. It seems therefore that its approach is reflective of both of a narrow view which is classroom based and a broad view based on the role of a teacher as role model. In the case of the latter, its concerns were allayed by his principal's view that 'the impact of the teacher's behaviour on his capacity to be a positive role model for students could be sympathetically and judiciously justified to the school community'.[521]

The majority of other cases in this category adopted a middle ground and their outcome was influenced more strongly by separate considerations.

For example, in *Re GDG*[522] the teacher in question had been found guilty of a number of offences (including theft, obtaining property by deception, recklessly dealing with the proceeds of crime and making a false document to the prejudice of others) for which he received concurrent sentences of 9 months imprisonment, wholly suspended for 18 months. The offences were instigated by his brother to whom he felt very protective due to a family history in which his father, a disruptive and abusive alcoholic, had regularly abused the brother. The brother had moved in with the teacher at the time in a stressed state and 'put on him' to assist him in his offending. The four offences, which were prompted by loyalty to his brother, were conducted at night and did not interfere with his teaching. The hearing panel commented in relation to them that:

> The teacher's offences relate to his personal conduct as opposed to his professional conduct. They do, however, affect the reputation of the profession and the public's trust in the profession.[523]

It ultimately concluded that the overall circumstances were not indicative of an 'inherent character flaw' and that there was therefore no reason to doubt the teacher's fitness to teach.[524]

[520] Ibid, p 5.
[521] Ibid.
[522] *Re GDG*, VIT, No 100, 30 April 2010.
[523] Ibid, p 8.
[524] Ibid.

In *Re Van den Brink*,[525] the hearing panel appeared to endorse a narrow approach but nevertheless cancelled the teacher's registration despite acknowledging that the teacher's convictions has no impact on teaching. It specifically commented that the teacher remained 'severely moral'.[526]

In this case the teacher suffered from kleptomania and her convictions included 45 counts of theft relating to multiple incidents of shoplifting. The hearing panel commented that there was no evidence that her 'whole approach to teaching and to the children in her care is profoundly and irretrievably flawed.' Indeed, the opposite is the case. The teacher's commitment to the teaching of disadvantaged children and children with special needs is both credible and admirable'.[527] It nevertheless cancelled the teacher's registration due to the lack of any guarantee that she would not re-offend.

The case of *Re AHE-H*,[528] involved a teacher who neither appeared at the hearing nor was represented. He came to the attention of the VIT many years after he had commenced as a teacher due to a criminal records check which revealed a string of minor theft-related offences. This case is unusual because the panel reached a decision favourable to teacher despite the absence of any evidence presented on his behalf at the hearing. In deciding not to cancel his registration, the panel referred to a number of features of this offending including the fact that his 'conduct did not raise any doubts about his future behaviour in a classroom'.[529] It also noted that there was 'no evidence to suggest that the teacher could not be a position of trust and authority with children on the basis that his whole approach to teaching and to the children in his care is profoundly and irretrievably flawed'.[530]

A further case, which also involved a teacher who failed to appear or have legal representation is *Re Pham*[531] in which the panel reached a different conclusion and cancelled her registration. The teacher in this case was found guilty without conviction of an offence involving an attempt to remove a wallet from a man's pocket. She had argued that she was

[525] *Re Van Den Brink*, VIT, No 073, 11 December 2008.
[526] Ibid, p 13.
[527] Ibid.
[528] *Re AHE-H*, VIT, No 148, 12 October 2014.
[529] Ibid, p 5.
[530] Ibid.
[531] *Re Pham*, VIT, No 132, 17 December 2012.

innocent but failed to provide the panel with any further explanation about her conduct. The panel noted that it 'could find no evidence that the teacher's whole approach to teaching or the children in her care was profoundly and irretrievably flawed'. However, it commented that:

> [T]he teacher's misconduct affects the reputation of the teaching profession because the public has a right to expect that teachers who are placed in a unique position of trust and authority with young people in their care will model ethical behaviour. The teacher's misconduct showed a lack of integrity on her part in a way that was a serious departure from the expected standards as outlined in Principle 2.1 of the Victorian Teaching Profession Code of Conduct. This Principle defines an expectation that teachers will be positive role models in the community and respect the rule of law.[532]

This comment is indicative of a broad view of the teaching role and is noteworthy because of its use of the Professional Code of Conduct in determining fitness to teach. As discussed in Chapter 4, the Code specifically states that it is not intended to be used for disciplinary purposes so this use is arguably problematic and unfair.

The hearing panel determined that the teacher was unfit to teach and decided to suspend her registration for 6 months and to impose a number of conditions on her registration.

The final decision in this category, *Re PBRF*,[533] concerned making a false statement to obtain a passport and other passport-related offences. These had been committed initially to emulate a ruse described in the novel 'Day of the Jackal'. In assessing the evidence, the hearing panel commented that 'the actions were aberrant in the context of his excellent reputation as a teacher of difficult students. There was no evidence that his acts had compromised his conduct with students or would do so in the future'.[534] It decided that the teacher remained fit to teach.

Mixed

The final case, *Re Mine*,[535] is unusual because it involved a conviction for theft (resulting from failure to return a rental car) which was unrelated to her employment or role as teacher

[532] Ibid, p5.
[533] *Re PBRF*, VIT, No 123, 1 August 2012.
[534] Ibid, p 6.
[535] *Re Mine*, VIT, No 136, 10 May 2013.

but also problematic conduct at her school (including an incident in the classroom when she resisted arrest by police for the theft offence). This means that it was necessary for the hearing panel to assess her fitness to teach from two quite different standpoints - one where the concern in issue (her criminal offending) was unrelated to her work as a teacher and the other (conduct at the school in the aftermath of her offending) was very clearly related as it impacted on children and others at the school.

The hearing panel concluded that the evidence before it demonstrated a pattern of behaviour that was 'inconsistent with the standards and expectations of a member of the teaching profession' and cancelled her registration.[536] The teacher did not attend the formal hearing and was not represented.

The cases in the dishonesty category do not establish any clear pattern. Where the offending has occurred in a work context this fact has not featured prominently (and generally not all) in decision-making. As with the drug cases panels have proceeded on the assumption that the offending always raises issues of fitness, irrespective of the context and that, in general, what matters is the extent of reform that can be demonstrated. However, as indicated by the case of *Re O'Hara*, there are cases in which the seriousness of the offending (as assessed by the panel) may itself be regarded as definitive.

Offences against the person

Threats against the person covers a wide range of offences, from making threats to actual physical violence. Penalties also vary widely. Offences that involve physical violence may be regarded as more heinous than offences not involving physical harm to others, but this may vary according to the context. They may be relevant to employment as a teacher to the extent that they are indicative of a propensity to violence that may pose a threat to children, teachers or others in the broader school community. It is arguable that this is less likely to be the case where the offending relates to a domestic dispute or in another context that is unlikely to be replicated in the school context. However, it is accepted that domestic assaults, including domestic violence, may be highly socially condemned and therefore relevant to professional reputation.

[536] Ibid, p 7.

Two crimes comprised the majority of offences in the group; namely stalking and physical violence.

Work-related offences

There were only two cases where the teacher's offending occurred in the school context, although one them had a personal dimension as the it occurred in context of the teacher's role as a father. These both involved threats to kill.

Re Stanley[537] involved a teacher who was convicted for making a threat to kill[538] another teacher at work. His offending occurred in a context where he was angry about the care of his daughter who attended the same school. He believed that she had been treated differently to other students. The hearing panel noted that making a threat to kill another teacher at work, was a gross departure from the behaviour expected of a teacher and such behaviour is offensive to members of the profession and the public.[539] The panel was not required to make a determination about registration as the teacher had ceased to be registered by the time of the hearing. However, it recommended that he sought treatment from a psychologist experienced in working with the teaching profession and who had knowledge of the professional standards of teachers before reapplying to be registered as a teacher. Mr Stanley did not attend the formal hearing and was not legally represented.

Re Tomasevic[540] concerned offending which was more directly work related and involved two separate offences. The first related to a threat to kill which was made against a former school principal. This resulted in a conviction and imposition of a 12 month Good Behaviour Bond with the condition that he continues with counselling and treatment. The second related to the making of a threatening phone call to a second school principal which caused her to feel fearful for her staff and family and also threatening phone calls to another teacher, He was convicted of using a carriage service to menace[541]and received a sentence of a ten month Good Behaviour Bond, a requirement to pay $300 to the Court fund and a requirement to

[537] *Re Stanley*, VIT, No 108, 14 February 2011.
[538] The offence of making a threat to kill carries a maximum penalty of 10 years: Crimes Act 1958 (Vic), s 20.
[539] Ibid, p 8.
[540] *Re Tomasevic*, VIT, No 138. 6 May 2013.
[541] Using a carriage service to menace, harass or cause offence carries a maximum penalty of 3 years: *Criminal Code Act 1995* (Cth) s 474.17.

continue to attend and follow specified clinical recommendations. While this offending occurred in a school context, it did not derive from the performance of his duties as a teacher but rather due to emotional reactions to specific events including allegations made against him.

The teacher did not attend the formal hearing and was not represented. In its discussion of his offending, the hearing panel commented that while the teacher's behaviour did not occur directly in the course of professional practice, *New South Wales Bar Association v Cummins*[542] provided authority for the conclusion that professional misconduct could be extended to include his offending behaviour.[543] Furthermore, while its decision that he was not fit to teach was based a range of factors, including lack of insight and remorse, the panel specifically noted that 'the teacher's conduct occurred in front of students, colleagues, parents and members of the wider community as well as in public places where the public's perception of the teaching profession could be affected'.[544] It also commented that he had shown a disregard for 'the public's perception of public education' and he 'was not a good role model in the school or in the community'.[545] The panel cancelled Mr Tomasevic's registration.

Offences unrelated to a teacher's work or school

Stalking

Stalking is difficult to define as it can comprise 'a series of actions that, taken individually, may constitute legitimate behaviour'.[546] It may also result from a range of motivations including difficulty in coping with a rejection, a misplaced desire for intimacy, resentfulness or predation. Stalking is characterised by course of conduct intended to harm the victim and is a serious criminal offence that carries a maximum penalty of up to 10 years imprisonment under s 21A of the *Crimes Act 1958* (Vic).

[542] (2001) NSWCA 284.
[543] *Re Tomasevic*, VIT, No 138. 6 May 2013, p 9.
[544] Ibid.
[545] Ibid.
[546] Michele Pathé, *Surviving Stalking* (Cambridge: The Press Syndicate of Cambridge University, 2002) p 7.

The extent to which stalking is relevant to fitness to teach, is arguably dependent on the context in which it occurs and the extent to which this is suggestive of a propensity to engage in similar behaviour towards children or other members of the school community. Arguably this is more likely where the stalking occurs beyond the domestic context, especially where it relates to a young person or a work colleague.

This was the case in *Re SR*,[547] which concerned a teacher who was convicted of stalking a young male by repeatedly phoning him, asking him sexually explicit questions concerning the size of his penis and seeking to persuade him to take part in a photo shoot. He was convicted of stalking and sentenced to 42 months imprisonment, wholly suspended for 12 months. The hearing panel in this case gave a split decision.

The majority members of the hearing panel concluded that the teacher was fit to teach and in arriving at its decision attached significance to the fact that the offences occurred in the teacher's private life and had no connection to his professional associations or activities. It found support for this view in *Ziems v Prothonotary of the Supreme Court of NSW*,[548] which it cited 'as authority for the view that there is a real distinction between professional misconduct and purely personal misconduct on the part of a professional'.[549]

The minority member of the hearing panel found instead that the teacher's misconduct 'was not remote from his professional role because his actions were directed to a young person of school-age, involved deceptive conduct and sexually explicit language and improper suggestions, and failed to consider issues of informed consent and potential harm to the young person'.[550] It should be noted that she did not disagree that the key issue was the relevance of the misconduct to the teacher's work but rather took a different approach in assessing the teacher's misconduct and its relevance to his teaching. She further explained her view on the basis that 'parents must feel confident that the teacher will care for their child appropriately'[551] (not on expectations of them to act as good role models).

[547] *Re SR*, VIT, No 004, 25 August 2004.
[548] *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279.
[549] Ibid, p 6.
[550] Ibid, p 8.
[551] Ibid, p 9.

Stalking is also more likely to be reflective of a potential threat to children or others in the school community when it is accompanied by other violent offending. This was the case in *Re Chappell*,[552] which concerned a teacher who was found guilty of stalking and breaches of various intervention orders and also of resisting police, assaulting police and making a threat to kill. The overall gravity of these offences was reflected by the fact that he received custodial sentences for some of them.

The hearing panel concluded that he was unfit to teach. In arriving at this conclusion it commented specifically on the relationship between his offending and his role as a teacher. In its view his conduct was very relevant to his role.

> His conduct was far from trivial; it was repeated and deleterious. It was blameworthy and deserving of more than passing censure. It was conduct that was repeated by choice, despite many police warnings and being incarcerated. Yet the teacher did not refrain.[553]

It also attached significance to the fact that it was conduct which, in its view, was 'greatly frowned upon by the community'. These comments, and especially the latter, are arguably reflective of a broad view of teaching.

In contrast, where stalking is motivated by difficulty in coping with rejection following the break-up of a relationship it is arguably less likely to be relevant to fitness to teach, provided one adopts a narrow rather than broad approach to the teacher's role.

This was the scenario in *Re GJI*,[554] which concerned a teacher who had been convicted of various stalking offences following the termination of a three year relationship. While the hearing panel ultimately found that he was fit to teach, it did not do so on the basis of its assessment of his offending. Instead the panel referred to its assessment that he took full responsibility for his actions and well understood their impact and why they were completely inappropriate and also on evidence which led it to conclude that the teacher should be able to command the respect and confidence of the education community in the future).

[552] *Re Chappell*, VIT, No 096, 10 December 2012.
[553] Ibid, p 10.
[554] *Re GJI*, VIT, No 010, 6 December 2004.

It expressed the view that to be fit to teach a teacher must not have a 'complete disregard for their legal obligations' and that it was necessary for it to consider whether the teacher's actions would be reasonably regarded as disgraceful or dishonourable by his professional colleagues'.[555] Nevertheless, it concluded in the teacher's favour, attaching significance to extenuating factors in relation to this offending (he genuinely thought that there might be some hope of reconciliation and was suffering from reactive depression at the time of the offending) and that he an exemplary teaching record and enjoyed the confidence of his colleagues.

Re NJP[556] was also concerned with stalking that followed the break-up of a relationship, although the victim in this case was the new love interest of the former partner. In this case the stalking had taken the form of cyber-bullying.

The school principal convinced the panel that the personal behaviour would not interfere with her professional duties in the future. The panel was provided with evidence of the teaching being proactive in taking control of her life. The work of the teacher in her profession caused no negative comment.

Another case where the motivation for stalking stemmed from a perception of rejection (even though there was no relationship ever been formed) was *Re PAL*,[557] which concerned a male teacher who was convicted of stalking and placed on a Good Behaviour Bond. The stalking had taken place when the teacher was a student and involved another student who was studying the same course. In assessing the evidence before it the hearing panel noted that an inquiry into fitness to teach was 'concerned with the person's character' and that this depended on the 'minimum standards demanded by the teaching profession given the particular responsibilities and duties placed on teachers'.[558] While noting the seriousness of the offending and its consequences for the victim the panel ultimately concluded that the offending did not mean the teacher was unfit to teach. As was relevant at the time (because the legislation distinguished between professional and other misconduct), the panel emphasised that the teacher's conduct did not arise in the course of his professional duties

[555] Ibid, p 13.
[556] *Re NJP*, VIT, No 127, 3 October 2012.
[557] *Re PAL*, VIT, No 013, 23 August 2004.
[558] Ibid, p 3.

and it noted the evidence from his colleagues and employers to the effect that he was able 'to competently and professionally carry out the role of a teacher in a variety of school settings'.[559]

Assault and causing or threatening to cause injury

Offences involving causing or threatening to cause injuries are arguably serious, although their relevance to teaching will again arguably vary according to the context. They will be most relevant when the offence indicates a propensity to violence or threats of violence that have some connection with, or are likely to find their way into, the school context. This is more likely to be the case where there is serious violence or the offending was related to the teacher's work environment.

The majority of these cases concerned offending that occurred outside of the school context. Of these four involved some form of domestic dispute.

Re BKP[560] concerned a teacher who was convicted of assault in relation to an altercation with a tenant and received a Good Behaviour Bond for 24 months. In its statement of reasons the panel commented in respect of his evidence that the teacher had 'displayed a certain naiveté about the fact that a teacher's fitness to teach is not judged solely on one's professional behaviour'.

> Given that he showed a ready understanding of why the Institute might be concerned about the impact of a teacher's assault charge conviction on the reputation of the profession, the Panel feels he should have been more alert to the implications of that in his own circumstances.[561]

This comment suggests that the panel adopted a broad approach although this was not determinative as its decision was based on other matters. The panel concluded that the teacher was fit to teach and remain registered based on a number of considerations - the fact that the assault was a one off event that had occurred some three and a half years previously, the court's decision not to record a conviction, his insight into why the offence reflected

[559] Ibid, p 10.
[560] *Re BKP*, VIT, No 121, 13 July 2012.
[561] Ibid, p 4.

badly on the teaching profession and his sense of shame that a conviction had been recorded against him.[562]

Re Dellaportas[563] also concerned an assault that took place in a domestic context and for which he received a community based order requiring him to perform 120 hours of unpaid community work over 12 months. However, in this case the offending (which involved the assault of a former partner) was much more serious, involving eye gouging and biting. Moreover, there was no explanation offered by the teacher, who did not attend the hearing.

In the absence of evidence to explain the teacher's behaviour, the panel concluded that the violent nature of his acts suggested that his character was 'such that he could not be entrusted with a position of trust and authority by the public'.[564] In other words it felt that it revealed a flaw that was directly relevant to his position of trust as a teacher. It concluded that he was not fit to teach and that his personal conduct had impacted on his own professional standing as well as that of the teaching profession as a whole.[565] It accordingly cancelled his registration.

The case of *Re KT*[566] also concerned an assault against a domestic partner, for which the teacher was found guilty without conviction and required to attend an anger management course and to pay a $250 fine. The hearing panel's statement of evidence records discussion concerning the ways in which the teacher would deal with questions by students about this conviction and how he would respond to students reporting domestic violence to him.[567] These lines of enquiry suggest active consideration of possible ways in which the convictions would impact on his performance of his role as a teacher. Elsewhere it commented that it accepted an assertion by a witness that the teacher 'would never endanger a child nor open his school to litigation or financial damage'. However, it also commented that the nature of his offence - ie recklessly causing injury - was 'of concern to a profession which has the responsibility of both working with children and acting as a role model for them'.[568] The

[562] Ibid, p 5.
[563] *Re Dellaportas*, VIT, No 133, 8 February 2013.
[564] Ibid, p 5.
[565] Ibid, p 6.
[566] *Re KT*, VIT, No 114, 31 January 2014.
[567] Ibid, p 4.
[568] Ibid, p 7.

latter comment is more indicative of the broad view of a teacher's role. The panel ultimately concluded that the teacher was fit to teach.

A fourth case, *Re SMMcF*,[569] arose from the teacher's intervention in a dispute involving his ex-partner and her husband. He was found guilty of recklessly causing serious injury and also for causing damage to property and received an aggregate fine of $7,600, with $66 statutory costs and $3,153 compensation. The hearing panel concluded that he was fit to teach. It commenced its analysis from the standpoint that the purpose of its role in determining the teacher's fitness to teach was 'to protect the public and the reputation of the profession and to maintain the public's trust in the profession'.[570] The statement makes no direct reference to protecting children, although this is arguably implicit in the concept of public trust.

The panel first approached this question from the perspective of character and concluded that the behaviour here was not indicative of the teacher's basic character and that his approach to his responsibilities as a teaching professional 'is not profoundly or irretrievably flawed'.[571] It also considered separately what students, parents, other teachers and the wider community would think about the teacher being able to continue teaching while having convictions for indictable offences. It concluded that he had sufficient standing in the school community that his offending would be viewed as an aberration and not part of his normal behaviour pattern.[572] Finally, it expressed confidence that he would use this experience positively to help students to understand cause and effect issues and that actions and poor choices have consequences.[573] These comments appear reflective of a mixed approach, but which nevertheless attaches significance to the class room context.

The final case in this category, *Re AZ*,[574] involved a teacher who was found guilty without conviction of one count of intentionally threaten serious injury. The offence in question was domestic in nature and involved threatening his wife with a weapon. In this case the hearing panel commented that:

[569] *Re SMMcF*, VIT, No 144, 11 November 2013.
[570] Ibid, p 7.
[571] Ibid.
[572] Ibid, p 8.
[573] Ibid.
[574] *Re AZ*, VIT, No 119, 30 June 2012.

> the nature of the indictable offence, namely intentionally threaten serious injury, which whilst at the lower end of offences involving violence and not with malice, is of concern to a profession which has the responsibility of both working with children and acting as a role model for them.[575]

This comment is again reflective of a mixed approach as it embodies both a reference to the teacher's duties (ie working with children) and also reference to the role of the teacher as a role model. The panel ultimately concluded that the teacher remained fit to teach, noting that 'he had demonstrated good relations and significant patience with students in the past, especially in special schools'.[576]

There were two further cases involving more serious injuries where the criminal offending was unrelated to the school environment.

In *Re De Wilde*[577] the teacher had been convicted of the offence of intentionally causing serious injury in respect of a 'glassing' incident, involving a victim who was known to him. The hearing panel noted that the offence in question was a single event, where the teacher was known to the victim and that involved personal conduct unrelated to his professional duty as a teacher. However, it decided that 'that the serious nature of the offence and the need for deterrence to prevent such violent crimes in the community' gave it ' no option other than to conclude that the teacher was not fit to teach at that time. However, it also stated that this did not mean that he would be unfit to teach in the future. It therefore determined to suspend his registration subject to conditions which he ultimately fulfilled.

The second case, *Re Fairley,*[578] concerned a teacher who had seriously injured a pedestrian while driving a car when drunk and then failing to stop and render assistance. These actions had resulted in a conviction for negligently causing serious injury and a sentence of 4 years and 6 months imprisonment with a minimum non-parole period of 3 years. The hearing panel approached this case from the perspective that 'unfitness may be demonstrated by conduct totally unconnected with any such employment or employment at all'.[579]

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[575] Ibid, p 6.
[576] Ibid, p 7.
[577] *Re De Wilde*, VIT, No 106, 04 February 2011.
[578] *Re Fairley,* VIT, No 027, 16 September 2005.
[579] Ibid, p 3, citing *Siguenza v Secretary, Department of Infrastructure* [2002] VSC 46.

The panel also noted in respect of the teacher's conviction that it was a very serious offence against the public and his behaviour in initially lying to the police and later concealing the conviction from his school involved a breach of trust which might result in the wider community calling into question the integrity of the profession. It further commented that:

> Teaching is an honourable profession and teachers serve as significant role models to students. It is important that the community has confidence in its teachers as responsible, trustworthy people.[580]

However, despite the broad view of the teacher's role reflected in these comments, the hearing panel ultimately found in favour of the teacher based on its assessment that he had reflected deeply over time on these matters and 'that his reactions to those circumstances were atypical behaviour'.[581] It therefore allowed him to retain his registration subject to conditions.[582]

As might be expected (given the issue of child safety), this category offences prompted much more discussion of the relevance of the offending to the teacher's classroom role and their responsibility for the care of children although, even then, only in some of the cases. The fact that the only case involving a teacher who had committed work-related offences resulted in loss of registration cannot be regarded as significant given that he neither appeared nor was represented.

The only two other teachers in the category of offences against the person who lost their licences lost them at least in part on the basis of factors related to offending and its nexus to their classroom role (Chappell because his conduct in of stalking, breaching various intervention orders, resisting police, assaulting police and making a threat to kill was very relevant to his role a teacher and Dellaportas because of the violent nature of his acts). The other teachers were allowed to remain registered but at least two of them paid specific attention to the issue of the extent to which the offending was relevant to the teacher's role. In the case of *Re Dellaportas*, the panel commented that his conviction for 'recklessly causing

[580] *Re Fairley*, p 9.
[581] Ibid.
[582] The note on the website entry for this case indicates that he satisfied this condition and that it was lifted a year later.

injury' and the allegations for a previous serious assault on the victim in 2009 outlined in her statement to Police raised questions about his conduct and raised further serious questions about his character and reputation'.[583] It should be noted that Dellaportas neither appeared nor made an appearance and so failed to provide any evidence of reform.

The other cases proceeded on the implicit assumption that the teachers' offending was relevant to the assessment of fitness to teach although they were able to demonstrate sufficient reform characteristics to retain their registration.

Offences of a sexual nature

Most offences of a sexual nature result in automatic deregistration, as discussed in Chapter 2. However, a small number of less serious offences of a sexual nature do not have this consequence. For example, offences involving 'upskirting'[584] and the new Victorian sexting offences[585] fall into this category.

Sexual offending is clearly a matter of potential relevance to the teacher's role to the extent that it is indicative of a potential to behave inappropriately to children or to other members of the school community. However, the points that were made in Chapter 2 are equally relevant here and it is important that sexual offending per se is not treated as making a teacher automatically unfit to teach.

Work-related offences

Three of the four cases in this category were concerned with behaviour that had some connection with the school context.

[583] *Re Dellaportas*, VIT, No 133, 8 February 2013, p 4.
[584] See *Summary Offences Act 1966* (Vic) s 41A Observation of genital or anal region; s 41B. Visually capturing genital or anal region and s 41C Distribution of image of genital or anal region.
[585] *Summary Offences Act 1966* (Vic), s 41DA - Distribution of an intimate image and s 41DB - Threat to distribute intimate image.

The first case, *Re Wescott*,[586] concerned a school principal who was convicted of possession of child pornography[587] and initially sentenced to 6 months imprisonment. That conviction was later overturned by the County Court on the basis that it had not been proven beyond reasonable doubt that the persons portrayed in the images were under the age of 16 years. The teacher did not appear and was not represented at the panel hearing but there appeared to be no dispute that he had uploaded numerous pornographic images of young people on various computers. There was no evidence that any of the images related to children at his school, but his conduct had a work-related aspect as the computers on which he uploaded images included his school computer.

The hearing panel described this conduct as amounting 'to both a substantial and deplorable departure from the accepted standards for the teaching profession'.[588] It also commented in respect of his statement to police that his activities did not impact on his work as principal that this statement was 'ludicrous, falling well short of deserving any valid consideration, irrespective of the context, given the teacher's profession and employment status as a primary school principal'.[589] The panel attached significance to the fact that 'teachers are placed in privileged positions of trust and responsibility when permitted to work and engage with young people' and further commented:

> The nature of their duties demands acknowledgement of, and commands adherence to, the rights of children being protected, as detailed in law. The teacher's serious misconduct, which the Panel viewed as marauding and disgraceful, is deemed highly offensive to all credible practitioners within the education community who work to ensure that the rights of children are upheld.[590]

It accordingly cancelled his registration.

