Office of the **Special Investigations Monitor**

The Special Investigations Monitor Annual Report | 2005–2006

Contents

1	Introduction		5
2	The Special Investigations Monitor		5
3	The *Major Crime Legislation (Office Of Police Integrity) Act 2004*		5
4	*Major Crime (Investigative Powers) Act 2004*		5
5	Director, Police Integrity – Coercive Questioning Powers		5–6
6	Role Of Special Investigations Monitor With Respect To Director, Police Integrity And Staff Of The Office Of Police Integrity		6
7	Obligations Upon Director, Police Integrity To The Special Investigations Monitor		6
8	Annual Report Of The Special Investigations Monitor To Parliament		6–7
9	*The Whistleblowers Protection Act 2001* (As Amended)		7
10	*Major Crime (Investigative Powers) Act 2004* – Chief Examiner		7
11	Role Of Special Investigations Monitor With Respect To The Chief Examiner And Victoria Police		8
12	Obligations Upon Chief Examiner And Victoria Police To The Special Investigations Monitor		8
13	Annual Report Of The Special Investigations Monitor To Parliament – Chief Examiner – Victoria Police		8
14	Office Of The Special Investigations Monitor		8–9
15	The Exercise Of Coercive Powers By The Director, Police Integrity		9
	15.1	Understanding relevance	9
	15.2	Why is the monitoring of relevance by the Special Investigations Monitor important?	9
16	Section 86ZB Reports		10
	16.1	Overview of section 86ZB reports received by the Special Investigations Monitor	10
	16.2	Summons to produce information, a document or thing	10
	16.3	Financial institutions	10–11
	16.4	Other	11
	16.5	Police member	11
	16.6	Telecommunications carrier	11
17	Interviews Involving The Use Of Section 86Q Reported And Reviewed		11–12
18	Persons Attending The Director, Police Integrity To Produce Documents		12
19	Coercive Examinations Reported To The Special Investigations Monitor		12
20	Warrants To Arrest		13
21	The Need For The Use Of Coercive Powers		13–14
22	Types of Investigations Conducted By The Director, Police Integrity Subject To Coercive Examinations		14
23	Descriptions Of The Investigations Where Coercive Examinations Were Conducted		14
	23.1	Allegation of theft of money during a police search	14
	23.2	Allegation of theft of money from a vehicle	15
	23.3	Allegations of harassment, bullying and abuse of junior members at a large suburban police station in Melbourne	15
	23.4	Investigation into the financial affairs of a serving police member	15
	23.5	Provision of information to Director, Police Integrity relating to criminal activity	15
	23.6	Investigation into serious misconduct at a suburban Criminal Investigation Unit ("CIU")	15
	23.7	Police member engaging in unlawful activity	15
	23.8	Investigation of a complaint relating to an assault	15
24	Summary Of Incoming Material From The Office Of Police Integrity To The Special Investigations Monitor		15
25	Issues Arising Out Of Examinations		15
	25.1	Summons issue procedures	15–16
	25.2	Production of documents without attendance before the Director, Police Integrity or his delegate	16
	25.3	Viewing of examinations from a remote hearing room	16
	25.4	Confidentiality notices	16–17

	25.5	Exclusion and non-publication orders	17–18
	25.6	Confidentiality, serving of summonses and protection of witnesses	18
	25.7	Breaches of confidentiality	18
	25.8	Service of summonses on witnesses	18–19
26		Legal Representation	19
	26.1	Legal representation and witnesses appearing before the Director, Police Integrity	19
	26.2	Who was represented and who was not	19
27		Relevance	20
28		Length Of Hearings	20–21
29		Mental Impairment	21–22
30		Witnesses In Custody	22
31		Explanation Of The Complaints Procedure	23
32		The Use Of Derivative Information	23–24
33		Certificates	24–25
34		Issues Arising From Section 86PA	25
35		Common Law Privilege Against Self-Incrimination Applies To Hearings Conducted By The Director, Police Integrity	25
36		Procedural Issues	25
	36.1	Handing of certificates to witnesses	25
	36.2	The operation of section 86PA(4)	25–27
	36.3	Certificates issued	27
37		Complaints	27–28
	37.1	Complaint regarding service of a summons	28–29
	37.2	Office of Police Integrity Report – Review of Fatal Shootings by Victoria Police	29–30
38		Search Warrants	30–31
39		Meetings With The Director, Police Integrity And Co-Operation Of The Director, Police Integrity	31
40		Compliance With The Act	31
	40.1	Section 86ZB reports	31
	40.2	Section 86ZD reports	31
	40.3	Other matters	31
	40.4	Relevance	31–32
41		Comprehensiveness And Adequacy Of Reports	32
	41.1	Section 86ZB reports	32
	41.2	Section 86ZD reports	32–33
42		Recommendations Made By The Special Investigations Monitor To Office Of Police Integrity	33
43		Generally	33
44		Chief Examiner - *Major Crime (Investigative Powers) Act 2004*	33–34
45		Organised Crime Offences And The Use Of Coercive Powers	34
46		Applications for Coercive Powers Orders	34–35
	46.1	The circumstances under which a CPO can be granted	35–36
47		The Role Of The Special Investigations Monitor	36
48		Reporting Requirements Of The Chief Examiner	36
	48.1	Section 52 reports	36
	48.2	Section 52 reports received	37
	48.3	Section 53 reports	37
	48.4	Section 53 reports received	37
49		Complaints: Section 54	37–38
50		Recommendations And Other Powers Of The Special Investigations Monitor: Sections 57 – 60	38
51		Assistance To Be Provided To The Special Investigations Monitor	38
52		Annual Report	38–39