It should be noted that the relevant duties in this case were those of a school principal rather than a classroom teacher and it seems that the panel's comments are indicative of a broad view of that role also.

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[586] *Re Wescott*, No 049, 14 May 2007.
[587] Possession of child pornography carries a maximum penalty of 10 years: *Crimes Act 1958* (Vic), s 70. This is one of the offences that falls within the definition of a 'sexual offence' in s 1.13 of the ETRA. His conviction did not result in automatic deregistration in this case because it was overturned on appeal.
[588] Ibid, p 10.
[589] Ibid.
[590] Ibid.

A second case, *Re Janse Van Vuuren*[591] concerned a teacher who was convicted of one count of 'upskirting'[592] and placed on a Community Based Order for 9 months, which required him to perform 80 hours of unpaid work over 6 months and to undergo assessment for programs to reduce re-offending. The offending occurred in a school context and involved, on two occasions, taking photographs up the dresses of female students without them knowing. In this case there was a clear nexus between the offending and the teacher's duties as a school teacher.

In approaching the question of fitness to teach the hearing panel applied the following test from *Davidson v Victorian Institute of Teaching* [2007] VCAT 920:

> 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.

The panel decided to cancel the teacher's registration because it did not have medical or psychological evidence showing that he was fit to return to the classroom. A key concern was the likelihood that he might reoffend therefore putting children at risk.

The final case involving offending with some connection to a teacher's duties, *Re GJB*,[593] concerned an indecent assault on a former student for which the teacher was charged many years after the offence took place. He had pleaded guilty to the charge but no conviction was recorded. The panel did not specifically discuss the nexus between this offending and the teacher's work, apart from noting evidence that he now maintained an appropriate physical and professional distance from students. Given the effluxion of time and his unblemished teaching record since, the panel found that he was fit to teach.

Offences unrelated to a teacher's work or school

[591] *Re Janse Van Vuuren*, VIT, No 080, 17 February 2009.
[592] *Summary Offences Act* 1958 (Vic), s 41 A and 41B. These carry maximum penalties of 3 months imprisonment and 2 years imprisonment, respectively.
[593] *Re GJB*, VIT, No 113, 16 January 2012.

The case of *Re Rodriguez,*[594] involved conduct unrelated to the teacher's duties or his employment. It concerned a teacher convicted of using a carriage service to cause offence[595] for which he was ultimately sentenced (following appeal) to 6 months imprisonment fully suspended for two years. The conviction related to sending offensive images to a person who had at one stage claimed to be a 14 year old girl.

In considering the evidence before it the hearing panel rejected an argument by the teacher's legal representative that the offending involved personal misconduct as opposed to professional conduct and should therefore be treated differently from offending relating to professional conduct and commented that:

> 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 identified a number of considerations in concluding that the teacher was unfit to teach. These included the fact that his conduct clearly breached the standards set out in Principle 2.1 of the Code of Conduct which includes expectations that teachers will be 'positive role models at school and in the community' and also 'respect the rule of law and provide a positive example in the performance of civil obligations'. It also said the teacher's offending behaviour was 'grossly offensive, and wanting in terms of the professional behaviour expected of teachers by both the community and the profession'.[596] The teacher was unregistered at the date of the hearing and the panel therefore made no determination in respect of his registration.

The second case, *Re Eyre,*[597] differs from the others in that the teacher was charged but ultimately acquitted in respect of a series of offences including committing an indecent act with a child under 16. This matter came to the attention of the VIT due to the police laying charges against the teacher but the decision was ultimately based on evidence provided by the

[594] *Re Rodriguez,* VIT, No 145, 6 March 2014.
[595] See *Criminal Code Act 1995* (Cth), s 474.17(1).
[596] Ibid, p 16.
[597] *Re Eyre*, VIT, No 039, 12 September 2006.

girl rather than the fact of conviction. The hearing panel found that he was unfit to teach and cancelled his registration In concluding that he was unfit to teach, the panel noted that it had examined the teacher's conduct 'in relation to the special responsibility placed on teachers because of the professional relationship a teacher has with children and students'. It also commented that the 'public needed to be protected from these acts and a person of this character'.[598]

The category of sexual offending is arguably the one most relevant to the teachers' role and it is not surprising therefore that panels generally paid specific attention to the nexus between the offending and the teacher's role, resulting in loss of registration. However, it was implicit in the published decision in *Re Janse van Vuuren* that he might have been able to retain his registration had he been able to demonstrate convincingly that he had addressed the underlying issues that led to his offending.

Multiple offences

There is one final case, *Re Muthuthanthirige*,[599] which involves offences against the person but also other types of offences including damage to property and contravention of a family violence intervention order. In assessing the evidence, the hearing panel noted that the teacher's offences were of a personal rather than professional nature and his professional conduct had not been called into question. It noted, however, that the offences reflected on his character and that 'the nature of his behaviour is of serious concern to a profession which has the responsibility of both working with children and acting as a role model for them'.[600] It ultimately decided to suspend the teacher's registration for 18 months and to impose a number of conditions so as to 'provide some comfort to the public that the teacher is at that time fit to teach'.[601]

This case is consistent with patterns discussed above whereby panels treat offending as affecting fitness to teach at the time of offending but are prepared to entertain evidence of reform in assessing current fitness to teach.

[598] Ibid, p 8.
[599] *Re Muthuthanthirige*, VIT, No 146, 28 April 2014.
[600] Ibid, p 7.
[601] Ibid, p 8.

Conclusion

The analysis of the approach taken to the issue of fitness to teach and the related issue of the scope of the role of the teacher shows a high degree of variation, including within different categories of offending. In many cases this does not appear to have made a difference to the outcome. For example, in *Re Fairley***,** the panel took a broad approach to the role of the teacher but nevertheless concluded in the teacher's favour based on other considerations. However, there are examples, where the approach taken has arguably made more of a difference - in those cases, for example, where the offending was not work-related but the panel nevertheless concluded that the teacher was unfit to teach.

It might have been expected that the safety and welfare of children would be at the forefront of panel discussions. However this has generally not been the case, although it is implicitly reflected in relation to concerns about character. To the extent that offending beyond the school context is indicative of character (or broader behavioural defects) that have the potential to impact on a teacher's performance of his or her duties, including duties in relation to welfare of children, that is an appropriate issue of panels to consider the safety of children. That is also the case where the offending is likely to impact on the willingness of parents to entrust their children to a teacher's care or the willingness of other staff to work them. However, these considerations are not clearly spelled out in the reported decisions.

There is also a clear emphasis in a number of cases on the reputation of the profession. In most cases this does not appear to have affected the outcome for a teacher. However, there are cases (for example, *Re O'Hara*[602]), where a broad approach which emphasises the teacher's role as role model, has resulted in outcomes which are arguably harsh. This suggests that while it is not a major issue in most cases (at least in terms of determining final outcomes), there remains scope for further narrowing of the criteria for assessment.

As argued earlier in the chapter, it is appropriate for a regulator to take into account conduct that is relevant to the employee's work, which affects interests of the profession being regulated or which poses a risk to the rights and freedoms of others including their safety. Allowing decision-making based on overly broad conceptions of the teacher's role arguably goes beyond this. To the extent that this results in loss of registration it arguably unfairly

[602] *Re O'Hara*, VIT, No 037, 17 August 2006.

deprives the teacher of their livelihood and also results in outcomes that may unnecessarily deprive the education system of good teachers. The issue of fairness as a formal value is further explored in the next two chapters.

CHAPTER 6 - PROCEDURAL FAIRNESS

Introduction

In Chapters 2 to 5 I have analysed the impact of a criminal history on teachers with reference to the actions that can be taken by the accrediting body, the VIT, where the criminal history is regarded as indicating that the teacher is not 'fit to teach'. This discussion has raised questions about the fairness/appropriateness of removing registration when a teacher is found not 'fit to teach' because of a criminal history. Issues are raised such as the relevance of the criminal history, and of the particular offences, to the teacher's fitness for their profession, and about competing narrow and broad interpretations of the teaching role.

Chapters 6 and 7 consider the fairness of these proceedings in more detail. Chapter 6 focuses on matters of procedure while Chapter 7 is concerned with matters of substance.

The issue of procedural fairness is an important one not only because it is a requirement of administrative law but also because it is feature of good regulation. Fair procedure matters from a regulatory perspective because it affects the legitimacy of decision-making and assists in achieving compliance. As explained by Tom Tyler, in positing and defending what he describes as a 'process-based model of regulation', ensuring legitimacy addresses two key concerns underlying effective regulation - the ability to gain immediate and long-term compliance with decisions and the ability to encourage general compliance.[603] Tyler's research suggests that both of these concerns are influenced strongly by people's subjective judgments of procedural fairness.[604] He also concludes that the key procedural elements which will generally be viewed as fair are that the decision-making is viewed 'as being neutral, consistent, rule-based, and without bias; that people are treated with dignity and respect and their rights are acknowledged; and that they have an opportunity to participate in the situation by explaining their perspective and indicating their views about how problems should be resolved'.[605]

[603] Tom Tyler 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) 30 *Crime and Justice* 283, 283-4.
[604] Ibid, p 301.
[605] Ibid, pp 300-301.

The requirement to apply fair procedures is important not just because this is required by law but also because it is an important aspect of good governance. These derive from two different sets of arguments, instrumental and non-instrumental.

The instrumental arguments arise from the nexus between procedural and substantive outcomes and the fact that fair procedures aid good decision-making. This has been explained as follows by Heydon J:

> Experience teaches that commonly one story is good only until another is told. Where a judge hears one side but not the other before deciding, even if the side heard acts in the utmost good faith and makes full disclosure of all that that side sees as relevant, there may be considerations which that side had not entertained and facts which that side did not know which, if brought to the attention of the judge, would cause a difference in the outcome.[606]

In a similar vein, Megarry J has commented that:

> [T]the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'[607]

So fair procedures are essential for good and effective decision-making.

More broadly, non-instrumental justifications identified are that a fair process 'supports the rule of law by promoting public confidence in official decision-making' and that it 'gives due respect to the dignity of individuals',[608] and respects human dignity and individuality[609] These parallel insights from extensive work in organisational theory demonstrate the importance of fairness to good regulation.

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[606] *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 (12 November 2009) per Heydon J at [143].
[607] *John v Rees* [1970] Ch 345 at 402.
[608] Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice? 'Sir Anthony Mason Lecture, The University of Melbourne Law School Law Students' Society 7 October 2010 at p 23.
[609] *International Finance Trust Company Limited v New South Wales Crime Commission* [2009] HCA 49 at [144] per Heydon J.

As noted by Lind et al, 'A substantial research literature shows that people's judgments of how fair an organization is play an important role in organizational decisions, behaviour, and attitudes'.[610]

Procedural fairness also promotes trust. As noted by Freiberg, '[t]rust sits at the first level of regulation because it is a positive, unlimited and efficient resource'.[611] Trust is central to the legitimacy of a regulatory scheme, and also to its effectiveness in regulating behaviour and achieving willing compliance. Procedural justice research has repeatedly found that involving people in the process leading up to a decision, and treating them with trust, fairness and respect, means that they will be more likely to comply with the decision made, even if they do not agree with it.[612] Research into procedural fairness from other disciplines confirms that it can provide positive attitudes on the part of those who are the subject of administrative decisions when procedural fairness principles apply.[613]

The so called fair process effect has been described by van den Bos[614] as

> the positive effect that people's procedural fairness perceptions have on their subsequent reactions (such as satisfaction with outcomes received, acceptance of decisions made by supervisors, protest behaviour, and many other important dependent variables). The fair process effect is arguably the most replicated and robust finding in the literature on organizational justice and one of the most frequently observed phenomena and among the basic principles in the organizational behaviour and management literature.[615]

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[610] Allan Lind, Carol Kulik, Maureen Ambrose and Maria de Vera Park 'Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic' (1993) 38 *Administrative Science Quarterly* 224.
[611] *The Tools of Regulation* (Sydney: Federation Press, 2010), pp 13-16.
[612] Kristina Murphy and Tom Tyler 'Procedural Justice and Compliance Behaviour: Mediating Role of Emotions' (2008) 38 (4) *European Journal of Social Psychology* 652 cited in Freiberg, op cit, p 77.
[613] Constantine Sekikides, Claire Hart and David De Cremer, 'The Self in Procedural Fairness' (2008) 2 *Social and Personality' Psychology Compass* 2107-2124; TRS Allan 'Review of Procedural Fairness and the Duty of Respect Due Process and Fair Procedures: A Study of Administrative Procedures by D J Galligan' (1998) 18 *Oxford Journal of Legal Studies* 497-515; Chief Justice Robert French, 'Procedural Fairness - Indispensable to Justice?' Sir Anthony Mason Lecture, The University of Melbourne Law School Law Students Society, 7 October 2010; Emily Bianchi and Joel Brockner, 'In the Eyes of the Beholder? The Role of Dispositional Trust in Judgements of Procedural Fairness' (2012) 118 *Organisational Behaviour and Human Decision Processes* 1.
[614] Kees van den Bos 'What Is Responsible for the Fair Process Effect?' in Jerald Greenberg and Jason Colquit (Eds), *Handbook of Organizational Justice* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2005) p 274.
[615] Ibid.

He further comments belief that one has received fair treatment from social authorities enhances acceptance of legal decisions and, significantly from the perspective of this thesis, obedience to laws.[616]

This chapter is concerned with the fairness of the procedures used by VIT hearing panels in their decision-making concerning teachers with criminal conviction. It considers the content and scope of the legal obligations of formal hearing panels to comply with procedural fairness and also broader aspects of procedural fairness that arise from the regulatory theory and why it is an important aspect of good governance. It uses the reported decisions of hearing panels to assess procedural compliance and highlights specific departures.

It should be noted that the provision of reasons is not currently viewed as a core feature of natural justice at common law[617] but it also contributes to the legitimacy of decision-making as it sheds light on how decisions are made, and also contributes to fairness by providing a basis for review if a decision has been made incorrectly. It is a positive feature of the VIT process that formal panel hearings provide written reasons for their decision-making and that these are made publicly available. The fact they do so has made it possible to undertake this research.

The legal obligations of hearing panels to accord procedural fairness

Procedural fairness is an important issue for administrative tribunals, including the formal hearing panels of the VIT. Matters of procedure are distinct from matters of substance, which are discussed in the next chapter but are equally important to the fairness of the decision-making process. Failure to comply with them may also have legal consequences.

The legal obligations of formal hearing panels to accord procedural fairness derive from three different sources; specific procedural requirements in the ETRA, obligations arising from administrative law and the duty to accord natural justice, and the right to a fair hearing in s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These obligations are closely interrelated. As discussed below, the ETRA sets out some specific procedural

[616] Ibid, citing Tom Tyler, *Why do people obey the law? Procedural justice, legitimacy, and compliance* (New Haven, CT: Yale University Press, 1990).
[617] *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

requirements concerning matters such as notice and the right to a legal representative that would otherwise be dealt with by natural justice requirements. It also specifies the VIT formal hearing panels have a duty to accord natural justice. The requirements in s 24 of the Charter derive from international human rights law but also overlap with natural justice requirements (for example, in relation to the effect of undue delay).

The ETRA

The ETRA leaves many aspects of the procedures of VIT panel hearings to be determined by the VIT itself, but it does contain some specific procedural requirements. These differ as between informal hearing panels and other panels. A key difference is that there is no right to legal representation in the case of informal hearings: the teacher who is the subject of the hearing is entitled to be present, to make submissions and to be accompanied by another person but is not entitled to be represented.[618] In contrast, a teacher who is the subject of a formal hearing is entitled to be present, to make submissions and to be represented.[619] This difference is explicable because there is less at stake in the case of an informal hearing panel as it lacks the power to suspend or cancel a teacher's registration;[620] if it decides that the sanctions available to it are insufficient it may instead refer the teacher to a formal hearing.[621] The right to legal representation is an important aspect of procedural fairness, as discussed below.

If the VIT decides to hold a formal hearing (or a matter has been referred to a formal hearing by an informal hearing panel or medical panel), the VIT must serve a notice of formal hearing on the teacher by post.[622] This notice must state the nature of the hearing and the complaint or allegations made against the teacher, give the time and place of the hearing and state that there is a right to make submissions and to be represented, that the hearing is open to the public, list the possible findings the panel can make and state that there is a right to apply for a review of the panel's determinations.[623] Curiously, however, considering the significance of what is at stake and the amount of time that might be required for a teacher to

[618] ETRA, s 2.6.38.
[619] ETRA, s 2.6.45(b).
[620] ETRA, s 2.6.40(1A).
[621] ETRA, s 2.6.40(2).
[622] ETRA, s 2.6.42.
[623] ETRA, s 2.6.44.

prepare their case, the Act does not specify any minimum notice period between notification and hearing, a point that will be considered further below.

The ETRA also states that a formal hearing panel must hear and determine the matter before it[624] and that the teacher who is the subject of the hearing is entitled to be present, to make submissions and to be represented.[625] If the hearing arises from a complaint, the complainant is also entitled to be present, and if he or she is not called as a witness is entitled to make submissions with the permission of the panel. The requirement to hold a hearing (ie in person and with the parties present) is an important procedural safeguard; it exists in most of the other Australian teacher registration laws although notably absent in Tasmania.

It should be noted that the ETRA refers to the right to be represented rather than a right to be legally represented. As discussed below, this is applied flexibly by the VIT, which allows for legal representation as well as representation by others (ie it is up to the teacher as to who they would like to represent them). The right to legal representation is important given that a teacher's livelihood is at stake, although as discussed below what is equally important is that representation may in reality be unavailable having regard to the fact that teachers may already be unemployed when their hearings take place, in which case the cost of representation may be a hurdle.

The ETRA also specifies certain other aspects of procedure to be followed at formal hearing panels. It requires that the proceedings must be conducted with as little formality and technicality as the requirements of the Act and the proper consideration of the matter permit[626] and that a hearing panel is not bound by rules of evidence but may inform itself in any way it thinks fit.[627] These requirements are reasonably typical for administrative tribunals of this type.[628] As noted by Justice Kerr, 'most of the statutory provisions that empower modern tribunals emphasise the importance of their accessibility, informality and procedural

[624] ETRA, s 2.6.45(a).
[625] ETRA, s 2.6.45(b).
[626] ETRA, s 2.6.48(b).
[627] ETRA, s 2.6.48(c).
[628] This is made clear, for example in the Australian Administrative Review Council's guide for tribunal members: ARC, *A Guide to Standards of Conduct for Tribunal Members* (revised 2009) pp 18-34 accessed at <http://www.arc.ag.gov.au/Documents/GuidetoStdsofConduct-RevisedAug2009.pdf>.

and evidentiary flexibility'.[629] These attributes are important in the case of the VIT formal hearing panels given the large proportion of teachers who are unrepresented.

Kerr contends that requirements of this type require that the admissibility of 'evidence' should be determined exclusively by the 'limits of relevance' rather than 'the interstices of the rules of evidence'.[630] He further conceives of this process as 'freedom to take into account all of the relevant testimony, materials and circumstances known to it removed from the strictures of the rules of evidence. However, that freedom is not at large. It is a freedom to be fair'.[631] In his view this means that if a tribunal that is not bound by the rules of evidence nonetheless requires, or considers requiring, compliance with formalities limiting the presentation of otherwise relevant materials, 'procedural fairness requires that that tribunal makes those circumstances known, either by well publicised general practice directions or by notice to the parties'.[632] There is no indication in the reported decisions analysed or elsewhere that the VIT formal hearing panels have required compliance with any such formalities.

Finally, the ETRA also prescribes requirements relating to openness and secrecy. The starting point is that panel hearings should usually be open but it contains provision for a panel to make a determination that 'the proceedings should be closed because the hearing is taking evidence of intimate, personal or financial matters'.[633] In terms of secrecy it forbids the publication or broadcasting of any information that might enable a complainant to be identified[634] and gives panels discretion to make determinations which offer similar protections to any witness who gives evidence.[635] Panels also have discretion to preclude the publication or broadcast of:

- any information that might enable the teacher who is the subject of the hearing to be identified prior to the making of the final determination; and

[629] The Hon Justice Duncan Kerr 'A freedom to be fair' (Paper presented to Excellence in Government Decision-Making: An AGS Symposium, Canberra, 20-21 June 2013), p 4, accessed at <http://www.aat.gov.au/Publications/SpeechesAndPapers/Kerr/pdf/FreedomToBeFair21Jun2013.pdf>.
[630] Ibid, p 6.
[631] Ibid, p 7.
[632] Ibid.
[633] ETRA, s 2.6.45(c).
[634] ETRA, s 2.6.45(d).
[635] ETRA, s 2.6.45(e).

- any evidence given before it and the content of any document produced to it during the hearing where it considers it necessary to do so to avoid prejudicing the administration of justice or for any other reason in the interests of justice.[636]

Other aspects of procedure are left to the discretion of the panels,[637] subject to an important proviso that they are bound by the rules of natural justice.[638]

The requirements of natural justice will now be considered.

Administrative law requirements for natural justice

Natural justice or procedural fairness is an important aspect of administrative law and is essentially concerned with ensuring justice. As stated by Justice French, as he then was:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.[639]

Duties to comply with natural justice were initially narrow in their application. As noted by Groves, they began to apply more generally to administrative decision-making when the principles limiting their application to decision- makers who were obliged to act judicially were cast aside.[640]

A key development was the decision of the High Court in *Kioa v West* in which Mason J held the law had reached that:

> a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[641]

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[636] ETRA, s 2.6.45(f) and (g).
[637] ETRA, s 2.6.48(a).
[638] ETRA, s 2.6.48(d).
[639] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37].
[640] Matthew Groves 'Exclusion of the Rules of Natural Justice' (2013*) 39 Monash University Law Review* 285, 286-287 citing *Ridge .v Baldwin* [1964] AC 40, and noting that this case was followed by the High Court in *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.
[641] *Kioa v Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550, 584.

More recently, the High Court has commented that:

> … 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interest may be adversely affected by the exercise of that power.[642]

It follows therefore that, unless excluded, the rules of natural justice regulate the exercise of a statutory power to adversely affect a person's rights or interests.[643]

These rules are essentially logical, having regard to their key purpose which is to provide a procedural context for fair decision-making. However, the fact that claims for breach of natural justice make up a substantial portion of applications for judicial review in Victoria and that a significant proportion are successful suggest that this is not sufficiently understood by decision-makers.[644]

The modern rationale for the principle of natural justice is said to rest on three bases, fairness, the rule of law and good administration. Firstly, it promotes fairness to the individual affected who must be given appropriate opportunity to have their side of the case heard by an unbiased decision-maker before a decision is made. Secondly, it promotes the rule of law by offering protection from the arbitrary exercise of power-the requirement for a fair process is said to ensure a more transparent, equal and certain decision-making regime. Thirdly, it promotes good administration, in that decisions are carefully made, after all aspects and sides of the issue have been properly and impartially considered, meaning that decisions are likely to be better, wiser and less contested.[645] In that sense it promotes similar objectives to those

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[642] *Plaintiff S10/2011* 243 CLR 319, 352 [74]. There is a useful discussion of the significance of this case in Groves, op cit, 291-293.
[643] Chief Justice Robert French, 'Administrative law in Australia: Themes and values revisited' in Matthew Groves (ed), *Modern Administrative Law in Australia, concepts and context* (Cambridge: Cambridge University Press, 2013) p 46.
[644] A study of 164 judicial review decisions by the Trial Division of the Victorian Supreme Court and the Victorian Court of Appeal for the years spanning 2007 and 2008, found that breach of the fair hearing rule was raised in 52 cases and was the claim was successful in 16 (31%) and that breach of the bias rule was raised in 11 cases and successful in 4 (36%): see Justice Emilios Kyrou, 'VCAT's Natural Justice Obligations', (Paper delivered to the VCAT on 23 June 2010).
[645] Michael Head, *Administrative Law, Context and Critique* (Sydney: The Federation Press, Third Edition, 2012) p 189.

that underlie regulatory theory, ie to promote legitimacy of decision-making and encourage compliance.

Natural justice is a common law concept that has evolved over time and continues to evolve. It consists of two key pillars - the hearing rule and the bias rule.

The first pillar: the hearing rule

The first pillar of natural justice is the hearing rule. This rule is a flexible one but is based on a single essential proposition that 'one essential is that the person concerned should have a reasonable opportunity of presenting his case'. This has been summarised as having the following core requirements:

- prior notice that a decision will be made;
- disclosure of an outline or the substance of the information on which the decision;
- is proposed to be based (that is, a summary of the case that has to be met); and
- an opportunity to comment on that information, and to present the individual's own case.[646]

As stated by Justice Kyrou, the fair hearing rule requires the adjudicating body to provide the parties before it a reasonable opportunity to present their cases and to answer any allegations against them.[647]

The hearing rule affects many procedural aspects of decision-making. These include the amount of notice that must be given to enable him or her to prepare a case, including what information must be provided to the individual to give them adequate notice, the conduct of any investigations relevant to the decision, the amount of delay in decision-making that is acceptable, the circumstances in which a hearing should be adjourned, whether oral hearing is required and whether or not the individual should be entitled to legal representation.

[646] Linda Pearson, 'Procedural fairness: The hearing rule' in Matthew Groves, *Australian Administrative Law Fundamentals, Principles and Doctrines* (Cambridge University Press, 1997) pp 272-273, citing Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (Chatswood, NSW: LexisNexis Butterworths, 2005) 572.
[647] Kyrou, op cit, p 1.

The hearing rule is based on the procedures used by courts, but it applies also to administrative decision-makers. There are two questions to be answered: first, whether natural justice is required, and then, if so, second, what natural justice means in practice in the particular circumstances. A duty to comply with it will be implied in circumstances where a decision affects individuals' rights or legitimate expectation. It is clearly relevant in the context of VIT decision-making as it affects a teacher's right to work, and this is reflected in s 2.6.48(d) of the ETRA.

Some recognised situations where an individual has legitimate expectations that bring into play the requirement for a fair hearing, of relevance to teachers and the VIT, are as follows.

Undertakings by the decision-maker; if a decision-maker informs a person affected that he or she will hear further argument upon a certain point, and then fairness will generally require that the person should be given an opportunity to be heard in relation to any further arguments on that point.[648]

Prior acts or conduct by the decision-maker; prior acts of a sustained nature (for example renewal of a licence on several occasions) and long standing practices by administrators may give rise to legitimate expectations that they will be continue in the future.[649] If so, there will be a requirement to provide an individual the opportunity to make relevant submissions before a decision is made.[650]

Dismissals from office; There is now considerable authority showing that a person cannot be subject to disciplinary action or removed from their employment or expelled from their club or society without a hearing. In *Annetts v Mc Cann*[651] the High Court stated that it can now be taken as settled that the rules of natural justice regulate the exercise of a power to dismiss a public official 'unless they are excluded by plain words of necessary intendment'.[652]

[648] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 (2003) 214 CLR 1, 12-13, per Gleeson J.
[649] Head, op cit, p 200.
[650] Ibid, 200, citing *Kioa v Minister for Immigration and Ethnic Affairs* (1985) CLR 550.
[651] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and Mc Hugh JJ.
[652] Ibid.

Decisions affecting reputation; In *Annetts v Mc Cann*,[653] the High Court made it clear that the rules of procedural fairness will apply generally to investigations where reputation is at stake and where a person's reputation might be adversely affected by a report.[654]

However, the obligation to comply with the hearing rules is not confined to these situations. In the case of teachers there is clearly a right affected in the case of formal hearings to determine fitness to teach - the right to continue to be registered (and to be able to earn a livelihood as a teacher).

The rules of natural justice are applicable to the exercise of statutory powers. They may be displaced by specific statutory requirements, but the courts will try and interpret them as far as possible in a way which is consistent with natural justice. In the case of the ETRA there is no direct displacement of natural justice except to the extent that it establishes or requires procedures that would otherwise be contrary to it, and there is in fact the express statement that natural justice is applicable. The issue of displacement is discussed further below in relation to the rule against bias.

The second issue however is, what specifically is required to comply with natural justice. This is determined by the context of the decision, and will 'depend on all of the circumstances of the case.'[655] The requirements of natural justice derive from rules applicable to courts. They do not necessarily require administrative bodies to use court-like procedures, but they are more likely to do so where there is some substantial right or interest at stake. As the potential for loss of livelihood involves a substantial right or interest, it is arguable that the procedures required of the VIT should be at the more protective end of the spectrum.

The nature of what is required is also affected by the statutory context for the decision-making. As stated by Brennan J in *National Companies and Securities Commission v News Corporation Ltd*:

> The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are

[653] (1990) 170 CLR 596, [4].
[654] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.
[655] Justice Emilios Kyrou, *VCAT'S Natural Justice Obligations* (Paper delivered to the VCAT on 23 June 2010) p 3.

> material factors in determining what must be done to satisfy the requirements of natural justice.[656]

Kyrou argues (in the context of VCAT decision-making) that in a typical case, compliance with the fair hearing rule will be achieved as a matter of course due to the standard procedures that are followed by a tribunal. It is arguable that the procedural obligations of the VIT are not dissimilar to those of the VCAT given what is in issue (ie a teacher's livelihood).[657] It follows therefore in the context of a VIT hearing that if a teacher is given adequate notice about the matter to be heard and the opportunity to present evidence and to make submissions in relation to it, this would ordinarily satisfy the fair hearing rule. However, there may be cases where something more is required. For example, where the teacher is challenging a professional misconduct allegation, it may be a breach of the fair hearing rule to require the teacher to give evidence first.[658]

Recent examples of VCAT decisions that were held to involve breaches of the hearing rule include:

- An order summarily dismissing the application for review on the ground that a ground had not been raised by the respondent and without giving prior notice to the applicant that it proposed to rely on that ground.[659]
- A decision made in a context where a party was not given prior notice by the VCAT of its intention to rely on a particular ground for summary dismissal in a discrimination case.[660]
- A decision in which the VCAT based its decision on its own case management directions rather than the correct test, namely whether the evidence of the new witness was relevant and, if the evidence was relevant, whether it could be received without causing irremediable prejudice to the other party.[661]

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[656] *National Companies and Securities Commission v The News Corporation Ltd* (1984) 156 CLR 296, 326.
[657] The *Victorian Civil and Administrative Appeals Tribunal Act 1998* (Vic) contains statutory procedural requirements which are not exactly identical to those that apply in respect of formal hearing under the ETRA. However, Kyrou J's comments are directed at the common law elements, rather that statutory procedural requirements.
[658] Ibid, p 3.
[659] *Towie v Victoria* (2008) 19 VR 640.
[660] *Victoria v Turner* [2009] VSC 66.
[661] *CGU Insurance Ltd v C W Fallaw & Associates Pty Ltd* [2008] VSC 197.

- A decision in which the applicant was prevented from tendering relevant documents and its key witness from giving evidence about relevant matters.[662]

These decisions arguably offer guidance to decision-makers with significant power to affect livelihood, such as the VIT.

Other ways in which the fair hearing rule can be infringed are where a decision-maker engages in private, undisclosed research that extends beyond traditional sources such as dictionaries, statutes and case law. This might be relevant to decision-making in relation to individuals with criminal records as it is now very easy to perform internet searches. However, it does not necessarily follow that acquiring information from other sources (such an internet search) will breach procedural fairness; it will not if it is disclosed to the parties so they have an opportunity to present arguments in relation to it.[663]

Decisions refusing adjournments are often impugned on the ground that the fair hearing rule has been contravened.[664] Granting adjournments where appropriate enhances fairness by ensuring that the real issues in dispute can be agitated properly and that the parties have sufficient time to prepare for the hearing. However, as noted by French J, timeliness of decision-making is also important.[665] This issue is relevant to the decision-making of VIT hearing panels as they have discretion to grant adjournments. The issue of adjournments is discussed further below.

The second pillar: the rule against bias

The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind which is free from pre-judgement and prejudice.[666] In other words, it requires an adjudicating body to be impartial.[667] The object of the rule against bias is to try and ensure that a decision-maker 'fairly hears' the person affected by a decision.[668]

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[662] *Leon Holdings Pty Ltd v O Donnell* [2009] VSCA 430, [89]-[91].
[663] *Weinstein v Medical Practitioners' Board of Victoria* [2008] VSCA157, [9].
[664] Kyrou, op cit, p 5.
[665] *Aon Risk Services v Australian. National University* (2009) 239 CLR 175, 182 [5].
[666] Matthew Groves, 'The Rule Against Bias' (2009) 10 *Monash University Law Review* 1.
[667] Kyrou, op cit, p 2.
[668] McKenzie, op cit, p 115.

The principle upon which the bias rule has been founded in modern times may be traced to the famous statement of Lord Hewart that: 'Justice should not only be done, but be seen to be done'.[669] The High Court has defined bias, whether actual or apparent, as an absence of impartiality but has noted that bias may not be an adequate term to describe all cases of the absence of independence.[670] Underlying this reasoning is the idea that impartiality is a concept generally directed to specific instances of decision-making, whereas independence is an institutional concept that governs the wider structures within which decision-makers act.[671] As with the hearing rule, the rule against bias has expanded to become a rule of almost universal application to administrative decision-makers,[672] and is clearly applicable to the hearing panels of the VIT.

However, in applying this rule the courts have stressed it must take account of the particular features of the decision-maker and wider environment to which the rule is applied.[673] As explained by the Supreme Court in Canada, the contextual nature of the duty of impartiality enables it to vary to reflect the context of a decision-makers activities and the nature of its functions.[674] In the case of the ETRA, formal hearing panels are appointed by the Governor in Council from a pool of people who consist of registered teachers, lawyers who have been admitted to legal practice in Victoria for not less than 5 years and current or former members of the VIT Council.[675] (The available pool also includes individuals with expertise in the health and community services fields but formal hearing panels generally consist of individuals who are teachers, lawyers and/or current and former VIT council members). It would seem that these groups have been identified as most likely to have the required expertise to decide the issues that come before such panels, including issues of fitness to teach.

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[669] *R v Sussex Justices Ex P Mc Carthy* [1924] 1 KB 256 at 259, cited in Groves, 'The Rule Against Bias', p 2.
[670] *Ebner v Official Trustee* [2000] HCA 63; (2000) CLR 337 at 348.
[671] Groves, 'The Rule Against Bias', p 3.
[672] Michael Head, *Administrative Law* (Sydney: Federation Press, 2012) p 188.
[673] Groves, 'The Rule Against Bias', p 1.
[674] *Imperial Oil Ltd v Quebec (Minister for Environment)* (2003) 231 DLR (4th) 477, cited in Groves op cit, at fn 13.
[675] ETRA, s 2.6.35F.

There are two types of bias that can infringe the bias rule: actual bias and apprehended bias. Cases involving actual bias are seldom litigated as it involves proving that the decision-maker actually failed to decide the matter impartially, which is generally hard to establish. Apprehended bias describes a situation where 'a fair minded lay observer might reasonably apprehend that the adjudicating body might not bring an impartial mind to the resolution of the question the body is required to decide'.[676] The test for apprehended bias is based on 'reasonable apprehension on the part of a fair minded and informed observer'.[677]

Much argument continues concerning the scope of 'apprehended bias', but it is generally not regarded as inappropriate for decision-makers to have their own perspectives on matters relevant to their decision-making role. As pointed out by Groves, the individual perspectives of the triers of fact will be properly influenced in their deliberations by their perspective on the world in which the events in dispute took place.[678] Likewise, there is acceptance that judges must rely on their background knowledge in fulfilling their adjudicative function.[679] It follows it is not contrary to the bias rule for members of VIT hearing panels to take into account matters based on their own background knowledge and experience.

This has been further explained as follows by the Canadian Judicial Council:

> [T]here is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experiences would probably lack the very qualities of humanity required of a judge…true impartiality does not require that a judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind'[680]

Four categories identified by the High Court in *Webb v R*[681] as supporting a finding of apprehended bias provide a convenient frame of reference:

[676] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].
[677] *Webb v R* (1994) 181 CLR 41cited in Groves, 'The Rule Against Bias', at p 496.
[678] Ibid , p 511.
[679] *RDS v R* (1997) 151 DLR (4th) 39.
[680] Canadian Judicial Council, *Commentaries on Judicial Conduct*, (Cowansville, Quebec, 1991) p 12.
[681] *Webb v R* (1994) 181 CLR 41.

- Cases where a decision-maker has some direct or indirect interest in the proceedings, whether pecuniary or otherwise, that gives rise to a reasonable apprehension of prejudice, partiality or prejudgement.
- Disqualification by conduct, including published statements that are made in cases where that conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias.
- Disqualification by association, direct or indirect.
- Disqualification by extraneous information (for example, where a judge is disqualified by reason of having heard some earlier case[682] or where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias).[683]

It should be noted that in the case of the first category a disqualifying interest need not be a personal one- it may also be work-related. This has been identified as an issue in relation to VIT Chairpersons, and other Council members given that part of their role is to promote the profession and that this may affect their impartiality in cases involving teachers with criminal convictions. This issue is discussed further below. The other categories are all potentially applicable but are not such that they are likely to be apparent when analysing reported decisions (unless they are specifically raised by or on behalf of teachers).

In its landmark decision in *Ebner v Official Trustee in Bankruptcy*[684] the High Court laid down a method of applying the apprehension of bias principle involving two steps:

> First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[685]

[682] *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Australian National Industries v Spedley Securities* (1992) 26 NSMLE 411.
[683] *Webb v R* [(1994) 181 CLR 41, [12].
[684] (2000) 205 CLR 337.
[685] Ibid at 345 [8] per Gleeson CJ, McHugh, Gummow and Hayne JJ. This rule is analysed in Matthew Groves, 'Public Statements by Judges and the Bias Rule' *(*2009) 40 *Monash University Law Review* 115, 119-121.

Morris J has argued that, recent decisions have shown the practical virtues of disclosure in circumstances of any doubt. In determining any objection a court or tribunal should apply a method that requires there to be some logical connection between the alleged disqualifying matter and an ability to impartially determine the proceeding.[686]

In providing advice to VCAT members, who may be members of appeals from the VIT, Kyrou refers to the decision of the High Court in *Ebner* and points out that apprehended bias can arise in many different circumstances. These include, for example, where:

a. the adjudicator is closely acquainted with one of the parties or a key witness for one of the parties in a case where credit is important;
b. the adjudicator expresses opinions, prior to hearing the evidence, which shows that he or she has prejudiced vital issues;
c. the adjudicator does not treat the parties equally on issues such as the admissibility of evidence; and
d. in the course of the proceeding, the adjudicator communicates with one of the parties or a witness for one of the parties without the knowledge of the other party.[687]

It is important to note that a reasonable apprehension of bias may arise even where the ultimate decision is clearly fair and well- reasoned. For example, in *Rustomn v Ismail*[688] the Victorian Supreme Court was required to consider a claim of bias made against a member of the VCAT in the context of a decision in the Domestic Building list. That member had previously made a prior decision in a proceeding brought by the builder against a different owner and had made adverse findings in respect of the builder's credibility. It held that the tribunal member should have disqualified herself. In the view of the Supreme Court a fair minded observer would have retained a reasonable apprehension of bias notwithstanding that the hearing was fair and the reasons for decision well written.[689]

It follows therefore in relation to the analysis of VIT decisions that there may be breaches of the bias rule even where those decisions appear to be fair and well-reasoned.

[686] Morris, Justice Stuart, Apprehension of Bias (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, 14 September 2006).
[687] Kyrou, op cit, p 5.
[688] [2009] VSC 625.
[689] Ibid, [32].

The Victorian Charter

The Charter of Human Rights and Responsibilities Act also includes a right to a fair hearing. Section 24 provides that:

> A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding determined by a competent, independent and impartial court or tribunal after a fair and public hearing.

This right may be subject to reasonable limits as specified in the general limitation power in s 7(2), which provides that all the rights protected in the Charter may be subject 'to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. It also states that the following factors are to be balanced when assessing the issue of the reasonableness of any such limitation placed on a right:

> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relationship between the limitation and its purpose; and
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Victorian Charter requires all statutory provisions to be interpreted in a way that is compatible with human rights, including the right to a fair hearing, 'so far as it is possible to do so consistently with their purpose'.[690] In addition, s 38 states that it is unlawful for a 'public authority' to act 'in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'. However, there is an exception if the public authority could not reasonably have acted differently or made a different decision as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law.[691]

The definition of 'public authority' in s 4 includes an entity established by a statutory provision that has functions of a public nature.[692] It also contains an inclusive list of factors

[690] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).
[691] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(2).
[692] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(b).

that may be taken into account in determining whether a function is of a public nature; these include that the function is conferred on the entity by or under a statutory provision and that the function is of a regulatory nature.[693]

It is arguable the VIT falls within the definition of a 'public authority' as it is an entity established by a statutory provision that has functions of a public nature.[694] The factors specified as relevant in determining whether a function is of a public nature include that the function is conferred on the entity by or under a statutory provision[695] and the function is of a regulatory nature.[696]

If a VIT hearing panel breaches s 24 this does not give rise to any remedy per se. However, s 39(1) provides that:

> If otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter. Section 39(2) further clarifies that if a person is entitled to seek judicial review, for example on the grounds of breach of natural justice, they can also argue that the decision is unlawful on the basis that it breaches s 38.

In Applying s 24 the courts can look at the parallel international jurisprudence under the ICCPR. The human right in s 24 is based on the right in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory. This states inter alia:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The ICCPR as an external treaty is not directly enforceable in Australia unless its terms are given effect to in domestic law. As discussed in Chapter 1, the ICPR is appended to the Australian Human Rights Act, giving the Australian Human Rights Commission jurisdiction

[693] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(2)(a) and (c).
[694] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(1)(b).
[695] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(2)(2)(a).
[696] *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 4(2)(2)(c).

in relation to it (but without creating binding rights under Australian law). The Commission has power to inquire into any act or practice that may be inconsistent with or contrary to any of the rights in the ICCPR but its powers are limited to attempting to conciliate and making a report to the Minister.

However, persons who have exhausted their options to have their complaints heard in Australia may be able to take their complaint to the United Nations Human Rights Committee. This United Nations committee is established under Art 40(4) of the ICCPR and is responsible for making general comments on the operation of the Convention, as well as having power to determine communications (ie complaints) from individuals about alleged violations of any of the rights in the ICCPR.

The Human Rights Committee has limited powers to express its views and to recommend remedies for any breaches that it finds. For example, in *Toonen v Australia*[697] Mr Toonen challenged two provisions of the Tasmanian Criminal Code which criminalised consensual private homosexual activities between adults. The Human Rights Committee concluded that these laws breached the applicant's right to privacy and recommended their repeal. This recommendation was accepted by the Australian Government and implemented via the enactment of the *Human Rights (Sexual Conduct) Act 1994* (Cth). The Human Rights Committee publishes its interpretation of the provisions of the ICCPR in the form of 'general comments'.

It follows that when interpreting s 24 of the Charter of Human Rights and Responsibilities Act, it is relevant to consider how the relevant part of Art 14(1) of the ICCPR has been interpreted. This international jurisprudence makes it clear that the right extends to administrative proceedings and therefore to decisions of VIT hearing panels.

A key document which sheds light on this is General Comment 32 of the Human Rights Committee. General Comment 32 makes it clear that Art 14(1) applies to administrative proceedings and refers to determining 'rights and obligations pertaining to the areas of contract, property and torts' and to equivalent notions in administrative law.

[697] Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992.

The Human Rights Committee has also stated in *Yves Morael v. France* that:

> Art. 14(1) applies not only to criminal matters but also to litigation concerning rights and obligations of a civil nature.[698]

In *Kracke v Mental Health Review Board*[699] the VCAT commented that the expression 'civil proceeding' in s 24 of the Charter of Human Rights Act was 'perfectly apt to describe proceedings of an administrative character in a statutory board or tribunal' and that s 24 could therefore 'cover civil proceedings which are of an administrative character' (for example, those of the Mental Health Review Board and the VCAT).[700]

What does this tell us about the content of a 'fair hearing'? Insofar at the content of the right to a fair hearing under s 14(1) is concerned, the Human Rights Committee has commented that:

> Although article 14 does not explain what is meant by a 'fair hearing' in a suit at law the Covenant should be interpreted as requiring a number of conditions, such as equality of arms, respect for the principle of adversary proceedings, preclusion of ex officio reformatio in pejus, and expeditious procedure.[701]

The first two concepts are similar in nature to the natural justice opportunity to be heard. The requirement of 'equality of arms' has been described as requiring that 'both sides shall have the same (and adequate) opportunity to make comments during the court procedure and none of the sides can be favoured over the other'.[702] It has been interpreted by the UN Human Rights Committee as demanding that 'each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[703] The principle of adversary proceedings applies to civil proceedings, and demands 'inter alia that each side be given the opportunity to contest all the arguments and evidence adduced by the other party'.[704] This right in s 24 was considered by the VCAT in *Smeaton v Victorian WorkCover Authority (General)*[705] in

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[698] *Morael v France*, Human Rights Committee, Communication No. 207/1986, UN Doc Supp No 40 (A/44/40) at 210 (1989).
[699] [2009] VCAT 646.
[700] [2009] VCAT 646, [418].
[701] Communication No. 207/1986, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989) at [9.3].
[702] Herke Csongor and Tóth Csenge, 'The prohibition of reformatio in peius in the light of the principle of fair procedure' (2013) 3 *International Journal of Business and Social Research* 92, 97.
[703] CCPR/C/GC/32 p 4.
[704] Human Rights Committee, *General Comment No 32*, 23 August 2007, [13].
[705] [2009] VCAT 1195.

relation to its own duty in relation to an unrepresented litigant. Measures that the Tribunal mentioned it had taken to ensure that the unrepresented litigant had a fair hearing included making an opening statement explaining the procedures to be followed and the main issues in the cases 'in terms appropriate to the nature of the case and his level of understanding', bringing his attention the relevant factual and legal issues assisting him to articulate responses to them, directing him away from irrelevant submissions and towards relevant submissions and explaining the difference and where appropriate, asking him questions so that he could fill in some gaps, or elaborate on, the factual circumstances of his case. It also mentioned referring him to pro bono lawyers so he could obtain assistance in relation to some important legal issues.[706]

Finally, the requirement for expeditious procedure reflects the need to avoid unacceptable delay. The Human Rights Committee has commented that it is an 'important aspect of the fairness of a hearing' and that 'delays in civil proceedings that cannot be justified by the complexity of the case or the behaviour of the parties detract from the principle of a fair hearing'.[707] This issue has also been considered by the VCAT in the context of s 24 of the Charter of Human Rights and Responsibilities Act. It commented that what amounts to unreasonable delay must be determined by the circumstances and that:

> Once a certain threshold is reached, delay must be justified. There is no formula for determining what unreasonable delay is. Each case has to be considered according to its circumstances. The general considerations are the nature of the case (including its complexity) and the behaviour of the parties. What is at stake for the applicant is an important consideration. The interests which the right to a fair hearing protects in the particular case should be identified and considered.[708]

In summary: teachers facing a hearing by the VIT are entitled to a fair hearing as required under the ETRA, the common law rules relating to natural justice and s 24 of the Victorian Charter of Human Rights and Responsibilities Act. What this means in the context of VIT decision-making is discussed next, and then what this means in practice in relation to the criminal record.

[706] [2009] VCAT 1195, [5].
[707] Human Rights Committee, *General Comment 32*, [27].
[708] *Kracke v Mental Health Review Board* [2009] VCAT 646, [496].

Assessment of the procedural fairness of VIT decision-making

There now follows an assessment of the VIT's procedural fairness based on the documentation outlining VIT procedures, and the reported decisions of formal hearing panels relating to teachers with criminal convictions.

Investigations

As outlined in Chapter 3, a hearing by a formal hearing panel is preceded by an investigation.

Investigations are mentioned in some of the decisions but the majority of information relating to this process is derived from a VIT webpage that provides an outline of the investigation process.[709]

This brochure begins by explaining the purpose of an investigation - ie 'to gather relevant information about concerns in relation to a teacher and to determine appropriate disciplinary responses'. An investigation involves interviewing all relevant witnesses and speaking also with the teacher.[710] The website indicates that the VIT will write to the teacher concerned within fourteen days of commencing an investigation and that it will invite the teacher to a meeting to discuss the concerns being investigated, to provide a written response to the concerns and to explore opportunities for early resolution by agreement.

It is suggested that a teacher may wish to obtain independent legal advice or union assistance but there is no mention of how much time will be made available for them to do this or whether the teacher is entitled to have a lawyer or friend present when answering questions. Neither the rules of natural justice nor s 24 of the Charter would impose requirements in relation to investigations, given that a teacher cannot be disciplined without a subsequent hearing. (In other words, the investigation itself does not constitute a determination for the purposes of s 24 of the Charter.) However, it is arguable that providing teachers with adequate time to prepare and the opportunity to be supported during questioning would be beneficial from a regulatory perspective, as it is more likely to ensure that investigations can be closed without a need for hearing in those cases where there is no arguable case for the

[709] VIT, 'investigation Process' at <http://www.vit.vic.edu.au/professional-responsibilities/investigations/process2>.
[710] Ibid.

imposition of disciplinary measures. Furthermore, investigations have the potential to significantly influence any subsequent hearing, especially when the teacher is not legally represented.

The website states that it is the aim of the VIT 'to conduct investigations as quickly as practicable having regard to the nature of the concerns'. The issue of delay at the investigation stage is significant because it can affect the overall amount of time that a teacher is out of work in those cases where the teacher has been already been suspended or dismissed by their employer. This issue will be further discussed below.

A report by the Victorian Auditor-General's Office (VAGO) relating to an audit of the VIT conducted in 2011 sheds further light on the VIT's investigations process.[711] It includes a finding that:

> VIT has developed policies and procedures covering disciplinary inquiries including actions to be taken upon receipt of a complaint, conducting or supervising an investigation, decision-making procedures and the conduct of a hearing. The policies and procedures have been developed with reference to all relevant statutory provisions of the Act.[712]

The report noted the specific documentation that had been prepared included 'an investigation procedures manual, a procedures manual for the branch and panels hearing unit, a training manual for sessional panel members and investigation guidelines'.[713] It did not comment on the adequacy of this documentation. These documents are not publicly accessible. The reasons for this lack of transparency remain unclear; it is difficult to see why such information should not be available via the VIT's website and this omission is arguably unfair to teachers since it does not enable them to approach an investigation with a complete understanding of what the process involves and what specific rights they may have.

Formal hearings

The VIT's website also contains some brief information about formal hearings. This explains that these hearings are 'conducted in a manner very similar to a court and the teacher is

[711] VAGO, op cit.
[712] Ibid, [2.4.1].
[713] Ibid, [2.4.2].

entitled to legal representation. Formal hearings are open to the public, unless an order for the hearing to be held in private is granted'.[714]

The website then details that a formal hearing panel has power to consider three matters - whether a teacher has engaged in misconduct, engaged in serious misconduct or been seriously incompetent. The meaning of each of these grounds is further explained via hyperlink. It also contains a summary of the findings and determinations which can be made by a formal hearing panel following a hearing.

This information is very minimal and fails to provide any detail about the way in which panels conduct their hearings and obtain evidence. The reasons for this lack of transparency again remain unclear; there is a strong argument that more detailed information should be available. This omission is unfair to teachers, especially those who are unrepresented, since it does not enable them to approach the hearing with a complete understanding of what the process involves and how they should best prepare for it.

Issues gleaned from the reported decisions of panels

All the reported decisions relating to teachers with criminal convictions have been examined from a procedural perspective. While they appear to be generally reflective of fair procedures there are some specific issues that they raise.

Delays

An aspect of lack of procedural fairness identified in the review of reported decisions was that of delay.

While it is rare for court to invalidate a decision due to delay it is accepted that undue delay can amount to a breach of natural justice. This was explained by Gleeson CJ in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*[715] on the following basis:

> A procedure that depends significantly upon the Tribunal's assessment of individuals may become an unfair procedure if, by reason of some default on the part of the Tribunal, there is

[714] See <http://www.vit.vic.edu.au/professional-responsibilities/investigations/process2>.
[715] (2005) 225 CLR 88.

> a real and substantial risk that the Tribunal's capacity to make such an assessment is impaired.[716]

In that case the High Court concluded that a delay of more than five years was sufficient to deny procedural fairness. Delay, by itself, is not necessarily a denial of procedural fairness, but the test is whether the delay was 'so extreme' that there was a 'real and substantial risk' the tribunal's capacity to assess the applicant was impaired.[717] A significant factor which led it conclude that this test had been met was the fact that the proceedings 'depended to a significant extent upon the Tribunal's assessment of the sincerity and reliability of the appellants'. While this comment was not further explained, it is explicable on the basis that the tribunal would have more difficulty remembering matters that affected its assessment of reliability than say, factual evidence.

As discussed above, delay has also been identified by the United Nations Human Rights Committee as an important consideration in international case law relating to fair hearings.

The time involved in the decision-making process may also indicate unfairness in the adjudicative function. VIT cases have continued for very lengthy periods which are discussed below. For teachers with criminal records the time may extend to between three to six years. The impact of the delay can affect teachers in many ways - financially, professionally, and socially. In some cases, other courts are involved and this fact can cause significant delay as highlighted in the earlier discussion of Davidson's case.[718]

The ETRA is silent as to any consideration of time for decision-making and delay, however other Victorian legislation provides for the 'just, efficient, timely and cost-effective resolution of the real issues in dispute'.[719] The overarching purpose of the Civil Procedure Act for example is to 'minimise delay'[720] to ensure the fair and just determination of the issues.[721]

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[716] Ibid, [9].
[717] Ibid.
[718] *Davidson v VIT* [2006] VSCA 193.
[719] *Civil Procedure Act 2010* (Vic), s 7.
[720] *Civil Procedure Act 2010* (Vic), s 9(e) and s 25.
[721] *Civil Procedure Act 2010* (Vic), s 9(i).

The problem of significant delay was identified by the King Review, which recommended that the VIT should establish measurable timelines for its investigations and inquiry processes and review reasons for any case extending beyond reasonable and agreed limits.[722] This recommendation was accepted by Department of Education and Early Childhood Development, responding that 'indicative timelines currently exist for investigations at VIT. Strategies to improve timelines can be introduced without legislative change'.[723]

The VAGO report, which was published at the end of 2011, noted that the VIT was yet to use its expanded disciplinary powers[724] even though they had commenced in January 2011 and that it had a backlog of cases which it was now addressing.[725] It commented that this backlog was due to delays by the government in approving panel members to hear cases following the introduction of s 2.6.35F.[726] (It noted that appointments to the pool had been made by the Governor in Council in October 2011).[727]

These issues have been examined in detail in the case of *Davidson*. Anthony Davidson did not have a criminal record. However, the VCAT's decision in *Davidson v VIT*[728] provides a useful discussion of the impact of delay in relation to VIT decision-making. The case of Davidson was first heard by a VIT hearing panel in June 2004, with the determination to deregister Davidson made on 27h October 2004. This was followed by a successful appeal to the Victorian Court of Appeal,[729] to determine whether VCAT could hear the appeal from Davidson against the cancellation of his registration. Davidson applied for review in the VCAT in 2007.[730]

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[722] King Review, p 110.
[723] Victoria, Department of Education and Early Childhood Development, *The Response of the Victorian Government to the Review of the Victorian Institute of Teaching*, July 2009, p 25, accessed at <https://www.google.com.au/?gws_rd=ssl#q=government+response+to+VIT+review>.
[724] The key changes were the expansion of the VIT's investigatory powers in s 2.6.30(1)(b)(ii) to include misconduct (ie behaviour which falls below the level of 'serious misconduct') and the insertion of s 2.6.33A, which allows for the VIT to investigate a matter relating to a registered teacher without a complaint in specified circumstances.
[725] VAGO, op cit, p 8.
[726] This was inserted via the *Education and Training Reform Amendment Act 2010* (Vic), which commenced in 2011.
[727] VAGO, op cit, p 8.
[728] [2006] VSCA 193.
[729] *Davidson v Victorian Institute of Teaching* [2006] VSCA 193.
[730] *Davidson v Victorian Institute of Teaching* [2007] VCAT 920.

Maxwell J in the Victorian Court of Appeal expressed his concern that the order against Davidson was made on 7 April 2005 and it had taken 17 months to hear appeal that took less than two hours to complete. In making this criticism of the procedures of his own court, he also highlighted a number of issues which are equally significant in relation to the hearings of VIT hearing panels. He commented on the prejudice that Davidson had suffered as a result of the delay and noted specifically that the decision of the VIT panel had affected Davidson's livelihood, in that he had been unable to carry on his occupation as teacher for 17 months, a period of delay which he described as 'completely unacceptable'.[731]

The more recent 2013 decision in *Re Tomasevic*,[732] of 2013, also demonstrated significant delay. In May 2003 Mr Tomasevic was found guilty without conviction of the indictable offence of making a threat to kill (although he also has a later conviction in 2011 stalking and using carriage service (ie a phone) to harass a school principal and another teacher. He was dismissed from his employment in August 2004 and the matter was then referred to the Disciplinary Proceedings Committee in May 2005, which decided to refer the matter to a formal hearing. He was served with a notice of formal hearing in February 2006 but the matter was adjourned pending the outcome of an appeal by him in respect of his 2003 conviction. It is unclear why it took him so long to appeal or when the appeal was finalised but it is clear from the hearing panel's statement of reasons that it was unsuccessful. The matter was finally heard by the VIT hearing panel on 28 February 2013 in the absence of Mr Tomasevic, who did not attend. The panel handed down in its decision some two months later on 6 May 2013 - ie more than seven years after he was first served with notice of the hearing.

In its statement of reasons the hearing panel noted that:

> [It] was presented with an affidavit from a legal officer at the Institute indicating that the teacher knew the day and date of the hearing and that he had been provided with a copy of the Hearing Book including a Notice of Formal Hearing. The evidence showed that these items were delivered.[733]

[731] [2006] VSCA 193 [25].
[732] *Re Tomasevic* No 138, 6 May 2013 - The teacher's employment was terminated on 2 August 2004, the VIT Formal hearing took place on 28 February 2013-nine years later.
[733] Ibid, p 7.

It was accordingly satisfied that all of the procedural requirements were met. However, it seems very likely that the long period of delay (during which time Mr Tomasevic would have been unable to work as a teacher and would have had to find some other means of earning his livelihood) would have contributed to his failure to make an appearance.

Eight VIT hearings experienced long delays of over two years, with one case commencing in 2006 and concluding six years later in 2012. Two of these are considered in detail in relation to delay.

In *Re Chappell*[734] the teacher was suspended without pay by the employer in November 2005. Almost seven years later, in May 2012 his matter was concluded by a VIT hearing panel. The teacher faced two formal hearings, the first in 2010 and the second in 2012. In the second hearing in 2012, the panel acknowledged this delay, stating that it had considered 'how best to conclude the matter given the delay which had occurred'.[735]

The teacher was convicted in October 2005 of breaching an intervention order ten times and of one count of entering a place in a manner likely to cause a breach of the peace.[736] His employer suspended him one month later in November 2005.[737] The teacher committed further offences whilst being suspended - with all occurring within a two year timespan. Three years later, in 2008, the matter was referred to the Disciplinary Proceedings Committee (DPC) which decided to refer the matter to an investigation in September 2008. This investigation lasted for 10 months. The next year in 2009, after considering the investigator's report, the DPC decided to refer the matter to a formal hearing. Six months later, in 2010, the matter was set down for hearing. A notice of the Formal Hearing was served upon the teacher on 12 January for the matter to be heard on 21 January 2010 nine days later. However, an amended Notice of Formal hearing dated 21 January 2010 was filed and served on the same day, and the hearing commenced on that day - 21 January 2010. The teacher was not legally represented but presented evidence and gave his closing submissions. During the time of consideration of the matter, the panel became unsure of whether it could continue to hear the

[734] *Re Chappell*, VIT, No 096, 10 September 2012.
[735] Ibid, p 4.
[736] This case was unusual in that the panel's statement of reasons failed to provide any further details about the convictions.
[737] ETRA s 2.6.27(6)(a)-(c) suspension without inquiry.

matter, due to the teacher's registration being suspended by the VIT for non-payment of registration fees. The matter was then referred back to the DPC for further determination as to the disposition of the matter.[738]

One year later, the determination noted that changes to the legislation came into effect on 1 January 2011. The effect of the changes required the hearing panel members to be appointed from a Governor in Council 'pool of approved persons' only'. The approved persons list was not completed and in place until ten months later in October 2011. Only two of the original persons from the first hearing, were appointed. This required that a new panel member be appointed to the new hearing date - day 2 of the hearing.

The following year, a letter dated 27 April 2012, was sent to the teacher advising him of the resumption of the hearing on 18 May 2012 - almost seven years after his suspension from employment in 2005. The teacher had waited 6 years and 6 months for a resolution to his matter.

In *Re AED*,[739] the delay in question amounted to 3 years. The teacher was again not legally represented; he had unsuccessfully attempted to get legal aid and was unrepresented on the day of the hearing.[740] Further as in the first example, he had failed to pay his registration fee as his employment was terminated prior to the hearing.

The DPC determined to refer the matter to an investigation on 24 June 2009. This investigation was held and eleven months later, in May 2010, the VIT was provided with information about the allegations which was then referred back to the DPC. On 26 May 2010, the DPC decided to refer the matter to a formal hearing. The VIT however determined that further evidence was required in order to proceed to a formal hearing and the matter was referred back to the DPC to reconsider its decision of 26 May 2010. Three months later, on 25 August 2010, the DPC rescinded its decision to refer the matter to a formal hearing and the matter was referred back for an investigation. The teacher's registration was suspended on 10 October 2010, due to the non- payment of the annual 2009 registration fee. The following year in March 2011, the DPC determined to continue the inquiry and referred the matter to a

[738] *Re Chappell*, p 3.
[739] Re *GJB*, VIT, No 113, 16 January 2012.
[740] *Re AED*, VIT, No 015, 3 March 2005, p 3.

formal hearing again. Nine months later on 13 December 2011 a formal notice for a hearing was served upon the teacher by registered post on 18 January 2012. Seven days later on 25 January 2012, a formal hearing commenced.[741]

In both cases above the delays were affected by the interplay between the VIT hearings and investigations by the DPC and also by failures to pay registration fees. It should be noted that the latter are explicable in the context of a teacher being unable to work and therefore presumably not in a position to pay (and also possibly unclear whether they needed to do so while not working). It is arguable that more could be done to ensure that teachers are not unfairly affected by delays that are outside their control and there could be scope for preliminary decision-making as to whether a teacher remains fit to teach pending the outcome of a lengthy DPC investigation. In addition, the failure of a teacher to renew their registration while under suspension should not prevent or delay a hearing concerning their fitness to teach.

The issue of delay is also relevant in cases where VIT hearings are preceded by investigations. The DPC determines which teachers with criminal records will be the subject of an inquiry.[742] The VIT may determine to conduct a hearing without conducting an investigation.[743] Fourteen of the reported decisions of VIT formal hearings for teachers with criminal records made reference to a prior investigation.[744] One teacher was the subject of two investigations.[745]

The ETRA requires that an investigation under the Act must be conducted as quickly as practicable having regard to the nature of the matter being investigated.[746] Since 1 January 2011, it has also required the VIT to report to the registered teacher about the progress of an

[741] *Re AED*, VIT, No 015, 3 March 2005.
[742] ETRA, s 2.6.33(2).
[743] ETRA, s 2.6.35.
[744] *Re Robinson* VIT, No 042 2 November 2006; *Re Eyre*, VIT, No 039, 19 September 2006; *Re Wescott*, VIT, No 049, 14 May 2007; *Re Crawley*, VIT, No 070, 9 September 2008; *Re Van Den Brink*, VIT, No 073, 11 December 2008; *Re Van Vuuren*, VIT, No 080, 17 February 2009; *Re* Chappell, VIT, No 096, 21 January 2010; *Re Sutton*, VIT, No 097, 4 March 2010; *Re Stanley*, VIT, No 108, 14 February 2011; *Re Taylor*, VIT, No 115, 25 January 2012; *Re AZ*, VIT, No 119, 30 June 12; *Re BKP*, VIT, No 121, 13 August 2012; *Re SJK*, VIT, No 122, 24 July 2012; *Re NJP*, VIT, No 127, 3 December 2012.
[745] *Re Taylor*, VIT, No 115, 25 January 2012.
[746] ETRA, s 2.6.33D(1).

investigation at intervals of not more than 3 months,[747] and if the matter has been referred to an investigator, that investigator must give the VIT any information it reasonably requires to enable it to comply with sub section 2.[748]

At the time of the new amendments, investigations were taking almost one year to complete,[749]although one matter was referred on the same day as it was received.[750] Late in 2012 investigations were taking seven months to complete.[751] No investigations were reported in 2013.

This issue of delay is a significant fairness issue given the prejudicial effect of these decisions and their potential impact on teachers' livelihoods. As noted above, at p 186, Maxwell J regarded the 17 months delay in the Davidson case as completely unacceptable.

Adjournments

Most professional regulatory legislation does not have specific directions addressing adjournment applications and the ETRA is similar in this respect. While it contains a provision for a formal hearing panel to adjourn a matter and refer it to a medical hearing panel if it 'is of the opinion that the teacher's ability to practise as a teacher is seriously detrimentally affected or likely to be seriously detrimentally affected because of an impairment',[752] it does not otherwise address the issue of adjournments.

Failure to grant an adjournment may in some circumstances amount to a breach of natural justice.[753] The principle is easy to articulate; a fair hearing is one where all parties are able to put their cases before the decision-maker, or respond fully to the evidence and arguments of the other parties. If a party makes an adjournment request because he or she cannot fully or adequately present his or her case, the tribunal may be required to grant the adjournment. The principle however may be difficult to apply.

[747] ETRA, s 2.6.33D(2)(b).
[748] ETRA, s 2.6.33D(3).
[749] *Re AZ*, VIT, No 119, 30 June 12.
[750] *Re SJK*, VIT, No 122, 24 July 2012.
[751] *Re NJP*, VIT, No 127, 3 December 2012.
[752] ETRA, s 2.6.45A.
[753] See, for example, *La Spina v Macdonnells Law* [2014] QCA 44.

Relevant factors identified by the Ontario Court of Appeal[754] in the context of its review of a decision to refuse an adjournment sought by the appellant to obtain legal representation included the fact that the case involved a very serious allegation, that the potential consequences of a finding of misconduct were loss of livelihood and that there was no discernible prejudice in granting a brief adjournment. It commented that the hearing panel was required to 'balance the public interest in having the hearing concluded expeditiously against the prejudice to [the appellant] of being forced to proceed at this point without counsel, taking into consideration the context and circumstances of the case'.[755]

In the context of the VIT, events that may warrant an adjournment include inadequate notice, illness of a party or witness, unforeseen developments in evidence, or the exigencies of employment or family life.[756] There may be difficulties in a hearing, for example whether to allow for an adjournment for the party to gather more evidence. Here there are clearly established principles to guide a court.[757] Legal counsel would argue for and clarify the issues and how to decide on any procedural question.[758] But natural justice does not require the application of fixed or technical rules; it requires fairness in all the circumstances.

The case analysis in this chapter shows that very few adjournments were requested or offered to teachers with criminal records.

There were two cases in which adjournments were granted. In *Re DRH*[759] the panel provided an adjournment of one year to a teacher who was legally represented. The hearing panel was unable to make an adverse finding against the teacher, which is a requirement needed prior to a suspension or cancellation. The panel permitted the teacher to continue to teach in the interim and to face a formal hearing one year later.

The second case involved a teacher whose registration had been suspended due to non-payment of fees. The teacher was notified on 27 April 2012 that his hearing would resume on

[754] *Law Society of Upper Canada v Igbinosun* 2009 ONCA 484 - request given lack of legal representative; *McIntyre v Ontario College of Teachers* 2012 ONSC 5957 - request denied, member had not complied with conditions.
[755] *Law Society of Upper Canada v Igbinosun* 96 O.R. (3d) 138 (2009) [48].
[756] Ibid.
[757] John Mc Millan, 'Natural Justice-Too Much, Too Little or Just Right?' (2008) 58 *AIAL Forum* 34.
[758] Ibid.
[759] *Re DRH*, VIT, No 075, 27 October 2009.

18 May 2012, following the adjournment of 21 January 2010, two years and four months earlier.[760]

In *Re Atkin*[761] a teacher was offered an adjournment but declined it. The determination reported that: 'the suggestion of an adjournment was a significant gesture and one which the teacher did not appear to appreciate or take up'.[762] In this hearing, the teacher was not legally represented, but his argument centred on his lack of confidence in getting a psychologist's report in time.[763]

The only case in which an adjournment was requested and refused involved a teacher who sought an adjournment on the basis that the panel did not have the jurisdiction to hear his matter and because he had been denied natural justice. The panel expressed the view that the principles and practical requirements of procedural fairness had been met and that the time frame for the hearing was based on that provided by the teacher himself. It rejected the application for adjournment on the basis that the teacher, who did not attend the hearing and was not legally represented, had given insufficient reason to adjourn the matter.[764]

In summary, the issue of adjournment is a significant one especially given the large number of teachers who are not legally represented at hearings and who may require more time to prepare for a hearing. While there has been only one case in which a teacher has been refused an adjournment when they have requested on, it is suggested that it would add to the fairness of hearing procedures if the ETRA were to specifically address this issue and to provide some guidance as to when an adjournment might be appropriate.

[Lack of] legal representation

As noted above, the ETRA provides teachers with a specific right to representation and its formal hearing brochure makes clear that teachers have the option of being represented by a lawyer (or another person of their choice). There is nothing in the reported cases to suggest

[760] *Re Chappell*, VIT, No 096, 18 May 2012.
[761] *Re Atkin*, VIT, No 045, 12 December 2006.
[762] Ibid, p 5.
[763] Ibid, p 5.
[764] *Re O'Hara*, VIT, No 037, 17 August 2006.

that teachers who elect to have legal representation are denied this procedural right.[765] However, the reported decisions show that a large number of teachers are not in fact represented and that this can make a significant difference to outcomes. This is an important issue given that livelihoods are at stake.

Before analysing the cases it is useful to consider why it is that the right to legal representation is an aspect of natural justice. It is not required in all cases but is regarded as important where the context warrants a hearing and where the hearing has significant implications for the person affected (including loss of livelihood and significant reputational damage).

There is general agreement in the field of criminal litigation that unrepresented defendants are rarely able to identify technical defences, they are rarely capable of mounting effective challenges to evidence, they are sometimes unaware of matters which might entitle them to a relatively light sentence, and that representation will often be almost essential if people are to present their cases effectively.[766]

The skills and training of lawyers who have represented teachers with criminal records at formal hearings are likely to have made the hearing fairer where teacher registration has been maintained. Having a lawyer is important because the case that has to be met by a teacher is presented by the VIT and its legal officers. In other words there is an issue of imbalance of power.

Lawyers are proceduralists. They place a high value on the need to follow established procedures, however drawn out and complex, instead of leaping to results, however clear the truth may seem.

> It is modesty regarding our ability to know the truth and prudence in the use of power. When people clamour for results because the truth is obvious to everyone, and the lawyers resist, there is bound to be a popular outcry for lawyers to get out of the way and take their ridiculous and obfuscating procedures with them.[767]

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[765] ETRA, s 2.6.44(c).
[766] Roger Douglas, *Douglas and Jones's Administrative Law* (Sydney: The Federation Press, 2009) p 570.
[767] AT Kronman, Dean of Yale Law School, *New York Times*, 29h September 1995. See also the comments of Megarry referenced at note 602 above regarding open and shut cases.

However, it is by no means certain that what is 'obvious' is necessarily what is ultimately shown to be the truth. In general, legal representation is important to ensure that decision-makers are fully informed and that there is an opportunity to clarify relevant legal and factual issues. The right to counsel is important in formal hearings as non-lawyers are usually not equipped to analyse their case, to identify its strengths and weaknesses, and to present arguments in the most effective manner.[768] Legal representation also encourages decision-makers to think more carefully, as well as lessening any possible perceptions of bias.[769]

Further, it is often pointed out that some questions that need to be asked can be put more safely and objectively by an advocate, and that a legal advocate may provide more competent advocacy than an unskilled person with little sense of relevance or appropriate procedure.[770]

Analysis of the cases suggests that legally represented teachers at formal hearings are more likely to retain their registration, and that decisions of those hearing panels are delivered more speedily, sometimes on the same day as the formal hearing.[771]

Two cases may usefully be compared, looking first at a sample case where the teacher was represented. In *Re LJB*[772] the formal VIT hearing concerned a teacher who had been found guilty of theft under s 74 of the *Crimes Act 1958* (Vic) on two occasions, in 2004 and 2009 and who had received sentences of a Community Based Order and Good Behaviour Bond. The teacher was legally represented and the lawyer arguably played a key role in ensuring that she received a fair outcome.

How did the lawyer assist the teacher to have a fair hearing? First, the lawyer made a number of submissions which had to be considered by the hearing panel. The submissions comprised a range of testimonials as to her competence which enabled the lawyer to show that the teacher was competent and effective, had good leadership qualities and had always received

[768] JRS Forbes, *Justice in Tribunals*, The Federation Press, 2010, p 165.
[769] Ibid.
[770] Ibid.
[771] See, for example, *Re SR*, VIT, No 004, 24 August 2004.
[772] *Re LJB*, VIT, No 126, 2 October 2012.

positive annual reviews by the school. They also highlighted that the teacher had been candid and open in relation to her convictions and the findings of the courts that convicted her.[773]

Secondly, the lawyer distinguished the decision of the VCAT in *Davidson v VIT*,[774] which had been relied upon and continues to be relied upon by VIT hearing panels as a bench mark for 'fitness to teach'. This persuaded the panel to accept a less restrictive interpretation of that term by the hearing panel.[775]

The lawyer's submissions about the teacher were accepted by the VIT hearing panel which commented that she had had 'a respected professional career without blemish'[776] The hearing panel was also convinced that the teacher was not motivated by any 'grievous intent', that the items stolen were not of any significant value, that she made little effort to avoid detection and that she had not contested the charges.[777]

To sum up, the lawyer in this VIT formal hearing facilitated a fair hearing for the teacher with a criminal record by ensuring the VIT hearing panel provided the teacher with a reasonable opportunity to put her case and to answer any allegations against her. In addition, the teacher's matter was opened and closed in a timely manner (ie within 14 months) and the determination was delivered on the same day as the hearing.

In contrast, *Re Sutton*[778] (discussed earlier in Chapter 3) illustrates the ways in which a teacher can be disadvantaged by not having a lawyer. This VIT formal hearing concerned a teacher who was convicted in the Magistrates' Court for various drug related crimes arising from her addiction to cannabis. Although some of the crimes in question (for example, attempting to traffic a drug of dependence and cultivating a narcotic plant) were nominally serious, they were clearly found to be very minor by the court, which recorded findings of guilt without conviction and the penalties received were at the lowest end of the scale - small fines and a Community Based Order for 12 months.

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[773] Ibid, p 3.
[774] *Davidson v Victorian Institute of Teaching (Occupational and Business Regulation)* [2007] VCAT 920.
[775] Ibid, p 7.
[776] Ibid, p 10.
[777] Ibid.
[778] *Re Sutton,* VIT, No 097, 24 February 2010.

The teacher was not legally represented and the formal hearing proceeded with the teacher being present and subject to cross examination by the VIT counsel. She made a number of submissions on her own behalf but was unable to convince the hearing panel of her fitness to remain registered as a teacher. Her supporting evidence included a counter-productive statement from her treating general practitioner, which influenced the panel member to find that she was unfit to teach.

It is arguable that this teacher was not given a reasonable opportunity to put her case. Firstly, as a government school teacher, she had already been dismissed by her employer under s 2.4.60(1)(c)[779] and s 2.4.6(1)(d).[780] In April 2008, two months before her court hearing in June 2008 and based on her evidence to the panel, she was living on a disability pension and receiving rehabilitation following a severe car accident in 2006. It may therefore be surmised that she was unable to afford legal representation. However, there is nothing in the panel's statement of reasons to suggest that it implemented any special measures of the type mentioned by the VCAT in *Smeaton*, as discussed above. It is also unclear that the panel specifically considered her disability and the extent to which this required flexibility and responsiveness to her needs.[781]

It is also clear that there were other measures which could have been considered and which were not raised, presumably because the teacher was unaware of them. One possibility would have been to grant her registration subject to a condition designed to address the issues of concern to the panel regarding her continuing addiction. Another possibility would have been to grant an adjournment to allow her time to establish a clean slate. For example, in Case No 075 the case was adjourned for a lengthy period to allow for the teacher to receive further medical and psychological counselling. The subsequent hearing was successful for the teacher. It is possible that this could have been done in her case to allow her more time to work on her addiction and establish that she was free of it.

[779] ETRA, s 2.4.60(1)(c) - during his or her period of service is convicted or found guilty of a criminal offence punishable by imprisonment or a fine;
[780] ETRA, s 2.4.61 - action against the employee-(1)(d) termination of employment.
[781] See *Disability Act 2006* (Vic), s 5(3)(b) - Principles of Disability.

In summary, the case of *Re Sutton* highlights the potential for unfairness that can arise where a teacher lacks legal representation in circumstances where a teacher is unemployed or otherwise impecunious and legal aid funding continues to be cut back. What is also disturbing is that there is nothing in the reasons statement in *Re Sutton* to suggest that the tribunal made any modification to its procedures to address the fact that Sutton lacked legal representation. As noted earlier, it is also significant that the information currently available on the VIT's website lacks sufficient detail adequately to equip teachers to be able to understand how best to prepare for formal hearings.

Structure of hearing panels – the rule against bias

The ETRA legislation makes specific provision concerning the composition of hearing panels.[782] The VIT hearing panels are formed from a pool of persons appointed by the Victorian Governor in Council on the recommendation of the relevant Minister. The pool is to include persons who have been admitted to practice for not less than five years, current and former members of the VIT Council and registered teachers.[783]

There are some requirements designed to minimise the potential for bias (for example, the fact that a member involved in an investigation or a complainant cannot be a member of a hearings panel). However, while these statutory requirements take precedence over common law requirements (allowing for common law requirements of independence to be modified), it is arguable that they risk challenge as they provide for membership of hearing panels by members of the VIT Council and that these members have multiple roles (including roles that may give rise to a perception of bias).

The VIT Council consists of a maximum of 12 persons who are responsible for the management of the affairs of the VIT including matters other than the disciplining of teachers. Based on the published information of the VIT, they may also from time to time perform an investigative role.

[782] ETRA, s 2.6.43(3) provides that the following people are not entitled to be members of a panel for a formal hearing: a person who has undertaken an investigation of the matter which is the subject of the hearing; a person who has been a member of the Professional Practice and Conduct Committee which held an informal hearing into the matter; and a complainant.
[783] ETRA, s 2.6.35F(3).

As noted above, a person who has conducted an investigation is excluded from sitting on a panel. However, the fact that a panel member also regularly conducts investigations and possibly interacts with other investigators in relation to those investigations may arguably predispose them to treat the information acquired via an investigation more positively than a person who is has not exercised that role.

The Institute has a council committee known as the Disciplinary Proceedings Committee (DPC), which oversees disciplinary procedures.[784] It consists of the Chairperson of VIT four council members and three non-council members. The DPC determines whether to conduct formal hearings and who will comprise the hearing panels. Each of the 47 hearing panels considered in this thesis was chaired by a member of the DPC.

The potential for the composition of panels to create a reasonable apprehension of bias was greater prior to the amendments that came into effect in 2010 because the functions of the VIT included promoting the teaching profession. The case of one teacher may suggest the panel took on advocacy role.[785] The hearing panel adopted a very broad view of the role of a teacher, using the 'broader role expected of the teacher', the 'trust and respect, model citizenship, and the privileged position of teachers' to satisfy itself in relation to the question of 'fitness to teach'. On the one hand, the teacher had committed serious offence but, on the other hand, no further offences had occurred for six years and the teacher was able to provide a set of eleven character references. An observer might be concerned that the hearing panel had already reached a view before hearing the evidence presented at the hearing.

As noted above, the common law standards of impartiality may be varied by statute. This occurs when the panels are comprised of representatives.[786] Parliament created the VIT hearing panels, consisting of three persons, two of whom must be VIT registered teachers.[787] Whilst there is no general right to a balanced tribunal,[788] there is a risk that representatives such as those on VIT panels may be partisan and see their roles as an advocate rather than a judge. Further the advocacy role of the VIT falls within the duties of the Chairperson of the

[784] King Review, p 104.
[785] *Re Chappell*, VIT, No 096, 21 January 2010.
[786] HWR Wade, *Administrative Law* (Oxford: Oxford University Press, Fourth Ed, 1977) p 747.
[787] ETRA, s 2.6.43(1)(a)(b).
[788] Forbes, op cit, p 292.

VIT. The review of the VIT identified this as 'a conflict of interest' given the VIT's main role as a regulator.[789]

Compared with other registration bodies, the VIT has an unusually integrated model.[790] The review identified a 'cradle to grave' disciplinary process (ie one in which the VIT has a wide range of responsibilities for the continuum of registration-related disciplinary activity).[791] This may impact upon the underlying fairness of the hearing panels, as the investigators are drawn from the same pool as the hearing panel members. Further the DPC is responsible for the composition of the hearing panel membership. Whilst the final determination is made by the formal hearing panel, the members of the panels may have been investigators in relation to other similar hearings.

Conclusion

As a Victorian administrative decision-maker the VIT is required to comply with specific procedural requirements in the ETRA 2006 together with (except to the extent that they are inconsistent with the ETRA) the administrative law requirements of procedural fairness, and the right to a fair hearing under s 24 of the Charter of Human Rights and Responsibilities Act.

In addition, procedural fairness is not simply important from a legal perspective; regulatory theory also makes clear that it is important for the VIT regulator to accord procedural fairness.[792] As stated by Freiberg, '[r]ules that are enforced unfairly may result in non-compliance'. This was recognised in the King Review which included fairness in the criteria used to assess the regulatory effectiveness of the VIT.[793] It stressed that the disciplinary function should be characterised by natural justice.[794]

The hallmarks of a good regulator are fair procedures which communicate respect and value; unfair procedures can communicate disrespect marginality and even exclusion from a valued group.[795] Procedural fairness matters as it relates to good governance. If regulation has been

[789] King Review, p 90.
[790] King Review, p 104.
[791] Ibid.
[792] Freiberg, *The Tools of Regulation*, pp 77, 270.
[793] King Review, p 4.
[794] Ibid.
[795] Freiberg, *The Tools of Regulation*, p 77.

identified as failing to meet its policy objectives, it will create unnecessary costs, erode confidence in the law and can lead to the undermining of other regulations and the rule of law itself.[796] The King Review found many examples of poor implementation of the VIT model, including issues of lack of natural justice in its disciplinary procedures and commented adversely in relation to the length of investigations and hearings.[797]

The evidence discussed above suggests that, while the procedures of the VIT formal hearing panels are generally fair, delays continue to be an issue and can result in unacceptably long gaps between notification of convictions and final decisions concerning fitness to teach. It also suggests that there are aspects of the structure of hearing panels that may result in a reasonable apprehension of bias. The VIT is arguably not providing the procedural fairness required.

Recommendations for reform in the identified areas of procedural fairness will be contained in the final Chapter.

The next Chapter addresses the second element of fairness, which is substantive fairness.

[796] Ibid, p 269.
[797] King Review, p 100.

CHAPTER 7 – FAIRNESS AS A SUBSTANTIVE REQUIREMENT

Introduction

In addition to the procedural issues outlined in the previous chapter, there are a number of substantive issues affecting fairness issues that arise from the reported decisions of formal hearing panels that warrant further discussion.

Fairness has been the subject of judicial reasoning in the Australian courts for over two decades. An essential attribute of a superior court is that it ensures that proceedings serve the ends of justice.[798] The requirement of fairness is not only independent, it is intrinsic and inherent. The tools of justice invoke 'according to our legal theory and subject to statutory provisions or other considerations…the power to prevent injustice in legal proceedings is necessary and, for that reason there inheres in courts such powers as are necessary to ensure that justice is done in every case'.[799]

This chapter considers issues of a non-procedural nature that go to fairness including the appropriate regard to the interrelationship between the disciplinary process and a teacher's criminal offending, application of the correct statutory test, consistency of outcomes and the extent to which there is appropriate protection of teachers' privacy. Its key emphasis is on reported decisions but there is also reference to the VIT's policy statement on criminal records. This document is not publicly available (which is itself arguably a substantial fairness issue), but its content can be gleaned from the reported decision of the hearing panel in *Re RGA*.[800]

In that case the panel noted that it had to consider the VIT's policy on criminal records which states that the following factors should be considered:

- The nature of the offence;
- The person's personal circumstances;
- Any other offences committed at the same time;
- Any other prior convictions of guilt;
- The period of time that has elapsed since the offending took place;

[798] *Polyukhovich v the Commonwealth* (1991) 172 CLR 501, 703 per Gaudron J.
[799] *Dietrich v the Queen* (1992) 177 CLR 292, 362-364- per Gaudron J.
[800] *Re RGA*, VIT, No 137, 11 March 2013.

- The severity of the penalty imposed by the court including;
    - Whether the court recorded a conviction
    - Whether the court imposed a Good Behaviour Bond or Community Based Order
    - Whether these orders were successfully completed; and
    - Whether the person was referred for treatment or counselling and whether this was undertaken
- Whether the offence is still a crime;
- Whether the offence involved children;
- Whether violence was involved;
- Whether the person's history shows a history or pattern of criminal behaviour;
- The circumstances surrounding the offence;
- Whether the person acknowledges the offence and shows remorse;
- The harm to the victim including any injury or loss;
- Whether it is in the public interest for this person to be registered as a teacher; and
- Whether the circumstances reflect badly on the person's standing as a teacher.
- Where the offences involved dishonesty the Panel should also consider:
    - The amount involved;
    - Whether the offence was against a school; and
    - Whether restitution has been made.[801]

How the panel is to weigh up these factors, and more broadly the two points on what is in the 'public interest', and an assessment of the person's 'standing as a teacher', appear to be at the discretion of the panel. However they must overall be 'fair'.

Disciplinary processes and their interrelationship with criminal processes

The decision-making function of VIT hearing panels is disciplinary in nature and, in the case of the decisions which form the basis of this thesis, is interconnected with the fact that teachers concerned have been found guilty of criminal offending. The starting point for this analysis is that: '[t]he fact of a conviction and sentence is not conclusive of the ultimate issue', as stated by the High Court in *Ziems v The Prothonotary of the Supreme Court of New South Wales*.[802] The ultimate issue in cases where a teacher is required to appear before a

[801] Ibid, pp 13-14.
[802] (1957) 97 CLR 279 at 288 (per Fullagar J).

formal hearing panel because he or she has committed an indictable offence is whether the teacher is 'fit to teach'.

Furthermore, while interconnected, these processes are fundamentally different in nature. As discussed by Zacharias, this means that while there are aspects of criminal law theory and jurisprudence that are relevant to disciplinary processes, but the professional responsibility context is a form of administrative regulation and different in significant respects.[803] Key differences include the nature of the sanctions available and the specific function that each is designed to serve. In the case of the latter what is critical are the regulatory goals of the regime being administered.

As noted in Chapter 4, the High Court in *NSW Bar Association v Evatt,*[804] commented in respect to its power to discipline a barrister that this was 'entirely protective' and involved no element of punishment, notwithstanding that its exercise might involve a great deprivation to the person disciplined.[805] The function of the VIT hearing panels is also fundamentally protective, although that term needs to be considered as applying more broadly than just to students.

In Zacharias' view this means that disciplinary bodies have greater 'leeway to decide on the necessity of imposing sanctions, in light of alternative mechanisms for accomplishing the rulemakers' goals'. It follows that this discretion needs to be exercised having regard to the fundamental justice principle of fairness, together with relevant human rights considerations as well as specific regulatory goals.

There are a number of issues that arise in respect of the interrelationship between the VIT hearing panels' task and a teacher's criminal offending. However, before going on to consider this, it should be noted that there are may be cases where the criminal offending provides the reason why the teacher is the subject of a VIT hearing, but also other issues of misconduct that are raised at the hearing and which are relevant to the tribunal's decision. As VIT hearing panels have power to cancel a teacher's registration on grounds that are not

[803] Fred Zacharias, 'The Purposes of Lawyer Discipline' (2003) 45 *William and Mary Law Review* 675, 684.
[804] (1968) 117 CLR 177.
[805] (1968) 117 CLR 177, 184.

related to criminal offending, it is permissible and appropriate for them to consider these matters in tandem. It follows therefore that some decisions may turn as much on misconduct other than the criminal offending that triggers the hearing.

That was the case, for example, in *Re Mine*,[806] which concerned a teacher who had been found guilty of theft without any conviction being recorded and ordered to pay compensation to a rental company in respect of her failure to return a rental car. This offence formed only one part of the case made to the VIT that she was unfit to teach. Other matters relied on included her failure to demonstrate courtesy and respect to colleagues, failure to maintain positive relationships with other staff, failure to provide students with appropriate learning and her behaviour in resisting arrest when police came to her school to interview her and which was witnessed by other teachers, parents and children. The panel's record of decision specifically records the argument made by counsel assisting the VIT that the teacher's behaviour compromised her professional standing as a teacher in her behaviours 'apart from the indictable offence'.[807] In concluding that the teacher was unfit to teach, the panel commented that it 'considered the teacher's conviction for theft and her behaviours in the school towards staff and students raised questions about her conduct and professionalism as well as raising further serious questions about her character and reputation'.[808] It also commented that:

> The vehemence of her reactions when challenged or questioned, and her behaviour when the police attempted to arrest her suggested to the Panel that she is not fit to teach because teachers are expected to be positive role models in the community and to respect the rule of law.[809]

Similarly in *Re Tomasevic*,[810] which concerned a teacher with convictions for a threat to kill and stalking, the case against the teacher also referred to findings in relation to his conduct at two schools, the regional office of his employer and various other organisations and public places like shopping centres. The hearing panel found against the teacher on a number of different bases. However, in its concluding comments the panel made specific reference to an alleged incident involving a parent and commented that it was indicative of his 'complete

[806] *Re Mine*, VIT, No 136, 10 May 2013.
[807] Ibid. p 6.
[808] Ibid, p 7.
[809] Ibid, p 8.
[810] *Re Tomasevic*, VIT, No 138, 6 May 2013.

disregard for the standards of the teaching profession, his lack of integrity in the way he treated students, his lack of respect and courtesy towards parents, his inability to be a positive role model, his inability to act with discretion or maintain confidentiality, his inability to maintain objectivity and his willingness to draw students into his personal agendas'.[811]

These cases illustrate therefore that criminal offences will not necessarily be determinative where there is other serious misconduct involved, and that the latter may be the primary factors leading to deregistration.

Determination of fitness at the time of the hearing

The task of hearing panels is to decide the question of fitness to teach at the time of the hearing. In some cases the VIT hearing may take place long after the date of the offending because there has been a delay in prosecuting the offence, there have been protracted appeal proceedings or the offence came to light later due to the outcome of a criminal records check.

The requirement to assess fitness at the date of the panel's hearing is important because a person may have been unfit at the time when they offended but may now be able to demonstrate that are fit to teach, for example, because they have addressed the underlying issues which led to the offending by successfully overcoming an addiction or dealing with an anger-management problem. Assessing fitness in this way is consistent both with fairness and with the regulatory objectives of the legislation.

It is generally also the case that the hearing panel will have additional material before it that was not presented at the criminal trial. This means that support from their colleagues and principal will often make a key difference to outcomes. Furthermore if a teacher has had a long and unblemished teaching record this will be a relevant consideration to weigh in the balance.

The reported cases suggest that the panels have been aware of the need to assess fitness at the date of hearing. They generally demonstrate this awareness when they take into account factors such as the extent of insight demonstrated into the seriousness of offending and its implications for the teacher's position and factors such as current measures in place to avoid

[811] Ibid, p 13.

reoffending. This approach is consistent with the VIT's guidelines on criminal offending which refer to 'whether the person acknowledges the offence and shows remorse' as a relevant factor to be considered by hearing panels.

An example of a case where this point is expressly stated is *Re Ingram*.[812] The hearing panel in that case concluded that the teacher was fit to teach at the time of the hearing based on a number of considerations, including his demonstration of insight into his offending and also genuine distress and remorse; evidence that he was under considerable stress at the time of his offending; and his demonstrated commitment to 'the maintenance of appropriate standards and moral integrity in his future life and career'.[813] Similarly in *Re Robinson*,[814] the panel made specific reference to this requirement and then went on to conclude that the teacher was fit to teach. It noted that the teacher had demonstrated insight into the serious nature of his offending and further commented that the teacher had 'demonstrated a full appreciation of the standards required of a teacher, acknowledged that his past conduct fell far short of these and further demonstrated his commitment to the maintenance of appropriate standards and moral integrity in his future life and career'.[815]

Another example is provided by the case of *Re CJI*,[816] which concerned a teacher found guilty of repeated stalking and breaches of intervention orders. The hearing panel concluded that the teacher was fit to teach because he took 'full responsibility for his actions and well underst[ood] their impact and why they were completely inappropriate'.[817]

It follows from this that, if a teacher's offending is regarded as relevant to their employment, failure to adduce evidence to show insight, remorse and (where relevant) measures taken to address the underlying issues that led to the offending, may tilt decision-making in favour of cancellation of registration. This is most clearly apparent in those cases where the teacher has not attended the panel hearing and where the panel is consequently unable to satisfy itself about these matters.

[812] *Re Ingram*, VIT, No 008, 25 October 2004.
[813] Ibid, p 8.
[814] *Re Robinson*, VIT, No 42, 2 November 2005.
[815] Ibid, p 5.
[816] *Re CJI*, VIT, No 010, 6 December 2004.
[817] Ibid, p 13.

One example is provided by the case of *Re Prodromou,*[818] which concerned offending involving dishonesty that was directly related to the teacher's employment and which the hearing panel described as raising issues of break-down of trust. In that case the panel commented that:

> A key element in determining the fitness of a teacher who has breached such trust is the degree and sincerity of the remorse shown regarding that breach, the degree of insight into the consequences of such a breach, the circumstances which contributed to its occurrence and possible remedies to ensure that such a breach does not occur again.[819]

As there was no evidence of remorse but there was evidence of continuing incidents of misconduct, it concluded that the teacher was unfit to teach.

Similarly in *Re Pham,*[820] the hearing panel commented in respect of a teacher who did not attend the hearing that she had given no indication 'that she understood the ethical obligations of being a registered teacher' nor that she 'had taken corrective action and this further added to the panel's concerns about her fitness'. The panel also expressed the view that her lack of engagement with the VIT in respect of these issues 'did not reflect well on her'.[821]

Another context where a teacher is likely to be judged unfit to teach is where the panel takes the view that there is a risk that reoffending will reoccur. In most cases this is based on evidence from medical practitioners involved in treating the underlying condition predisposing the offending. Arguably, however, this approach can be problematic and unfair, particularly where the teacher is unrepresented and therefore not well equipped to test the cogency of such evidence.

For example, in *Re Sutton,*[822] (the facts of which are described in detail in the form of case study in Chapter 3), a case where the teacher was unrepresented, the hearing panel ultimately found against the teacher, who had convictions for drug related offences, on the basis of concerns about continuing addiction. It commented that the sticking point for it was an issue raised by her doctor, ie 'her ongoing personal use of cannabis, as a potential teacher of school

[818] *Re Prodromou,* VIT, No 055, 12 November 2007.
[819] Ibid, p 9.
[820] *Re Pham,* VIT, No 132, 17 December 2012.
[821] Ibid, p 6.
[822] *Re Sutton,* VIT, No 054, 24 September 2007.

pupils'[823] and the doctor's comment that she 'had longstanding problems in reducing her cannabis intake, linked to high levels of craving and environments which precipitated and supported her use of the drug'.[824] It should be noted, however, the panel also referred to other evidence by her doctor to the effect that her 'treatments were currently stable and she was appropriately addressing each of the inputs, which she needed to have in her ongoing recovery' and that he 'considered her prognosis for further recovery as excellent'.[825] It may be surmised that the outcome might have been different if she had had the advantage of a legal advocate who could have tested these discrepancies and suggested possible alternative remedies such as the imposition of condition, adjournment or suspension for a specified period of time.

Likewise, in *Re Van der Brink*[826] the hearing panel found against an unrepresented teacher with convictions for shoplifting largely on the basis of evidence from her treating psychiatrist to the effect that 'kleptomania can prove resistant to treatment and the teacher under stress would always be prone to lapses'.[827] This conclusion was reached even though the panel acknowledged that there were many mitigating factors and its acknowledgment that there was no evidence that her 'whole approach to teaching and to the children in her care is profoundly and irretrievably flawed' but that, on the contrary, her commitment to the teaching of disadvantaged children and children with special needs was 'both credible and admirable'.[828]

On the other hand, in *Re NJP*,[829] in which the teacher was found fit to teach, the panel partially justified its decision on the basis that it was 'confident that if the teacher continued her process of rehabilitation, there would be no repetition of her misconduct'.[830] The critical difference here was that the teacher's treating psychologist was more positive about her future prospects and she also enjoyed the support of her school principal.[831]

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[823] Ibid, p 5.
[824] Ibid.
[825] Ibid.
[826] *Re Van der Brink*, VIT, No 073, 2 October and 11 December 2011.
[827] Ibid, p 11.
[828] Ibid, p 13.
[829] *Re NJP*, VIT, No 127, 3 December 2012.
[830] Ibid, p 8.
[831] The panel's statement of reasons summarises the information provided to it by him at p 6. It should be noted that this teacher was self-represented at the hearing.

In summary therefore the cases demonstrate that hearing panels have been cognisant of the need to determine fitness to teach as at the date of the hearing and that they have consistently done so.

Nexus of offending to the role of a teacher

A critical point is that, in assessing fitness to teach in a context where this has arisen due to criminal offending, panels should consider the nexus of the offending to the teacher's job. This brings into play the issues discussed in Chapter 5 concerning the nature and breadth of the teacher's role. The 'broad view' attaches considerable significance to the role of teacher as role model, whereas the 'narrow view' regards the role of teacher as being defined by classroom and educational activities. Irrespective of the approach taken, however, the nexus should be a key focus. There can be no justification for depriving someone of their vocation where there is no clear link between their offending and the requirements of their job. This is a matter of substantive fairness to the individual teacher.

Furthermore failure to consider the interrelationship between offending and the inherent requirements of the job amounts to discrimination. As explained in the Australian Human Rights Commission's Guidelines relating to for the prevention of discrimination in employment on the grounds of criminal records, an employer can make a distinction against someone with a criminal record only if 'the criminal record is relevant to the job'.

In the majority of cases panels seem to be aware of the requirement for some nexus, although in some cases the connections would seem to be quite tenuous, and a broad interpretation of the teacher's role supports this. There has also arguably been insufficient attention given to the weight attaching to different aspects of the teacher's job (for example, matters that might affect the welfare of children or the broader school community as opposed to broader issues of reputational damage to the profession). It is arguable that issues affecting the welfare of children should be the paramount consideration, but in many cases reputational damage is regarded as the key issue.

The VIT's policy on criminal records singles out for express consideration a number of factors relevant to the nature of the offending; ie whether the offence involved children;

whether violence was involved; whether a dishonesty offence involved a school and whether the circumstances reflect badly on the person's standing as a teacher.

There seems no indication that the panels have treated the absence of the first three factors as being a relevant consideration favouring a teacher. For example, in those cases involving teachers who have committed dishonesty offences the hearing panels seem to have attached minimal significance to whether or not the offending involved a school. On the other hand the fourth factor has feature more prominently. For example, in the panel in *Re RGA*[832] referred to this a relevant factor noting that his convictions 'raised serious questions about the teacher's character, reputation and conduct',[833] but it nevertheless concluded that he was fit to teach as it felt that that there was little likelihood he would re-offend.[834]

Likewise, there has been no specific mention of the 'public interest' factor in decisions concerning teachers with criminal records, although it has received some limited mention in other decisions relating to allegations of misconduct.[835]

In summary therefore, there appears to have been minimal attention given to the nexus of offending to the teacher's role except to the extent that it impacts on their reputation as a teacher.

Relevance of individual circumstances and sentencing

In deciding whether or not to cancel a teacher's registration or impose some other penalty a formal hearing panel must focus on the question of fitness to teach. Disciplinary proceedings are against teachers found guilty of criminal offending arguably should consider how the offending is characterised as well as issues about current fitness to teach. What is critical is that the criminal offending should be approached from the perspective of its relevance to the teacher's fitness to teach.

[832] *Re RGA*, VIT, No 137, 22 March 2013.
[833] Ibid p 14.
[834] Ibid, p 15.
[835] See, for example, *Re Connell*, VIT, No 125, 10 October 2012, p 6; *Re Sargsyan*, VIT, No 040, 20 November 2006, p 12.

When King reviewed the VIT's operations, he discussed the policy that was used at the time to guide decision-making in relation to teachers with criminal records. The review noted that this policy was a flexible one which required consideration of each case on its merits rather than requiring cancellation of registration simply because a teacher had a criminal record. It also noted the criteria used for criminal offences in general and also for certain offences (ie. sex, violence, dishonesty and drug offences).

In the case of general offences, these included: 'nature of the offence; applicant's personal circumstances; period of time that has elapsed since the offence(s) took place; severity of the penalty; whether the offence involved a child; whether violence was involved; etc'.[836] In the case of the latter specific serious offences they required consideration of additional assessment criteria: 'For example, where sex offences have been identified, the age and vulnerability of the victim and any injury to the victim would be considered'.[837]

Haller observed that 'traditionally the courts have stated that the protective nature of disciplinary hearings meant that a practitioner could not rely on personal, mitigating factors to the same degree as in criminal proceedings'[838] However, this proposition needs qualification to the extent that those mitigating factors may be of relevance to the question of the teacher's fitness, depending on the nature of the test used. To the extent that the test focuses on issues such as character or reputation it is arguable that mitigating factors are in fact relevant.

This issue was considered by the hearing panel in *Re GDG*[839] which relied heavily on the approach taken by the Victorian Court of Appeal in *Medical Practitioners Board of Victoria v Sabi Lal*,[840] a case concerning the registration of a medical practitioner. That case turned on the meaning of s 6(2)(d) of the *Health Professions Registration Act 2005* (Vic) which provides that a board may refuse to grant general registration to an applicant on the ground:

[836] King Review, p 36.
[837] Ibid, p 37.
[838] Linda Haller, *Discipline of the Queensland legal profession,* A thesis submitted for the degree of Doctor of Philosophy at the University of Queensland, July 2006, Ch 7.
[839] *Re GDG*, VIT, No 100, 30 April 2010, p 6.
[840] [2009] VSCA 109.

> that the applicant has been found guilty of an offence where the suitability of the applicant to practise as a health practitioner is likely to be affected because of the finding of guilt or where it is not in the public interest to allow the applicant to practise because of the finding of guilt.

In assessing the correctness of the decision by the VCAT to uphold Mr Lal's application for review of the Board's refusal to register him, the Court rejected an argument that the circumstances of an individual's offending were irrelevant to s 6(2)(d) having regard to s 1(a), which stressed the need to consider the nature and circumstances of the offending, including in particular the issue of moral culpability and commented that:

> With almost every offence, there are so many factual situations that could give rise to a finding of guilt, ranging from the minor to the very serious, that the offender's suitability to practise medicine (including the question whether the trust between health professionals and patients would be undermined) could not sensibly be assessed by reference to the finding of guilt alone.[841]

While VCAT's decision concerns both a different profession and a test that is differently worded from that in the ETRA, the issue of moral culpability is arguably equally relevant in the case of the ETRA, although it is not clearly specified in its policy. It is therefore significant that *Re GDG* is the only one of the cases analysed to specifically address this issue. While the VIT's guidelines specifically mention an individual's 'personal circumstances' and the decisions consistently refer to the need to consider the circumstances of the offending, it is arguable that the test of moral culpability is more specific and to the extent that offending is relevant to a teacher's position, more directed to the underlying rationales for the power to deregister on the ground of lack of fitness to teach.

A related consideration is the nature of the sentence imposed on an offender. The fact that a court has chosen to impose a sentence at the lowest range of the sentencing spectrum is arguably strongly indicative that the court either regards the offending as not being serious or is satisfied that there are strong mitigating factors applicable. This should be treated as relevant by hearing panels even though it cannot be definitive due to the different nature of their task. For example, it may be that a teacher warrants merciful treatment but is nevertheless unfit to teach because they pose a continuing threat to the welfare of children or to the broader school community. On the other hand the sentence imposed may also be

[841] Ibid, [48].

indicative of the extent to which the court regards the offender as being likely to reoffend. It is arguable that courts have considerable experience in making such judgments and that panels should therefore treat these assessments with appropriate respect as part of a fair decision-making process.

The VIT's policy on criminal records includes the severity of the penalty imposed by the court in the list of factors to be considered by hearing panels, and it also requires consideration of whether the court imposed a Good Behaviour Bond or Community Based Order. However, there is little evidence in the reported decisions to suggest that panels have given specific consideration to this issue and there are a small number of cases which stand out because the decision of the hearing panel is highly punitive (ie resulting in cancellation of registration) in a context where the sentence imposed by the court is at the lowest end of the sentencing spectrum. One clear example is the case of Tara Sutton, who received very low level sentences for her offending (low level fines and Community Based Orders) but nevertheless had her registration cancelled without any specific mention of the penalties imposed by the sentencing court.

A related issue concerns the need for panels to take account of the significance of decisions by courts not to record convictions. A sentencing decision by a magistrate or judge not to record a conviction reflects a specific intention to reduce the impact of the guilty finding on a person's future, including their employment.[842] As described by the Tasmanian Sentencing Advisory Council, the non-recording of a conviction:

> …allows the court to exercise its discretion to shield an offender (in the appropriate case) from the collateral consequences of a conviction, particularly in the area of employment. This recognises that the imposition of a conviction is a punishment in itself and, having regard to its longterm legal and social consequences, the recording of a conviction may, in the circumstances of the case, be disproportionate to the offence.[843]

The power of courts to make findings of guilt without recording a conviction varies from jurisdiction to jurisdiction. In the case of Victoria this power is contained in the *Sentencing Act 1991* (Vic). This states that the factors a court must have regard to in deciding whether or

[842] See *Sentencing Act 1991* (Vic), s 8(1)(c).
[843] Tasmania, Sentencing Advisory Council, *Non-Conviction Sentences: 'Not record a conviction' as a sentencing option,* Final Report No 3, August 2014, vi.

not to record a conviction include the impact of recording a conviction on 'the offender's economic or social well-being or on his or her employment prospects'.[844] The Act goes on to state that, unless otherwise provided by legislation, 'a finding of guilt without the recording of a conviction must not be taken to be a conviction for any purpose'.[845]

It is arguable that non-conviction sentences should not form the basis for loss of registration in the absence of strong countervailing considerations because they reflect a deliberate judgment by a court of law after considering evidence and argument put before it 'that the offending is not of a serious nature and did not reflect adversely on the person's character to the point where a record should be created'.[846]

The VIT's policy lists whether a conviction was recorded as a relevant factor in assessing the severity of the sentence imposed. This point was clearly understood by the hearing panel in *Re BKP*,[847] which mentioned as a factor justifying its conclusion that the teacher was fit to teach that his offence 'on the lower end of seriousness as is reflected by the Court's decision to not record a conviction, instead placing the teacher on a two year Good Behaviour Bond'.[848]

However, other reported decisions do not indicate any specific attention to this issue. For example, in *Re NJP*, in which the teacher's original conviction for stalking had been set aside on appeal and substituted with a non-conviction sentence and Community Based Order, the hearing panel made no specific mention of the fact that appeal court had decided not to record a convictions. Nevertheless, in arriving at its conclusion that the teacher remained fit to teach, it focused on the fact that there were mitigating factors present (presumably the same ones that influenced the County Court in it sentencing) and on her behaviour since the offending.

In *Re Pham*,[849] which involved a finding of guilt without conviction in respect of a single count of theft relating to theft of a wallet, the panel emphasised the fact of the conviction but

[844] *Sentencing Act 1991* (Vic), s 8(1)(c).
[845] *Sentencing Act 1991* (Vic), s 8(2).
[846] Attorney-General's Department [South Australia], *Proposal to Amend the Spent Convictions Act 2009* Discussion Paper (2011) 5, cited in Tasmanian Sentencing Advisory Council, op cit, 57.
[847] *Re BKP*, VIT, No 121, 13 July 2012.
[848] Ibid, p 5.
[849] *Re Pham*, VIT, No 132, 17 December 2012.

made no reference to, and did not discuss, the fact that the Magistrate had chosen not to record a conviction. It ultimately decided to suspend her registration and to impose a number of specified conditions.

In the latter case the panel's failure to consider or attach significance to the fact that no conviction was recorded may well have been attributable to the fact that the teacher did not appear at the hearing either in person or via representative and that it therefore has no evidence before it to shed light on any mitigating factors that may have influenced the court. However, failure to consider the implications of a non-conviction sentence is problematic, and could be seen as unfair, as it undermines the sentencing rationale for not recording a conviction.

Application of the relevant statutory tests

It is the function of VIT hearing panels to decide questions of fitness to teach consistently with the ETRA legislation. As discussed in Chapter 3, the terms 'misconduct' and 'fitness to teach' were inserted into s 2.6.1 via amendments made by the *Education and Training Reform Amendment Act 2010* (Vic).

'Fitness to teach' is defined in s 2.6.1 in relation to a person as meaning 'whether the character, reputation and conduct of a person are such that the person should be allowed to teach in a school'.

It is a notable feature of many of the decisions which have post-dated this amendment that they make no specific reference to the definition, but instead continue to apply the tests that were formulated prior to its inclusion: ie they largely continue to apply the formulation developed by the VCAT in the *Davidson* case, as discussed below, and on the common law cases more. This is unsatisfactory; even if it is the case that the statutory definition restates the common law position, this point needs to be stated explicitly.

The meaning of fitness to teach developed prior to the introduction of the statutory definition is summarised in the following extract from the decision of the VCAT in the Davidson

case[850] which, while not itself a case that concerned a teacher with a criminal conviction, has been referred to in many of the decisions which have been analysed in this thesis.

> 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.[851]

The VCAT in Davison also referred with approval to the following passage from *Burgess v Board of Teacher Registration Qld*:

> Any behaviour found to be inappropriate for a teacher is relevant to the ultimate question of fitness to be a teacher, even though the events may have happened many years earlier. The weight to be attached to that behaviour was a matter for the Board to determine.[852]

It should be noted that the entire focus of the VCAT in this decision under the earlier legislation was on the question of conduct. In contrast what is required by the new statutory test is consideration also of character and reputation.

The interrelationship between conduct, character, reputation and fitness to engage in a profession is explained in the following passages from the decision of the High Court in *Australian Broadcasting Tribunal v Bond*.[853]

> The expression 'fit and proper person', standing alone, carries no precise meaning. It takes its meaning from its context, from the activities in which the person is or will be engaged and the ends to be served by those activities. The concept of 'fit and proper' cannot be entirely divorced from the conduct of the person who is or will be engaging in those activities. However, depending on the nature of the activities, the question may be whether improper conduct has occurred, whether it is likely to occur, whether it can be assumed that it will not

[850] *Davidson v Victorian Institute of Teaching* (Occupational and Business Regulation) [2007] VCAT 920.
[851] Ibid, [169].
[852] *Burgess v Board of Teacher Registration Qld* (2003) QDC 159 at 176.
[853] (1990) 170 CLR 321.

> occur, or whether the general community will have confidence that it will not occur. The list is not exhaustive but it does indicate that, in certain contexts, character (because it provides indication of likely future conduct) or reputation (because it provides indication of public perception as to likely future conduct) may be sufficient to ground a finding that a person is not fit and proper to undertake the activities in question.[854]

The concepts of character and reputation are further explained by Freiberg, Donnelly and Gelb. They point out that character generally refers 'to the inherent moral qualities or disposition of a person' and can be contrasted with reputation, which refers to 'the public estimation or repute of a person irrespective of that person's inherent qualities'.[855]

Freiberg, Donnelly and Gelb further explain that character has a dual aspect: 'negatively relating to prior criminal conduct and positively relating to the offender's contribution to the community'.[856] Factors listed by them as relevant to character in the context of criminal sentencing include 'the number, seriousness, date, relevance and nature of any previous findings of guilt or convictions of the offender' and 'any significant contributions the offender made to the community'.[857]

Past offending may shed light on character to the extent that specific offences may be regarded as reflective of specific character traits (for example, theft is typically regarded as indicative of a trait of dishonesty), while repeated offending or serious offending may be regarded as indicative of being non-law abiding. It is arguable that the type of offence committed is relevant to whether a teacher is fit to teach, but based on a narrow view of the role of the teacher (as discussed in Chapter 5). However, there is also a strong argument that such assessments should be tempered by the context of the offending.

The remaining factor listed by Freiberg, Donnelly and Gelb is reputation. While it is separate from character, reputation is also one of the factors that is relevant to assessments of character. Presumably this is based on the assumption that a person's inherent qualities will

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[854] Ibid, per Toohey and Gaudron JJ.
[855] Arie Freiberg, Hugh Donnelly and Karen Gelb, *Sentencing for Child Sexual Assault in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2015 at p 79, citing *Melbourne v R* (1999) 198 CLR 1;[1999] HCA 32 at [33] per McHugh J.
[856] Ibid.
[857] Ibid.

generally affect how they are regarded by the public. In the case of teachers the issue of reputation is relevant in two ways; the light that sheds on a teacher's personality traits and also the extent to which their offending will affect their ability to work with colleagues and the broader reputation of the profession.

The concept of reputation or 'good repute' as it is otherwise known has been further elucidated as follows by the Appeals Panel of the New South Wales Administrative Decisions Tribunal in *Director General, Department of Transport v Z (No.2)*:

> 'Good repute' refers to the way reasonably-minded people assess an individual's current reputation, with reasonably precise knowledge of those matters that put the person's reputation in doubt. The fact that the person produces evidence from witnesses who vouch in general terms for the person's reputation cannot be conclusive. Equally, care must be taken, as we see it, not to use the 'good repute' requirement as a way of bringing into consideration stereotypes or assumptions which offend, for example, against human rights or anti-discrimination standards.[858]

The last sentence highlights the significance of human rights and anti-discrimination concerns. These are similarly relevant to the VIT's decision-making about fitness to teach, as outlined in Chapter 5.

In summary it is arguable that there are key differences between the new definition of fitness to teach and the definitions that were developed when there was no definition in the Act. It follows that it is problematic that panels continue to resort to the old definition.

Consistency of outcomes for like cases

An element of fairness is the consistency of outcomes for like decisions. As administrative decision-makers, panels are not bound by rules of precedent. Nevertheless fairness requires that their decisions should be as consistent as possible, while still factoring in and having regard to the individual circumstances of each case.

[858] *Director General, Department of Transport v Z (No.2) (GD)* [2002] NSWADTAP 37, [38].

The cases analysed relate to many different types of offences with individual circumstances unique to each of them. Nevertheless, there are instances where the similarities in offending and differences in outcomes are very stark.

Take for instance the cases of *Re Sutton*[859] and *Re JS*. These concerned teachers with cannabis related convictions, both of whom received very low level penalties due to mitigating factors. However, Sutton had her registration cancelled whereas JS was found fit to teach and was allowed to continue on with her teaching. While the panel in *Re Sutton* justified its decision on the basis that it could not be satisfied that she was free from her drug habit, it would have been open to it have suspended her licence or granted it subject to conditions rather than cancelling it altogether. The fact that she lost her registration is in stark contrast to the outcome in *Re JS*.[860]

The same issue arises in relation to the outcomes in *Re Van den Brink*[861]and *Re LJB*[862] which concerned teachers with multiple convictions for shoplifting who both received low level penalties due to mitigating factors. In *Re LJB* the panel allowed the teacher to retain her registration noting that she had led 'an exemplary professional life simultaneously with committing the offences'.[863] In contrast, in Re Van der Brink the panel cancelled the teacher's registration despite commenting that there was no evidence that: her 'whole approach to teaching and to the children in her care is profoundly and irretrievably flawed'.[864] Its reason for doing this was due to the lack of any guarantee that she would not re-offend. As in *Re Sutton*, the panel does not appear to have given any thought to alternative sanctions such as suspension or imposition of conditions.

These examples suggest that panels are giving insufficient attention to the issue of consistency, thereby undermining the fairness of their decision-making.

[859] *Re Sutton*, VIT, 097, 24 February 2010.
[860] *Re JS*, VIT, No 018, 12 April 2005.
[861] *Re Van Den Brink* , VIT, No 073, 11 December 2008.
[862] *Re LJB*, VIT, No 126, 2 October 2012.
[863] Ibid.
[864] Ibid, p 13.

Privacy issues

The issue of privacy arises in relation to two aspects of decision-making by VIT hearing panels - the hearings themselves and the extent to which they are open to the public, and the extent to which the published decisions of the panels name the teachers to whom they relate. The latter is arguably more significant in an analysis of whether the decision has been fair given that there appears to be no evidence that hearings are commonly attended by individuals other than those directly involved in the hearing (including any witnesses).

The ETRA establishes openness as the default provision both in relation to hearings and the publication of tribunal decisions and other material relating to hearings, demonstrating its regard for natural justice, but also contains specific provisions which allow for hearings to be closed and for non-publication of information in specified situations.

Turning first to the issue of hearings, s 2.6.45(d) provides that the proceedings of formal hearing panels 'are to be open to the public unless the panel determines that the proceedings should be closed because the hearing is taking evidence of intimate, personal or financial matters'. However the Act provides no further guidance as to the circumstances in which this discretion should be exercised.

In the case of publication of reasons, s 2.6.49A provides that subject to exceptions, the VIT may publish the whole or part of the findings, reasons or a determination of a formal hearing panel relating to a matter heard by a formal hearing panel in any manner that it thinks fit. The exceptions relate to suppressing the identity of complainants, witnesses and the teacher who is the subject of the decision.

Section 2.6.45(c) relates to cases where the hearing arises out a complaint (this is not the case where the hearing arises as a result of criminal records check or notification) and prohibits the publication of any information that might enable the complainant to be identified to be published or broadcast. This provision differs from the others that follow in that there is no discretion involved. While there is no information as to why this is worded so strongly, it seems likely that the wording reflects a desire to encourage individuals to make complaints by guaranteeing that they will not be named.

Section 2.6.45(e) relates to witnesses and provides that 'the panel may determine that any information that might enable any witness giving evidence in the proceedings to be identified is not to be published or broadcast'. This differs from s 2.6.45(c) in that whether or not to make such a determination is left as a matter at the discretion of the hearing panel. As is the case with s 2.6.45(d) the Act provides no guidance as to the exercise of the discretion.

The most significant provision relating to protection of teachers is s 2.6.46(4)(b) which provides that a formal hearing panel may determine:

> that any information, which might enable the teacher who is the subject of a determination made under subsection (2) to be identified, must not be published or broadcast if the panel considers it necessary to do so to avoid prejudicing the administration of justice or for any other reason in the interests of justice.

Section 2.6.45(f) allows panels to protect information 'might enable the teacher who is the subject of the hearing to be identified' prior to the making of the final determination, but only 'if the panel considers it necessary to do so to avoid prejudicing the administration of justice or for any other reason in the interests of justice'.

It is significant that there is no provision which empowers panels to make non publication orders simply to protect the privacy of teachers even in cases where the panel concludes that they are fit to teach.

Requests for closed hearings and or suppression orders are recorded in only three of the decisions analysed. The first of these concerned an unrepresented teacher who was required to attend a second hearing before a VIT formal hearing panel in relation to non-compliance with conditions imposed following the first hearing.[865] (The teacher was referred to the panel following convictions for theft and was allowed to remain registered subject to various conditions, including requirements to attend counselling and to provide reports from his treating psychologist.) The teacher requested a closed hearing on the basis that the earlier hearing had 'resulted in publicity in his local newspaper and was a contributing factor to the loss of his teaching position'.[866] This was refused on the basis that:

[865] *Re Atkin*, VIT, No 045, 12 December 2006.
[866] Ibid, p 5.

> There was a public interest in maintaining an open justice system. The matters to be discussed were not of such intimate, personal or financial matters as to justify granting an exception to this general rule.[867]

The panel's statement of reasons stated its understanding that the teacher was 'suffering from a debilitating mental illness and ha[d] done so since his adolescence'.[868] They also noted that the teacher continued to reside in the same area and had given evidence that 'he could not go to the supermarket or out in public out of a sense of shame and embarrassment'.[869] It seems therefore that its decision was harsh given the consequences for the teacher and the fact that the hearing did involve highly sensitive personal matters (ie his ongoing psychiatric condition).

The panel concluded that the teacher was guilty of serious misconduct for failing to comply with the conditions placed on his registration. However, it decided that the teacher would remain registered subject to further conditions. The VIT website entry for this case notes that the panel was satisfied that he fulfilled these new conditions and that the conditions on his registration had been lifted. The reasons statements in respect of both hearings have not been anonymised ensuring that information about his case has continued to be publicly available in a way which is directly associated with him (thereby continuing to cause him shame).

A second case concerned a request by another unrepresented teacher for an order suppressing her name from appearing in any publication.[870] She requested this order on the basis that her three children had already suffered for her actions and they would be further mistreated in their community if her name became public.[871] This request was denied on the same basis as the denial of the closed hearing discussed above. The panel also commented that 'the teacher's name was already in the public arena through her appearance in the Magistrates' Court'.[872]

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[867] Ibid.
[868] Ibid, p 6.
[869] Ibid, p 5.
[870] *Re Sutton*, VIT, No 054, 24 September 2007.
[871] Ibid, p 5.
[872] Ibid.

The panel in this case concluded the teacher's convictions for medical certificate fraud amounted to serious misconduct but she remained fit to teach. However, its statement of reasons was not anonymised (presumably therefore adding to her children's suffering to the extent that they gave new or revived publicity to her offending).

The third case,[873] again involved an unrepresented teacher. The teacher who had been convicted in respect of upskirting, and likewise requested to have his personal details suppressed in order to protect others. The teacher sought the order on the grounds that his family had already suffered great humiliation during the courts case would endure this again if his personal details were made public. This was rejected on similar grounds; ie that there was a public interest in maintaining an open justice system, matters of an intimate, personal or financial nature had not been put forward in support and the teacher's name was already in the public domain through his court appearance. The panel concluded that the teacher was unfit to teach and his name was not anonymised in its statement of reasons.

In each of these cases the issue was dealt with very briefly in a single paragraph of the panel's published decisions. This suggests that panels may not have devoted the attention arguably required to balance the competing interests of privacy and open justice, having regard to the context of their decision-making and the specific circumstance of the individual teachers. It also suggests that they may not have been appropriately cognisant of the human rights dissension of privacy and their obligations under the Victorian Charter. While the Charter does not contain right to privacy that is absolute (as discussed in Chapter 1), it does require consideration and articulation of the reasons why the teacher's right to privacy should be overridden in the specific circumstances. It is significant that none of the three teachers was legally represented.

The issue of privacy was noted in the King Review, which referred to a stakeholder submission that cited concerns with the limited privacy protection in the Act, citing concerns that media reporting can easily lead to the identification of a teacher prior to panel making a final determination.[874]

[873] *Re Janse van Vuuren*, VIT, No 080, 17 February 2009.
[874] King Report, p 100.

The rationale for open hearings has been developed principally with regard to courts. While it has been extended to administrative bodies (at least in the context of quasi-judicial proceedings) it is arguable that its application in this context needs to be a flexible one that is guided by the regulatory context and the extent to which the factors that weigh against openness, including privacy, should be given additional weight.

The openness of our courts is a fundamental principle of our judicial system. As noted by McLachlin J, 'The open court principle is a venerable principle, deeply rooted in western consciousness'.[875] She further explains that:

> Courts must be open and reasons for judgment public so that the litigants, the media, legal scholars and ultimately the general public may follow, scrutinize and criticize what is done in the name of justice. It is a point of pride that long before transparency became the buzzword of governance, the courts insisted that their proceedings be open to all.[876]

However, open justice is not without cost and exists in tension with privacy.[877] It has therefore been recognised by the courts that open justice may need to give way to privacy in some circumstances.[878] As explained by Kirby P:

> …exceptions have been allowed by the common law to protect police informers; blackmail cases; and cases involving national security. The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer) or discourages its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) the rule of openness must be modified to meet the exigencies of a particular case.[879]

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[875]The Hon Justice Beverley McLachlin, 'Openness and the Rule of Law' (Paper presented at the Annual International Rule of Law Lecture, London, United Kingdom, 8 January 2014) p 10.
[876] Ibid.
[877] Ibid.
[878] See *Hogan v Hinch* (2011) 243 CLR 506 and the cases cited by the court at [21]. There is also a discussion in ALRC, *Traditional Rights and Freedoms-Encroachments by Commonwealth Laws*, ALRC Interim Report 127, 2015 at [10.48]-[10.54].
[879] *John Fairfax Group v Local Court of New South Wales* (1991) 36 NSWLR 131, 141 (citations omitted from quote).

This has also been explicitly recognised in many laws which specifically require proceeding to be held in private and/or for restrictions on publication of material generated in the course of proceedings in order to protect privacy interests.[880]

A key question therefore is where to draw the line. In the case of the ETRA it is arguable that the requirement for proceedings in general to be open to the public offers a measure of protection to teachers against abuse of power by VIT hearing panels. In addition, the standard practice of publishing reasons for decisions serves a valuable role in permitting external scrutiny of VIT decisions as manifested in this thesis.

However, it is important to bear in mind that VIT hearings do not generally receive media scrutiny which casts doubt on the role of media scrutiny in ensuring appropriate accountability and fairness. In addition, the publication of VIT decisions on the Internet means that they are available for research on an indefinite basis and likely to come to the attention of any student, parent or other interested person who may wish to scrutinise a teacher.

This raises the issue of the right to be forgotten. This concept is has attracted considerable discussion in Europe and the United States in the light of proposals to include such a principle in the European Data Protection Regulation and, more recently, following the decision of the Court of Justice of the European Union in the 'Google Spain case',[881] a case based on the current European Data Protection Directive.[882] The right to be forgotten is based on similar policy rationale to that which underlies spent convictions regimes as discussed in Chapter 1. It has been described by Pelekanos[883] as deriving its intellectual roots 'in French law and the 'right of oblivion' (*le droit à l'oubli*), the right that allows a convicted criminal to object to the publication of information concerning his conviction and imprisonment'.[884]

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[880] See, for example, *Family Law Act 1975* (Cth) s 121; *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s 27; *Federal Court of Australia Act 1976* (Cth) ss 37AE-37AL; *Open Courts Act 2013* (Vic).
[881] *Google Spain SL, Google Inc. v Agencia Española de Protección de atos, Mario Costeja González*, Case No C-131/12, 13 May 2014.
[882] Directive 95/46/EC.
[883] Apostolos Pelekanos, 'The Latest Developments Regarding the 'Right to Be Forgotten'' (May 11, 2015). Available at SSRN: ≤http://ssrn.com/abstract=2645768≥, at p 2.
[884] Ibid, citing Jeffrey Rosen 'Symposium Issue: The Right To Be Forgotten' (2012) 64 *Stanford Law Review Online* 8.

Moreover, it is important to bear in mind in relation to the decision-making under scrutiny in this thesis that it is generated by the criminal records checking process. In other words, except in those rare cases where the offending takes place at or involves a teacher's school, the criminal offending comes to the attention of the VIT either because a criminal records check has been performed or because the VIT has been informed via the criminal checking process. This is significant as information about an individual's criminal history falls within the category of 'sensitive information' under the *Privacy Act 1988* (Cth).[885] Personal information that qualifies as 'sensitive information' receives stronger protection under the Australian Privacy Principles (APPs). For example it cannot be collected without the consent of the individual to whom it relates unless one of the exceptions specified in APP 3.4 is applicable.[886] In contrast, other 'personal information' can be collected if its collection is reasonably necessary for, or directly related to, one or more of the entity's functions or activities[887] (or reasonably necessary for one or more of the entity's functions or activities, in the case of an entity that is a private sector organisation).[888]

It is therefore arguable that such information should not be made public in circumstances where a hearing panel decides that the teacher is currently fit to teach. In that case the lack of anonymity is both unfair (because the conviction and other factors taken into account have been assessed as not affecting current fitness) and also potentially harmful to the extent that public knowledge about it may undermine the teacher's ongoing rehabilitation.

As previously discussed, the decisions of hearing panels are available on the VIT's website. A significant number of these decisions have been anonymised (in the sense that there are initials used in place of a teacher's name). All of these relate to teachers who were found fit to teach. However, there are also two early cases where the teacher is named even though he or she has been found fit to teach (including one which concerned a teacher who has sought a suppression order, as discussed above).[889] Naming these teachers in the panels' published decisions seems very unfair given that their criminal history has been made public (and still

[885] The definition of 'sensitive information' can be found in s 6(1).
[886] *Privacy Act 1988* (Cth), Sch1, APP 3.3.
[887] *Privacy Act 1988* (Cth), Sch1, APP 3.1.
[888] *Privacy Act 1988* (Cth), Sch1, APP 3.2.
[889] *Re Fairley*, VIT, No 027, 9 September 2005; *Re Ingram*, Case No 008, 25 October 2004.

continues to be made public many years later), despite the fact that their convictions were not regarded as sufficient to preclude them from remaining registered as teachers. However, this practice seems to have ceased given that all recent decisions involving teachers who were found fit to teach have been anonymised.

The other cases where the teacher is named are those where there has been a decision made to either impose conditions or to suspend registration for a period of time. For some there is no indication of whether those teachers satisfied their condition, although it may be inferred that they did (from the absence of any statement of decision cancelling their registrations). In the case of the more recent decisions the VIT website contains notices to the effect. For example, in relation to one case[890] there is a note immediately below the link to the decision stating that:

> *The Panel was satisfied that [name of teacher] fulfilled the conditions of the determination and the conditions on his registration were lifted on 11 December 2014.*

It is arguable in respect of these cases that, to the extent that there is justification for naming the teacher where their registration remains conditional, this ceases to be the case once those conditions have been met and the name of those teachers should be anonymised once the conditions were lifted. This would be consistent with the practice used in relation to the Register of Disciplinary Action, as discussed below.

There are further privacy issues arising from requirements for the VIT to keep a Register of Teachers[891] and to make an up to date copy available for inspection by any person at the VIT's offices, during normal office hours, free of charge.[892] The ETRA permits the VIT to publish the register, or any part of it, in any manner it considers fit[893] and it does so by making the available via the Internet in searchable form a register teachers currently able to teach[894] and separate Register of Disciplinary Act (as a pdf document) which contains details of disciplinary action taken against teachers (including conditions, suspension, cancellation

[890] *Re Kerstens*, VIT, No 142, 2 June 2013.
[891] ETRA, s 2.6.24.
[892] ETRA, s 2.6.25(1).
[893] ETRA, s 2.6.25(2).
[894] See <http://www.vit.vic.edu.au/search-the-register>.

and disqualification from applying for registration for a period of time), It would seem that teachers who fall into the latter group (including those who are subject to conditions) are excluded from the searchable register.

The requirements for the Register of Disciplinary Decisions[895] were inserted into the ETRA in 2014.[896] They require to the VIT to maintain a Register of Disciplinary Action (RoDA). Again they require the VIT to keep an up to date copy of the Register available for inspection by any person at its premises,[897] while permitting it to publish the whole or any part of the register as it thinks fit.[898]

Section 2.6.54C specifies the requirement content of the RoDA, which must contain details of all disciplinary decisions by formal hearing panels (other than those subject to suppression orders as discussed above), including decisions to impose conditions on a teacher's registration. These details are to be included only after the end of any relevant period of appeals.[899]

As a general rule particulars recorded must remain on the register for a minimum of 5 years or until the period for which the disciplinary action continues to have effect.[900] As is made clear in the note that follows s 2.6.54G, this means that, in the case of a teacher whose registration is cancelled, the particulars recorded in the Register relating to that cancellation will remain on the Register until he or she is re-registered.

However, the VIT must remove particulars from the RoDA in specified cases including where the VIT has made a decision under s 2.6.54E. Section 2.6.54E(1) permits the VIT to remove particulars on the application of a teacher where this is necessary to avoid endangering the physical safety of a person and the here is no overriding public interest for the particular to be included or to remain in the Register. This power is most likely to be

[895] See ETRA, ss 2.6.54A-2.6.54H.
[896] They were implemented via the *Education and Training Reform Amendment (Registration Of Early Childhood Teachers and Victorian Institute of Teaching) Act 2014* (Vic).
[897] ETRA, s 2.6.54B(2).
[898] ETRA, s 2.6.54B(3).
[899] ETRA, s 54D.
[900] ETRA, s 2.6.54G(a)-(b).

relevant in the case of teachers recorded as having lost their registration due to the commission of sexual offences.

The VIT has chosen to make the RoDA available online. It is arranged in alphabetical order and lists each teacher's full name and specifies the actions taken against each teacher together with the effective date and, where relevant, the date when that action ceases.

As required, it distinguishes between teachers who have been disqualified for sexual offences and others whose registration is cancelled. For example, in the case of Andrew Phillips the record of action taken reads: 'The teacher's registration has ceased and the teacher disqualified from teaching in a school, because the teacher has been convicted or found guilty of a sexual offence'. In contrast the entry for Tara Sutton which reads 'Formal Hearing Panel determined to cancel the registration of the teacher pursuant to section 2.6.46 of the Act'.

The requirement in s 2.6.24(d) to maintain a register of teachers was inserted into the ETRA via amendments made in 2010. It had the effect of changing the previous practice whereby the name of a teacher whose registration had been cancelled or suspended was removed from the register. The reason for retaining cancellation information was to enable members of the public to confirm whether at teacher was in fact a registered teacher when working outside of the teaching profession (for example, as a tutor).[901]

This amendment was opposed by the then Privacy Commissioner who pointed out that the previous practice 'would seemingly achieve this goal as it currently st[ood]'given that the absence of a person's name would lead to the assumption that they were not registered to teach.[902] The Commissioner pointed out that publication of cancellation information might have a substantial and prejudicial effect on the teacher[903] and that the absence of any time limit meant that an ex-teacher might be 'shown as a cancelled teacher in perpetuity, despite the possibility that the individual may have moved on to different professions or

[901] Office of the Victorian Privacy Commissioner, *Submission to the Victorian Parliament's Scrutiny of Acts and Regulations Committee in relation to the Education & Training Reform Amendment Bill 2010*, 10 April 2010, [8] accessed at <https://www.cpdp.vic.gov.au/images/content/pdf/privacy_submissions/submission_04_10_no3.pdf>.
[902] Ibid, [9].
[903] Ibid, [10].

employment'.[904] These are important points and equally applicable to the RoDA. The fact that people have received criminal convictions or guilty findings is a matter of public record (except where a court orders the offender's identity to be suppressed, for example to protect the identity of their victim/s). However, it is difficult to see why the fact that teachers whose offending is already on the public record should also be indefinitely on record also as having lost their registration for that reason. This is significant as a Google search using an individual's name will bring up their entry on the Register of Disciplinary Action.[905]

As explained by the Privacy Commissioner, naming the individual is not necessary for public protection as the absence of that person's name from the register should be sufficient notice that the teacher is unregistered. On the other hand, the fact that they are named in this way is quite likely to impact on them adversely and to hamper their chances of obtaining employment in other fields.

In summary therefore there have been three privacy issues identified. The first is the failure to anonymise decision statements in cases where a teacher is found fit to teach and where there are no conditions imposed on his or her registration; this was in an issue in relation to some if the earlier cases but appears to have been addressed.

The second relates to teachers who have conditions imposed on their registration. While there may be a case for not anonymising these decisions while the conditions remain outstanding, it is difficult to see why there is any public interest in continuing to so if and when teacher meets the required conditions and they have been lifted.

The third relates to publication online of the information about disciplinary action taken against teachers. While the VIT is legally required to maintain the RoDA, it has discretion as whether or not to publish it or any part of it and how to do so. The fact that is has elected to publish the full RoDA online arguably involves an unreasonable invasion of the privacy of the teachers listed on it.

[904] Ibid, [11].
[905] This can be tested easily using individuals with less common names.

Conclusion

This analysis suggests that there are a number of matters affecting the substantive fairness of decisions by hearing panels which warrant further attention.

The next chapter, which concludes this thesis, suggests possible ways of dealing with them and also with the issues identified in Chapters 2 to 5.

CHAPTER 8 – CONCLUSION AND WAY FORWARD

Introduction

This thesis has critically examined the regulation of the Victorian teaching profession and specifically the assessment of criminal records as part of its disciplinary regime. This analysis has focussed on the extent to which convictions and/or guilty findings provide a basis for loss of professional registration, the appropriateness of such assessments, and the application of requirements for fairness in these proceedings.

The thesis has evaluated the ways in which the ETRA regime deals with teachers with criminal convictions from two perspectives; the extent to which this system is consistent with principles of good regulatory design and the extent to which it operates fairly while balancing the important competing interests at stake. Good regulatory design principles require that occupational licensing regimes of the type found in the ETRA should be fit for purpose having regard to the specific occupational group which is being regulated and consistent with human rights and broader fairness principles. It follows that it is important to consider the nature of the teaching profession and the appropriate role of the teacher in assessing the extent to which criminal offending makes an individual unfit to teach leading to loss of registration. It is also important to consider fairness as a practical concept and the need to avoid practical injustice.[906]

The aspects of the ETRA considered fall into two groups: the provisions requiring automatic deregistration in respect of specified offences and those which require a formal hearing panel to consider whether or not a teachers remains fit to teach. Key fairness issues relating to both sets of provisions were highlighted in the case studies of Andrew Phillips and Tara Sutton, who were both deregistered when criminal records checks revealed that they had committed indictable offences; the former by virtue of automatic deregistration and the latter following a finding by a VIT formal hearing panel that she was unfit to teach. These case studies illustrate the potential for both groups of provisions to operate unfairly, and highlight the need for a more detailed analysis of their operation.

[906] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [37].

As argued in Chapter 2, the requirement for automatic deregistration where a teacher is found guilty of specific serious offences, irrespective of extenuating factors, is inherently unfair. Without any discretion to allow continuation of the registration in exceptional circumstances, and without any right of review this component of the ETRA process inadequately balances the competing interests involved and compares unfavourably with the more flexible regimes that exist in other parts of Australia in relation to teachers who have committed similar offences. It also compares unfavourably with the parallel Victorian Working With Children (WWC) regime, which regulates persons other than teachers who work with children.

The position in relation to teachers who have committed offences other than sexual offences is more complex (as analysed in Chapters 3 to 7), requiring an analysis of the procedures contained in the ETRA, the concept of fitness to teach, and the published decisions of the VIT formal hearing panels which have considered whether the teachers remained fit to teach.

The analysis of the procedures contained in the ETRA and decisions of the VIT hearing panels suggests that, while generally fair, there are aspects that are unfair and contrary to optimal regulatory design principles.

In the case of the ETRA itself, the main issues relate to bias and delays. These are discussed further below. The issues identified in relation to decision-making by VIT formal hearing panels span the three specific areas considered - ie, variations in the approach taken to the teacher's role when assessing fitness to teach (as discussed in Chapter 5), procedural fairness (as discussed in Chapter 6) and issues of substantive fairness (as discussed in Chapter 7).

This final chapter summarises the overall findings of the research and makes recommendations for reforms to address the issues identified. The latter build on recommendations of the 2008 King Review,[907] which were not implemented by the Victorian Government.[908]

[907] See 2008 King Review pp 155-168, 171-179.
[908] See Victoria, Department of Education and Early Childhood Development, *The Response of the Victorian Government to the Review of the Victorian Institute of Teaching*, July 2009 accessed at <https://www.google.com.au/?gws_rd=ssl#q=government+response+to+VIT+review>.

As explained in Chapter 1, the analysis in this thesis focuses on two interrelated issues. It considers the extent to which the ETRA regime (including its operation via the work of VIT formal hearing panels) is consistent with good regulatory design and the extent to which it operates fairly based on administrative law and human rights considerations.

In analysing the ETRA from a regulatory perspective it is important to bear in mind three key points.[909] Firstly, '[g]ood regulation requires clarity of analysis and purpose'.[910] This means that it is important to work out what it is that the criminal records checking process for teachers is intended to achieve and the extent to which it is capable of meeting this objective.

While there can be no doubt that the concerns with child safety that provided the initial impetus for the enactment of this regime are valid, it is also the case that past offending is not an accurate predictor of future misconduct generally or of misconduct towards children within the school context. Furthermore, there is a risk that the implementation of criminal records checking may create complaisance in terms of need to implement additional measures to prevent misconduct by individuals who have not previously offended (or whose previous offending remains undetected).

Secondly, it is important to bear in mind that regulation is influenced by emotions, values and ideologies and therefore requires 'understanding of the emotional as well as the rational/cognitive dimensions of a problem'.[911] This is an important issue here given the extent to which issues of child welfare carry a heavy emotional content. While this is easy to understand in a context where Royal Commissions have brought to light evidence of long-standing abuse of children, including in schools, it is important to ensure that a regulatory regime with the potential to damage the careers and livelihoods of individuals is designed and administered in a fair and considered way.

Thirdly, 'good regulation should not stifle the activities it seeks to regulate' and its costs, including social costs, should not outweigh its intended benefits.[912] This is again a significant issue given the broader social and economic costs that flow from denying trained, and often

[909] The first three derive from Arie Freiberg, *The Tools of Regulation*, (Sydney: Federation Press, 2010).
[910] Ibid, p 80.
[911] Ibid, p 81.
[912] Ibid.

experienced, teachers the opportunity to continue to work in their chosen profession. This is especially important to the extent that decisions are made having regard to issues such as professional reputation, as opposed to issues relating to the welfare of school children and broader school community.

Fourthly a good regulatory regime should operate fairly. Fairness is also a legal requirement that is imposed on administrative decisions-makers.

The case law on natural justice discussed in Chapter 6 makes clear that the stringency of the procedures required for an appropriate level of fairness is a function of what is at stake for the individual affected. Where what is in issue is removal of an occupational licence - as is the case under ETRA - the procedural standards expected are the highest end of the spectrum and should include adequate notice and time to prepare, a right to legal representation, a timely hearing and a hearing by decision-makers who are untainted by bias. Likewise as discussed also in Chapter 6, s 24 of the Victorian Human Rights Charter similarly requires timeliness in relation to decisions.

While the rules of natural justice are confined to matters of procedure, it should also be expected that administrative bodies act fairly and consistently with their legal obligations. It follows therefore, as argued in Chapter 7, that they should take appropriate account of the nature of a teacher's criminal offending and its evaluation by the sentencing court, apply the correct statutory test in assessing fitness to teach, ensure consistency in their decision-making and strike an appropriate balance between privacy and open justice in determining requests for closed hearings and the extent to which their decision statements should be anonymised.

Teachers with Convictions Requiring Automatic Deregistration

Automatic dismissal is an extreme measure, especially when there is scope for the exercise of discretion and no right of appeal. Section 2.6.29 of ETRA sends a very strong message which may operate as a deterrent, but its inflexibility can also promote unfairness, as illustrated via the Andrew Phillips case study.

As discussed in Chapter 2, the inflexibility of this provision is inconsistent with the approach taken in most other parts of Australia and also with that taken in the WWC regime. This

unfairness was absent from the original Bill for the VIT Act (which preceded the ETRA), and it would seem that the current wording of s 2.6.29 was the result of lobbying based on an emotional response to child abuse, rather than objective assessment of whether it was genuinely necessary to remove all elements of discretion.

The King Review recommended that the Act should be amended to provide a right of review to VCAT in respect of a decision to cancel a teacher's registration because of a conviction for a sexual offence, but it did not elaborate on how this right of appeal should be worded.

Way forward

There are a number of different approaches which can be taken to remedy the harshness of the current provision in s 2.6.29, as illustrated by in the various regimes that regulate teachers in other parts of Australia. However, it is proposed here that the approach taken in the Victoria WWC Act to individuals who have committed offences that are regarded as being at the highest level of seriousness strikes the best balance between the public interest in ensuring child protection, and the competing public interest in ensuring fairness to an individual whose livelihood is at stake. It does so by requiring automatic refusal of an assessment coupled with a right of appeal to the VCAT.[913] VCAT can issue a WWC check if satisfied that granting an assessment would not pose an unjustifiable risk to children. In addition, as discussed in Chapter 2, the Victorian WWC regime has proven to work well in the sense that there are well reasoned decisions by the VCAT which demonstrate a nuanced approach to the granting of checks based on the individual circumstances of the applicant. It is arguable therefore that there would be merit in using the WWC model as the basis for reform of the ETRA. This could be achieved in two different ways.

The first is to amend the current position whereby Victorian teachers do not need to hold a WWC check.[914] If they were to be required to hold a WWC check, there would arguably be no requirement for deregistration via ETRA processes, as the matter would be resolved as WWC matter, based on the criterion and procedures in the WWC Act. This approach would have the advantage of simplicity and avoid a duplication of resources. However, as the focus

[913] *Working With Children Act 2005* (Vic), ss 12 and 26A.
[914] *Working With Children Act 2005* (Vic), s 26A(3).

of the WWC Act is on child safety, this would remove the opportunity to consider also any matters specific to teachers.

A second approach would be to amend the ETRA so that it contains a test similar to that in the WWC Act. This would essentially provide a default rule whereby an applicant who has committed a 'sexual offence', as defined in the ETRA, has their registration automatically cancelled but has a right to apply to the VCAT for an order requiring his or her registration to be reinstated if the VCAT is satisfied that making such an order would not pose an unjustifiable risk to the safety of children.

As discussed above, this approach arguably strikes an appropriate balance between the rights of teachers and children. The seriousness of the offences specified, the sexual nature of the offences and their direct relevance to child safety and welfare would be such as to establish a prima facie case for deregistration. However, there would be scope for an individual to seek review by the VCAT and for it consider the individual's circumstances including the types of matters that gave rise to widespread concern in the automatic deregistration of Andrew Phillips.

It is recommended therefore that s 2.6.29(1) should be replaced with the following:

> (1) Subject to (2), a person who is registered as a teacher or an early childhood teacher under this Part ceases to be so registered if the person is, in Victoria or elsewhere, convicted or found guilty of a sexual offence.[915]
>
> (2) A person whose registration is cancelled under (1) may apply to the VCAT for an order reinstating their registration and the VCAT may make such an order if it is satisfied that making the order would not pose an unjustifiable risk to the safety of children and that applicant is fit to teach.[916]

[915] This reflects the approach taken in the *Working With Children Act 2005* (Vic), s 12(2), which requires the Secretary to refuse an assessment on a Category A application. An application is a Category A application if it relates to a person who is subject to reporting requirements under the Sex Offenders Registration Act, a person subject to a supervision or detention order and a person who has committed a Category A offence: see *Working With Children Act 2005* (Vic), s 12(1). Category A covers a range of sexual offences (including rape), child pornography offences and murder: see Schedule 1.

[916] This reflects the test contained in the opening words of the *Working With Children Act 2005* (Vic), s 26A(3) but adds to it an additional test based on fitness to teach.

(3) In deciding whether making an order under (2) would pose an unjustifiable risk to the safety of children the VCAT must have regard to the following factors:

(i) the nature and gravity of the offence and its relevance to child-related work; and
(ii) the period of time since the applicant committed the offence; and
(iii) whether a finding of guilt or a conviction was recorded for the offence or a charge for the offence is still pending; and
(iv) the sentence imposed for the offence; and
(v) the ages of the applicant and of any victim at the time the applicant committed the offence; and
(vi) whether or not the conduct that constituted the offence has been decriminalised since the applicant engaged in it; and
(vii) the applicant's behaviour since he or she committed the offence; and
(viii) the likelihood of future threat to a child caused by the applicant; and
(ix) any information given by the applicant in, or in relation to, the application; and
(x) any other matter that VCAT considers relevant to the application.[917]

(4) In satisfying itself that reinstating a teacher's registration would not pose an unjustifiable risk to the safety of children, the VCAT must also be satisfied that a reasonable person would allow his or her child to be taught by the applicant; and the applicant's engagement in any teaching-related activities would not pose an unjustifiable risk to the safety of children.[918]

Ideally the ETRA should also be amended to include a provision equivalent to s 26A(2) of the WWC Act which would allow the VCAT to make an order staying the teacher's deregistration based on the criteria used to determine whether or not the teacher poses an unjustifiable threat to children and subject to any conditions that it regards as necessary. This is important given that the teacher would be unable to work pending the appeal and that this might take some time to be heard and determined.

[917] These criteria are identical to those in the *Working With Children Act 2005* (Vic), s 26A(3).
[918] This is a modified version of the test in the *Working With Children Act 2005* (Vic), s 26A(4).

Teachers with convictions/finding of guilt in respect other offences

The ETRA regime

The ETRA processes relating to teachers with convictions or findings of guilt in relation to other offences is a complex one and may result in unfairness, as illustrated via the Tara Sutton case study in Chapter 3.[919] This case study and the discussion that follows illustrates the potential unfairness that can result where a teachers is unrepresented in a context where formal hearing panels are currently constituted from a pool that is appointed by the Governor, which includes lawyers who have been admitted to practice for at least three years. However, there is no requirement for the three-person formal hearing panels to include a member who is a lawyer, even though they have power to cancel the registration of teachers.

As discussed in Chapter 3, the King Review recommended that the transfer of power to deregister a teacher to VCAT on the basis that members presiding over such matters should have adequate professional knowledge. This recommendation was rejected by the government on the grounds that such decisions should be made by 'people who have an understanding of the education context' and that the VIT had 'the appropriate level of knowledge and the expertise' to retain this decision-making power.[920] The assessment of the panel decision-making in this thesis suggests that the government's response was, in general correct, subject to the comments below relating to legally qualified members.

The requirement for pool members to be appointed by the Governor in Council was introduced via the 2010 legislation that implemented some of the recommendations in the King Review. However, an important recommendation which was not given effect related to ensuring that panel membership included legally qualified members when natural justice was in issue. As discussed above, administrative decision-making that has the potential to result in loss of livelihood requires the most stringent application of the rules of natural justice.

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[919] *Re Sutton*, VIT, No 097, 24 February 2010. Sutton's case stands out because she lost her registration due to drug-related offences for which she received very low penalties due to a large number of extenuating factors). Problematic features of the current ETRA process involve an investigation process which is very limited in its transparency, hearings by formal hearing panels which publish detailed decision statements, problematic composition of the panels, and use of the power to set time limits.

[920] Victoria, Department of Education and Early Childhood Development, *The Response of the Victorian Government to the Review of the Victorian Institute of Teaching*, July 2009, p 19 accessed at <http://www.education.vic.gov.au/about/programs/archive/pages/vitreview.aspx>.

Furthermore, decisions about the fitness to teach of teachers with criminal convictions require an understanding of the criminal sentencing processes and an ability to assess and weight up competing public interest factors in the context of decision relating to open hearings and suppression orders as discussed in Chapter 7. These factors arguably point to the need for a legally qualified person to chair formal hearings.

Criteria for deregistration

Central to this analysis has been a critique of the meaning of the key criterion for deregistration, 'fitness to teach', and the related question of different conceptions of the role of the teacher.

Fitness to teach

Criminal offending is always characterised as involving serious misconduct. However, whether it results in loss of registration or suspension of registration depends on an assessment of whether the teacher is 'fit to teach'. The centrality of the concept of 'fitness to teach' to the decision-making by the VIT as to whether or not a teacher convicted of a criminal offence should be subject to deregistration has been explained in Chapter 4, which also highlighted the flexibility of the approaches taken to this issue in relevant case law, including key decisions of the High Court.

The expression fitness to teach was not originally defined, requiring panels to glean its meaning from caselaw relating to other professions. That situation has now been addressed via the 2010 legislation that gave effect to a number of the recommendations in the King Review. However, that definition has not added to the clarity of the expression and, as discussed in Chapter 7 and elaborated below, had not been much used by the hearing panels. While it may be the case that criteria of this type need to be loosely defined due to the complexity of the issues that may arise and the desirability of not unduly constraining decision-makers in respect of the criteria that they can take into account, it is arguable that further guidance is required to assist in this process. This is especially the case if panels are to continue with their current composition (ie without the mandatory presence of a lawyer on each panel).

As discussed in Chapter 3, the VIT has developed a Code of Conduct which spells out both the personal and professional conduct required of teachers. This has curiously not been designed to be used to guide decision-making in relation to fitness to teach (although it has been incorrectly used for this purpose in some cases). Arguably there is a case for reconsidering the role which the Code should play in relation to disciplinary proceedings, and revising it appropriately so it could form the basis for showing lack of fitness to teach. This would be extremely valuable, too, in providing greater certainty for teachers and schools.

Developing a narrower conception of the role of the teacher

A key issue relates to how the role of the teacher is articulated and it is argued that this conceptualisation should have appropriate regard for the privacy rights of teachers. As discussed in Chapter 5, underlying assumptions about the nature and scope of the role of the teacher raise significant policy issues in terms of the appropriate boundaries between teachers' work and private lives and their right not to be discriminated against on the basis of a criminal record unless it is relevant to their job. It is important that panels direct their attention to the nexus of a teacher's offending to their role as a teacher, but it is also important that this role is not conceived of too broadly as this arguably subjects them to inappropriate controls in relation to their private activities.

The argument that individuals should be entitled to a measure of privacy in respect to their criminal records (in the sense that they should be treated as 'out of bounds' in relation to disciplinary action by employers or regulators where they are not related to an individual's job) raises complex issues relating to public/private boundaries, discussed in Chapter 5. Drawing on the work of Mantouvalou,[921] it is argued in this thesis that there is a case for differentiating between the public law domain where criminal offending is regarded being of a public nature and the employment context where it should be treated as having a private dimension to the extent that it is not directly relevant to an individual's job. To allow otherwise, results in domination by the employer/regulator that impinges inappropriately on an individual's autonomy.[922]

[921] Virginia Mantouvalou, 'Life After Work: Privacy and Dismissal' *LSE Law, Society and Economy Working Papers* 5/2008, 11; Virginia Mantouvalou 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912.
[922] See Mantouvalou, 'Human Rights and Unfair Dismissal', 914 and the discussion in Chapter 5 at p 107 above.

The analysis of hearing panel decisions in Chapter 5 indicates that to the extent that their published decisions shed light on this issue, panels have generally conceived of the role of the teachers as being at the broad end of the spectrum. That is, panels tend to conceive of the role of the teacher as a role model - a role which is arguably incompatible with any form of criminal offending. On the other hand, many of the outcomes have been favourable to teachers (in the sense that they have been found fit it teach and therefore to maintain their registration). This has primarily occurred because panels are required to assess the issue of fitness to teach at the date of the hearing and have (appropriately) attached significance to circumstances that postdate the offending.

The decisions of formal hearing panels relating to teachers with criminal convictions were analysed based on the category of the offending, the extent to which it was work-related and the degree of attention given to this issue by hearing panels. As might be expected (given the issue of child safety), the categories of offences against the person and offences of a sexual nature prompted much more discussion of the relevance of the offending to the teacher's classroom role and their responsibility for the care of children.

The analysis suggested that panels generally proceeded on the implicit assumption that the teacher's offending made them unfit to teach at the time of the offending and that what was critical was that they had shown appropriate reform; for example, by addressing any underlying issues that led to the offending and/or showed that they had developed the necessary insights as to why their offending made them unfit to teach and were likely to or already had the confidence of their colleagues. This approach seemed to follow from the (at least implicit) acceptance of a broad view of the teacher which suggested that all offending affected fitness, although this lack of fitness could be overcome by subsequent actions, at least where the offending did not suggest a risk to children.

While many of the cases resulted in outcome that were objectively fair, despite reflecting a broad view of the role of the teacher, cases such as that of Sutton make clear that the adoption of a broad view can produce an outcome that is negative for the teacher even where that offending has attracted very low level sanctions.

Fair proceedings

It has been shown that there are two areas in which fairness is important - procedural fairness (natural justice), and substantive fairness.

Procedural fairness

As outlined in Chapter 6, the legal obligations of formal hearing panels to accord procedural fairness derive from three different sources; specific procedural requirements in the ETRA, obligations arising from administrative law and the duty to accord natural justice, and the right to a fair hearing in s 24 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Pre-hearing processes will be noted first, followed by discussion of the requirements of procedural fairness at formal hearings.

Formal hearings are preceded by investigations which are not themselves subject to the rules of natural justice or obligations under the Victorian Charter. This can be seen as broadly acceptable, as the teacher cannot be disciplined without a subsequent hearing, which is itself subject to natural justice. However, there is a case for ensuring that their processes are transparent and these processes allow teachers adequate time to prepare (while also striving to minimise delay) and the opportunity to be supported during questioning. This is important because evidence gathered in the course of an investigation may significantly influence the outcome of any subsequent hearing, especially when the teacher is not legally represented. The information currently made available lacks sufficient detail and makes it difficult to assess the overall fairness of the investigations process.

The ETRA provides that a teacher who is the subject of a formal hearing is entitled to be present, to make submissions and to be represented. It also requires hearing panels to comply with the rules of natural justice. While it is possible for statutes to contain specific provisions which override natural justice obligations there are none present in the ETRA except to the extent that rules relating to the composition of panels may give rise issue of bias as discussed below. Analysis of the reported decisions of formal hearing panels suggests there are four aspects of procedural fairness which warrant attention.

Delay

The first is the issue of delay. Delays can have a significant impact on teachers and was identified as a significant issue in the King Review. The government accepted King's recommendation that VIT should establish measurable timelines for its investigations and inquiry processes and review reasons for any case extending beyond reasonable and agreed limits, but a report by the Victorian Auditor General's Office (VAGO) in 2011 reported that there was a backlog of cases.[923] There are a number of reasons for delays, some of which are outside the control of the VIT (for example, where it is necessary to adjourn a hearing pending the outcome of an appeal against the conviction which gave rise to the VIT proceedings). There was also a period of time following the introduction of new requirements for members in the hearing pool to be appointed by the Governor in Council when positions remained vacant leading the backlog referred to by the VAGO. However, the long delay (seven years) in *Re Tomasevic*[924] suggest that more needs to be done to address this issue and that there may be some benefit in the ETRA specifying time limits for both the investigations and hearings processes (subject to appropriate exceptions to ensure that this does not result in unfairness).

Adjournments

The second issue relates to adjournments. Granting an adjournment may be necessary to enable teachers to put their cases, or respond fully to the evidence and arguments of the other parties. The ETRA does not address this issue; this leaves it open to panels to grant adjournments (as they have done in a couple of cases) but without guidance as to when this might be appropriate. There is no mention of the possibility of obtaining adjournments in any of the available literature relating to hearings making it unlikely that unrepresented teachers (arguably the category most likely to need additional time to prepare) are aware that option might be available to them. It is arguable that the ETRA should be amended to provide an express right to seek an adjournment where this necessary in the circumstances and that material made available to teachers in relation to formal hearings should inform them of this possibility.

Legal representation

[923] VAGO, op cit, p 8.
[924] *Re Tomasevic*, Case No 138, 6 May 2013.

The third issue for procedural fairness relates to legal representation. This is an important feature of natural justice as a hearing has significant implications for the person affected (including loss of livelihood and significant reputational damage). The ETRA provides teachers with a right of representation (including by a lawyer).[925] However, the analysis in this thesis indicates that a substantial number of teachers did not have legal representation and that legally represented teachers at formal hearings were more successful in retaining their registration. It also showed that decisions of hearing panels were delivered more speedily in the cases where teachers were legally represented. While it is only possible to guess at the reasons why so many teachers appear without lawyers, it is significant that a number of them were either unemployed or facing other financial difficulties. Moreover, a number of the hearings occurred soon after the legal proceedings which gave rise to the conviction/guilty finding in question, suggesting that the teacher may have already spent any available money on representation at the earlier proceedings.

The fact that so many teachers may be unable to pay for lawyers is not an easy issue to address in a context where the money available for legal aid is continuously diminishing. However, there are some practical measures that can be put in place to improve the fairness of hearing processes for those teachers.

Firstly it would be useful to provide teachers who are required to appear before formal hearing panels with detailed advice and guidance about the hearing process and the measures required to prepare for it. This is important to ensure that teachers arrive at the hearing with appropriate evidence to support their case. A teacher who appears before a panel without such evidence is unlikely to be able to put their case effectively, even if the procedures for the hearing are otherwise fair.

Secondly steps should be taken to ensure appropriate adjustment of hearing procedures in cases where a teachers is unrepresented. This may require offering and granting of adjournments (as discussed above) in cases where the teacher has arrived inadequately prepared, for example, without a key witness or without necessary medical or other documentation. It may also require the panel chair to assist the teacher to question counsel for

[925] ETRA, s 2.6.45(a).

the VIT. Arguably this is best achieved via the provision of detailed advice to panel members via a bench book or equivalent document.

Composition of the panel

The fourth and final issue raising procedural fairness relates to the composition of hearing panels and the inclusion within the pool from which they are drawn of current and former VIT Council members. It is arguable that this is problematic because of the number of different roles that Council members play. These include not only panel membership but also involvement in investigatory processes and the work of the Disciplinary Proceedings Committee, as well as promotion of the activities of the VIT. While a person who has conducted an investigation is excluded from sitting on a panel in relation to that matter, the fact that a panel member also regularly conducts investigations and possibly interacts with other investigators in relation to those investigations may potentially predispose them to treat the information acquired via an investigation more positively than a person who has not exercised that role. A possible solution would be to create a separate pool for formal hearing panels, and implement the King Review's proposal to include legal and community members (substituting them for council members), as well as revising the panel to comprise three members, a teacher, community representative and lawyer (as chair).

Substantive fairness

This thesis has also considered a number of broader fairness issues relating to the decision-making of formal hearing panels. Four issues were identified; issues relating to the interrelationship between teachers' criminal offending and their fitness to teach, application of the correct test, consistency of outcomes for teachers for like cases and privacy issues.

It is vital that the panel has an appropriate understanding of the interrelationship between a teacher's criminal offending and the task of assessing fitness to teach, to ensure fair and correct decisions. Hearing panels appear to have understood and complied with the need to determine fitness to teach at the date of the panel hearing (rather than at the time of the offending or conviction/guilty finding). However, the picture has been less positive in relation to considering the nexus between teachers' offending and the requirements of their job and also in terms of properly attaching relevance to sentences imposed in respect of their offending.

The issue of nexus is an important one given that failure to look for and identify the interrelationship between the offending and the inherent requirements of the job risks being discrimination, as discussed in Chapter 7. This failure is in part attributable to the implicit acceptance of a broad conception of the teacher's role, which suggests (inappropriately) that all offending is relevant. Adopting this broad view has the effect of making it almost unnecessary to consider any actual nexus in more detail. The fact that the panels are required to assess fitness at the time of the hearing means outcomes frequently turn on matters that postdate the offending. This therefore usually results in findings of fitness to teach, an outcome which ameliorates the adverse consequences that would otherwise follow from the failure to pay sufficient attention to the issue of nexus. However, the focus on present 'fitness' disadvantages teachers such as Tara Sutton who are unable to demonstrate the required level of 'reform'. It is arguable that a more detailed consideration of the relevance of nexus, coupled with a narrower conception of the teacher's role, would have achieved a fairer outcome in her case.

A panel's assessment of fitness at the time of the offending, and therefore also its assessment of the extent of the reform required, will be adversely affected if it fails properly to take account of the sentence. The sentence imposed by court is an important statement of its assessment of the seriousness of a teacher's offending. While it cannot be determinative, the fact that the sentencing court treated a teacher's offending as warranting a very minor sanction must arguably be a relevant consideration in assessing the extent to which the offending itself indicated lack of 'fitness to teach'.

The argument is strongest when the sentence involves a finding of guilt without a conviction. That is because it involves the court's exercise of discretion to shield the teacher from 'collateral consequences of a conviction, particularly in the area of employment'.[926] It is arguable that non-conviction sentences should not form the basis for loss of registration in the absence of strong countervailing considerations because they reflect a deliberate judgment by a court of law after considering evidence and argument put before it 'that the offending is not of a serious nature and did not reflect adversely on the person's character to the point where a

[926] Tasmania, Sentencing Advisory Council, *Non-Conviction Sentences: 'Not record a conviction' as a sentencing option*, Final Report No 3, August 2014, vi.

record should be created'.[927] However, the reported cases include example where the panel has made no reference to the fact that a conviction was not recorded.

It is arguable that both the issue of nexus and relevance of sentence are best dealt with via guidance materials for panel members. However, this is also an aspect of panel decision-making that would be assisted by having legal members as panel chairs, adding weight to the recommendation above.

Two further substantive issue identified are the failure of panels to apply the new statutory definition of fitness to teach[928] and some lack of consistency in outcomes for like cases. As explained in Chapter 7, the definition was inserted into the ETRA via the 2010 amending legislation (giving effect to a recommendation in the King Review), and is not identical to the tests developed previously. However, panels continue to rely on the earlier definition. The other issue is that fairness requires some measure of consistency, even in the absence of a formal requirement for panels to follow the decisions of earlier panels. While each individual case is different and needs to be assessed on its own merits, there are a small number of cases that stand out for the fact that teachers with very similar offending have received different outcomes.

Both these matters are arguably best dealt with by the same measures as those identified for the category above, that is, via the provision of guidance materials and having legal members as panel chairs.

The final substantive matter of fairness relates to the privacy of the hearing process. Privacy is a significant issue for teachers who have committed criminal offences and also for their families. However, it needs to be weighed up against the competing interest in transparency and it is acknowledged that a substantial amount of the research that underlies this thesis has been possible only because the panel's published hearings are available on online.

An important issue identified relates to the ways in which hearing panels have exercised their discretion under s 2.6.45(d) to determine 'that the proceedings should be closed because the

[927] Attorney-General's Department [South Australia], *Proposal to Amend the Spent Convictions Act 2009* Discussion Paper (2011) 5, cited Ibid at 57.
[928] ETRA, s 2.6.1.

hearing is taking evidence of intimate, personal or financial matters' and to grant suppression orders under s 2.6.45(g). The cases analysed in Chapter 7 suggest that panels have not devoted sufficient attention to balancing the competing interests of privacy and open justice, having regard to the context of their decision-making and the specific circumstance of the individual teachers. The analysis also suggests that they may not have been appropriately cognisant of the human rights dimension of privacy and their obligations under the Victorian Charter. This issue is arguably best dealt with via guidance material for panels and also again highlights the potential advantages of legally qualified panel chairs who could be expected to be more cognisant of these issues.

Privacy can be protected without jeopardising transparency and accountability by anonymising cases. The key aspect that would appear to remain an issue relates to the anonymising decisions where panels impose conditions on a teacher's registration. These cases are currently not anonymised even once the condition has been satisfied and there is arguably a case for doing so, at the very least at the end of the 5 year period when that teacher's details are removed from the Register of Disciplinary Action (RoDA).

A final issue of substantive fairness relates to the RoDA itself and the requirement that details of teachers whose registration is cancelled must remain on the register until such time, if any, that the teacher applies successfully for registration, an option currently unavailable to teachers who have committed sexual offences. The issue would be best addressed by legislative amendment but in the meantime it would be possible for the VIT to substantially address it by removing it from the Internet.

Concluding comments

There are undoubtedly community and professional concerns about protecting children from inappropriate teachers; at the same time there are clear justice demands for ensuring that any disciplinary process which has the potential to exclude a person from their employment based on criminal convictions is fair and transparent. This analysis of the ETRA disciplinary regime relating to teachers with criminal convictions has identified several areas that require reform.

As discussed above, the reforms can in the main be achieved via non-legislative means. The issues relating to the hearings processes are capable of being addressed largely via additional

guidance material both for teachers and panels. However, more fundamentally, what is required is re-conceptualisation of the role of the teacher and of the appropriate bounds between teacher's public and private lives.

Key aspects that require legislative amendment are the proposed reforms to the system of automatic deregistration of teachers with specific serious criminal convictions, and reforms to the provisions relating to the composition of formal hearing panels.

It is acknowledged that aspects of these reforms will be controversial, especially at a time when the issue of child abuse is again featuring prominently in the media. The evidence being revealed by the Royal Commission into Institutional Responses to Child Sexual Abuse[929] highlights the need for robust safeguards for children. The proposed reforms would not reduce the protections provided to children in schools but would improve fairness to teachers. It is important to ensure regulatory regimes such as the ETRA meet the requirement for good regulation, and they operate fairly and consistently with administrative law and human rights principles, ensuring an educational environment which is both safe and fair.

[929] See for example the case studies on the Commission's website at <https://www.childabuseroyalcommission.gov.au/public-hearings/findings>.

Appendix 1: VCAT decisions relating to Category A assessments under the Working With Children Act over the period 2011-2016

Decisions in which the VCAT has directed to the Secretary to give the applicant an assessment notice

1. *DQO v Secretary to the Department of Justice (Occupational and Business Regulation)* [2012] VCAT 292 (18 April 2012)
2. *TSL v Secretary to Department of Justice (Occupational and Business Regulation)* [2012] VCAT 792 (12 June 2012)
3. *BQD v Secretary to the Department of Justice (Review and Regulation)* [2015] VCAT 1057 (15 July 2015)
4. *FKX v Secretary to the Department of Justice (Review and Regulation)* [2015] VCAT 404 (8 April 2015)
5. *KFC v Department of Justice (Review and Regulation)* [2015] VCAT 1761 (4 November 2015)

Decisions in which the VCAT has affirmed the decision of the Department of Justice to give a Negative Notice to the applicant

1. *BHU v Secretary to the Department of Justice (Review and Regulation)* [2014] VCAT 259 (14 March 2014) assault
2. *CDY v Secretary of Department of Justice (Review and Regulation)* [2014] VCAT 784 (30 June 2014)
3. *VBZ v Secretary to the Department of Justice (Review & Regulation)* [2014] VCAT 701 (13 June 2014)
4. *NKJ v Secretary to the Department of Justice (Review and Regulation)* [2014] VCAT 1045 (26 August 2014)
5. *EBE v Secretary to the Department of Justice (Review and Regulation)* [2014] VCAT 1350 (1 October 2014)
6. *SVG v Secretary to the Department of Justice (Review and Regulation)* [2015] VCAT 534 (27 April 2015)
7. *Eccles v Secretary to Department of Justice and Regulation (Review and Regulation)* [2015] VCAT 1840 (20 November 2015)
8. *BNT v Secretary to the Department of Justice (Review and Regulation)* [2013] VCAT 461 (10 April 2013)

9. *MFK v Secretary to the Department of Justice (Review and Regulation)* [2013] VCAT 844 (28 May 2013)
10. *FLL v Secretary to the Department of Justice (Review and Regulation)* [2013] VCAT 1456 (20 August 2013)
11. *VZI v Secretary to the Department of Justice (Occupational and Business Regulation)* [2012] VCAT 220 (22 February 2012)
12. FB*G v Secretary to the Department of Justice (Occupational and Business Regulation)* [2012] VCAT 479 (18 April 2012)

APPENDIX 2 – SUMMARY OF KEY INFORMATION RELATING TO VIT HEARING PANEL DECISIONS RELATING TO TEACHERS FOUND GUILTY OF INDICTABLE OFFENCES

Case	Teacher attend-ed	Repres-ented	Hearing Date	Decision Date	Offence	Sentence	Related to teachers' school	Finding and outcome
AC	Yes	Yes	12 Oct 2004	12 Oct 2004	5 counts of obtaining property by deception	Found guilty without conviction and placed on a two year Good Behaviour Bond.	No	Fit to teach/ remained registered
AED	Yes	No	25 Jan 2012	25 Jan 2012	3 sets of offences relating to heroin possession, taking /sending anything into a prison and receiving stolen goods	Found guilty without conviction for each Good Behaviour Bonds, $300 fine and 12 month Community Based Order.	Yes	Fit to teach/ remained registered
AHE-H	No	No	26 Aug 2014	12 Oct 2014	Multiple counts of theft-related offences spanning multiple years ending 2005	Found guilty. No information provided as to whether convicted or what sentences were imposed.	No	Fit to teach/ remained registered
Atkin	Yes	No	8 Dec 2005 12 Dec 2006	8 Dec 2005 12 Dec 2006	2 charges of theft from school	Convicted and sentenced to 12 month Community Based Order.	Yes	Fit to teach with conditions imposed/conditions not met at hearing 045 on 12 Dec 2006 but met and lifted on 27 June 2007
AZ	Yes	No	17 May 2012	30 Jun 2012	One count of intentionally threaten serious injury	Found guilty without conviction and placed on a one year Good Behaviour Bond. Also required to complete a welfare organisation's positive lifestyle course	No	Fit to teach/ remained registered

BKP	Yes	No	27 Jun 2012	13 Jul 2012	Common assault	Found guilty without conviction and placed on a two year Good Behaviour Bond	No	Fit to teach/ remained registered
Chappell	Yes	No	21 Jan 2012 and 18 May 2012	10 Sep 2012	10 counts of breaching an intervention order and 1 count of entering a place in a manner likely to cause a breach of the peace	Convicted and received two jail terms and a Community Based Order. No further information was provided regarding sentencing	No	Not fit to teach/registration cancelled
Crawley	Yes	No	9 Sep 2008	9 Sep 2008	5 court appearances for possession of cannabis and other drugs spanning 1978 to 2006	2 guilty findings without conviction and Good Behaviour Bonds. 3 convictions resulting in total fines of $1500 and forfeiture orders	No	Not fit to teach/ conditions imposed on the teacher's registration requiring him to attend counselling. A later hearing on 9 June 2009 found that he had not met these conditions and cancelled his registration
De Wilde	Yes	No	20 Jan 2011	20 Jan 2011	One count of the indictable offence of intentionally causing serious injury	Convicted and sentenced to 3 years jail (with 30 months suspended)	No	Not fit to teach/ registration suspended for 6 months subject to conditions relating to counselling and treatment. The Panel was satisfied that the teacher has met these conditions and his suspension was lifted on 5 December 2011.

Dellaportas	No	No	17 Dec 2012	8 Feb 2013	One count of recklessly causing injury	Convicted and given a one year Community Based Order	No	Not fit to teach/registration cancelled
DRH	Yes	Yes but not for 2nd part	15 Oct 2008 27 Oct 2009	27 Oct 2009	One count of blackmail	Convicted and sentenced to two years imprisonment (wholly suspended) and as ordered to pay a fine of $3,000.00.	No	Fit to teach/ remained registered
Eyre	No	No	19 Sep 2006	19 Sep 2006	One count of child stealing, one count of committing an indecent act with a child under 16, one count of committing an indecent assault against a child under 16 and one count of unlawful assault against a child under 16.	These charges were all dismissed but the panel found that he induced a 14 year old girl to get in his van and attempted to kiss her.	No	Not fit to teach/registration cancelled
Fairley	Yes	Yes	9 Sep 2005	9 Sep 2005	Negligently causing serious injury to a pedestrian	Convicted and sentenced to 4 years and 6 months jail with a minimum non parole period of 3 years	No	Fit to teach/ remained registered
GDG	Yes	Yes	30 Apr 2010	30 Apr 2010	Multiple counts of theft, obtaining property by deception, know thief loitering in a public place and making a false document to prejudice another	Convicted and sentenced to 9 months jail (wholly suspended for 18 months), as part of an aggregate sentence	No	Fit to teach/ remained registered

GJB	Yes	Yes	16 Jan 2012	16 Jan 2012	One count of indecent assault relating to an event that took place some 24 years previously	Found guilty without conviction and placed on one year Good Behaviour Bond	Yes	Fit to teach/ remained registered
GJI	Yes	No	6 Dec 2004	24 Dec 2004	One count of stalking, breach of intervention order, breach of Community Based Order	Found guilty and convicted in relation to each and received penalties comprising two Community Based Orders (for one year - unpaid community work plus and two years - medical assessment and treatment) and fines totalling $800.	No	Fit to teach/remained registered
Ingram	Yes	No	25 Oct 2004	25 Oct 2004	One count of obtaining property by deception, Six counts of forged medical certificates	Found guilty without conviction and placed on one year Good Behaviour Bond and ordered to pay $600 to court fund	Yes	Fit to teach/remained registered
Janse van Vuuren	Yes	No	25 Nov 2008 17 Feb 2009	17 Feb 2009	One count of up skirting	Convicted and placed on Community Based Order for 9 months, ordered to perform 80 hours unpaid community work over 6 months, undergo assessment for programs to reduce re-offending	Yes	Unfit to teach /registration cancelled
JS	Yes	No	12 Apr 2005	12 Apr 2005	One count of possession and one count of cultivation of drugs	Found guilty without conviction, Community Based Order for one year, perform 200 hours of community work, undergo assessment as directed	No	Fit to teach/registration remained

Kerstens	Yes	Yes	12 Jun 2013	11 Nov 2013	Four counts of shop stealing over period 2006-2013	Convicted on all four counts and received sentences comprising: a fine of $1200, placement on a 12 month Community Based Order requiring 80 hours of unpaid community work, placement on a 6 month Community Based Order requiring 25 hours of unpaid community work and a fine of $750 and $71.40 statutory costs	No	Fit to teach/ majority decision/ remained registered
KT	Yes	Day 1: no Day 2: yes	15 Dec 2011 and 17 Jan 2012	31 Jan 2012	One count of recklessly causing injury (domestic violence)	Found guilty without conviction and required to enrol in anger management with the Salvation Army, file completion of course with Court, pay $250 fine to fund course.	No	Fit to teach/remained registered
LJB	Yes	Yes	2 Oct 2012	2 Oct 2012	Five court hearings over the period 1992–2009, involving multiple counts of shop stealing and one count of possessing the proceeds of crime	Found guilty without conviction on each occasion with sentences three good behaviour bonds and two Community Based Orders (6 months - medical/psychological/ psychiatric assessment and treatment and one year - treatment and counselling etc).	No	Fit to teach/remained registered
LKT	Yes	Yes	27 Oct 2004	20 Jul 2005	3 counts of obtaining property and 3 counts of theft from school	Convicted and placed on Intensive Corrections Order for 9 months and ordered to pay restitution of $31,106	Yes	Fit to teach/retain registration

Mine	No	No	18 Feb 2013	10 May 2013	One count of theft of a motor vehicle	Found guilty without conviction and placed on a one year Good Behaviour Bond and required to pay $13,031.67 compensation to car rental company and $500 to Court fund.	No	Not fit to teach/ no determination because teacher was not registered.
Misell	Yes	No	24 Aug 2005	24 Aug 2005	One count of soliciting a secret commission related to school student	Convicted of soliciting a secret commission, sentenced to 12 months jail wholly suspended for 2 years.	Yes	Unfit to teach/registration cancelled
Muthutha-nthirige	Yes	No	25 Mar 2014	28 Apr 2014	One count each of intentionally damaging property, destroying property and contravening a family violence intervention order	Found guilty on one count without conviction and place on a one year Community Corrections Order. He was convicted on the second count and sentenced to 10 months jail, (wholly suspended for an operational period of 2 years). He was later resentenced to 4 months jail (wholly suspended and then the suspended sentence was partially restored (1 month to be served).	No	Not fit to teach/ Registration suspended for 1 year-subject to conditions
Neville	Yes	No	5 May 2008 14 Aug 2008	14 Aug 2008	One count of theft from school	Convicted and sentenced to 3 months jail suspended for 15 months, ordered to pay $11,500 compensation.	Yes	Not fit to teach/ registration suspended for a minimum of 6 months subject to conditions, including repayment of money.

								These conditions were not met and his registration was cancelled on: 16 September 2009.
NJP	Yes	No	3 Oct 2012	3 Dec 2012	One count of stalking – cyber bullying	Found guilty without conviction and required to attend community correctional work, attend treatment, undergo assessment as directed for alcohol and drug addictions.	No	Fit to teach/retain registration
O'Hara	No	No	17 Aug 2006	17 Aug 2006	18 counts of the indictable offence of make a false document	Convicted and was sentenced to a term of imprisonment of 6 months wholly suspended for a period of two years.	No	Not fit to teach/registration cancelled. The teacher applied review by the VCAT. In a decision handed down on 13 September 2007, the VCAT affirmed the decision to cancel the teacher's registration but for different reasons.
PAL	Yes	Yes	26 Jul 2004 and 23 Aug 2004	24 Feb 2005	One count of stalking-nuisance telephone calls	Guilty of stalking, Interim Intervention Order, placed on Community Based Order for one year.	No	Fit to teach/ retain registration

Papa-georgiou	Yes	No	19 May 2005	26 May 2005	One count of theft	Guilty without conviction, fined $1000.	Yes	Unfit to teach/ registration cancelled
PBRF	Yes	No	24 July 2012	1 Aug 2012	One count of a false statement, to obtain an Australian passport issued to another person	Found guilty with conviction and fined $4000.	No	Fit to teach/retain registration
Pham	No	No	17 Dec 2012	17 Dec 2013	One count of theft	Guilty without conviction and placed on 1 year Good Behaviour Bond, fined $500 and ordered to pay victim $700.	No	Not fit to teach/ registration suspended for 6 months subject to conditions relating to counselling and treatment.
Prodromou	No	No	12 Nov 2007	12 Nov 2007	Two count of theft	Found guilty without conviction in respect of both and received sentences comprising: Orders to pay $1200 to the court fund and two one year Good Behaviour Bonds.	Yes	Unfit to teach/ registration cancelled.
RGA	Yes	Yes	20 Feb 2013	22 Mar 2013	One count of obtaining property by deception	Convicted on all counts Sentenced to jail for 12 months wholly suspended for two years.	No	Fit to teach/remain registered.
Rodriguez	Yes	Yes	4 Feb 2014	6 Mar 2014	One count of use of a carriage to cause offence	CC convicted the teacher and sentenced to 6 months jail, partially suspended for 3 months. Appeal to VSC appeal upheld, quashed the sentence, handed down 6 months jail, wholly suspended with a 2 year Good Behaviour Bond.	No	Unregistered /no determination in respect of his registration.

Runciman	Yes	No	27 Jun 2012	13 Jul 2012	One count of trafficking of methyl amphetamine	Found guilty without conviction and placed on a one year Community, Community Based Order, required to forfeit drugs and pay $250 to the Court fund.	No	Unfit to teach, teacher unregistered.
Robinson	Yes	Yes	2 Nov 2006	2 Nov 2006	One count of OPD, one count of using false document to prejudice another	Guilty Good Behaviour Bond for 12 months, ordered to pay school $1,982.	Yes	Fit to teach/remained registered
SJK	Yes	No	24 Jul 2012	24 Jul 2012	Falsifying medical certificates	Found guilty without conviction and one year Good Behaviour Bond.	Yes	Fit to teach/ remained registered
SMMCF	Yes	Yes	30 Oct 2013	11 Nov 2013	Recklessly causing serious injury and intentionally damaging property	Convicted and fined an aggregate of $7,600 with $66 statutory costs, and $3,153 compensation.	No	Fit to teach/ remained registered
SR	Yes	Yes	25 Aug 2004	25 Aug 2004	Stalking	Convicted and sentenced to 42 months imprisonment wholly suspended for 12 months.	No	Fit to teach/ remained registered (one panel member in dissent)
Stanley	Yes	No	31 Aug 2009	14 Feb 2011	Threat to kill	Found guilty without conviction. Ordered to comply with a bond/undertaking.	Yes	Not fit to teach/ no determination made as teacher was not registered
Sutton (K)	Yes	No	24 Sep 2007	24 Sep 2007	One count of OPD, fraudulent medical certificates	Found guilty with conviction, 12 month GBB, ordered to pay $2,074.	Yes	Fit to teach/remain registered
Sutton (T)	Yes	No	20 Feb 2010	4 Mar 2010	One count each of: attempting to traffic a drug of dependence, cultivating cannabis, possessing drug of dependence and using cannabis	Found guilty without conviction, placed on a one year Community Based Order and required to pay fines totalling $1100.	No	Unfit to teach, cancellation of registration

Taylor	Yes	No	25 Jan 2012	25 Jan 2012	Counts of making false medical certificates, using school computers	Found guilty without conviction and required to repay $5,316.	Yes	Unregistered, no determination
Tomasevic	No	No	28 Feb 2013	6 May 2013	One count of threat to kill	Found guilty without convictions, fined $300 and placed on 10 months Good Behaviour Bond for 10 months counselling and to continue medical treatment.	Yes	Not fit to teach, registration cancelled
Van den Brink	Yes	No	2 Oct 2008 and 11 Dec 2008	11 Dec 2008	Multiple counts of shop stealing	Multiple penalties including suspended jail, Community Based Order, both with and without conviction.	No	Not fit to teach/ registration cancelled
Westcott	No	No	14 May 2007	14 May 2007	One count of assessing pornography from school computer	Convicted and sentenced to 6 months jail (with term to be served 2 months). This conviction was overturned on appeal to the County Court but the VIT hearing panel found that he has committed the offending based on the balance of probabilities.	Yes	Not fit to teach/ registration cancelled.
Zinedar	No	No	8 Mar 2003	8 Mar 2003	Theft from educational body	Convicted and sentenced to 2 years suspended jail term and ordered to repay $30,152.94	Yes	Not fit to teach/registration cancelled

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