Contents

53	Section 62 Report	39
54	The Power To Summon Witnesses	39
54.1	Types of summonses issued	39
54.2	When a summons can be issued	39–40
54.3	Summons issue procedure	40
54.4	Procedure relating to summonses issued by the Supreme Court	41
55	Reasonable Service	41
56	Contents of Each Summons	41
57	The Power To Compel The Attendance Of A Person In Custody: Section 18 Orders	42
58	Confidentiality Notices: Section 20	42
59	When Confidentiality Notices May Or Must Be Issued	42–43
60	Powers That Can Be Exercised By The Chief Examiner	43
61	Contempt of the Chief Examiner	43
62	The Conduct Of Examinations By The Chief Examiner	44
63	Preliminary Requirements Monitored By The Special Investigations Monitor	44–45
64	Legal Representation	45–46
65	Who Was Represented And Who Was Not	46
66	Privilege Against Self-Incrimination	46
67	Restriction On The Publication Of Evidence	46–47
68	The Use Of Derivative Information	47
69	Legal Professional Privilege	47–48
70	Authorisation For The Retention Of Documents By A Police Member	48
71	Magistrates' Court Proceedings	48
72	Issues Arising Out Of Examinations (Compliance With The Act And Adequacy Of Reports)	49
72.1	Relevance	49
72.2	Examination 1	49–50
72.3	Breach of confidentiality	50
73	Obligations of the Chief Commissioner of Police to the Special Investigations Monitor under the *Major Crime (Investigative Powers) Act 2004*	50
74	Obligations Of The Chief Commissioner Under Section 66 Of The *Major Crime (Investigative Powers) Act 2004*	50
75	Records to be kept by the Chief Commissioner: Section 66(a) and Regulation 11 (a – k)	51
76	Register For Retained Documents And Other Things	51–52
77	Inspection Of The Computerised Register For Retained Documents And Other Things: Section 66(b) And Regulation 12	52
78	Chief Commissioner's Report To The Special Investigations Monitor: Section 66(c) And Regulation 13	52
79	Secrecy Provision	52–53
80	Compliance With The Act	53
80.1	Section 52 reports	53
80.2	Section 53 reports	53
80.3	Section 66 reports and register	53
81	Relevance	53
82	Comprehensiveness And Adequacy Of Reports	54
81.1	Section 52 reports	53
81.2	Section 53 reports	54
81.3	Section 66 reports	54
83	Recommendations	54
84	Generally	54
Appendix A		55–56
Appendix B		56–60

1 Introduction

This is the Annual Report for the financial year ending 30 June 2006 of the Special Investigations Monitor ("the SIM") pursuant to s 86ZL of the *Police Regulation Act 1958* (as amended) ("*Police Regulation Act*"), s 105L of the *Whistleblowers Protection Act 2001* (as amended) ("*Whistleblowers Protection Act*") and s 61 of the *Major Crime (Investigative Powers) Act 2004* (as amended) ("*Major Crime (Investigative Powers) Act*"). It is considered appropriate and convenient to combine reports under these provisions in the one report.

As required by s 86ZL of the *Police Regulation Act*, s 105L of the *Whistleblowers Protection Act* and s 61 of the *Major Crime (Investigative Powers) Act*, this Report relates to the performance of the SIM's functions under Part IVA of the *Police Regulation Act*, Part 9A of the *Whistleblowers Protection Act* and part 5 of the *Major Crime (Investigative Powers) Act*.

The background and legislative history relating to the office of the SIM ("OSIM") and its functions are set out in the 2004-2005 Annual Report, being the first for the office. Consequently, only brief reference to those matters will be made in this Report.

2 The Special Investigations Monitor

The OSIM was created by s 4 of the *Major Crime (Special Investigations Monitor) Act 2004* ("SIM Act") which commenced operation on 16 November 2004.

David Anthony Talbot Jones was appointed SIM by the Governor-in-Council on 14 December 2004 for a period of 3 years. Mr Jones is an Australian lawyer of 40 years standing and from 1986 to 2002 was a Judge of the County Court of Victoria and until 13 December 2004 a Reserve Judge of that Court.

3 The *Major Crime Legislation (Office Of Police Integrity) Act 2004*

The *Major Crime Legislation (Office of Police Integrity) Act 2004* ("the *OPI Act*") established a new Office of Police Integrity ("OPI"), headed by a Director, Police Integrity ("DPI"). The provisions establishing the DPI and the OPI were inserted into the *Police Regulation Act*, alongside the existing provisions dealing with the relevant functions and powers. These provisions commenced operation on 16 November 2004.

The 2004-2005 Annual Report refers to the background to the establishment of the OPI and other aspects of the legislation. There is no need to go over that ground in this Report.

Reference was made in the 2004-2005 Annual Report to the OPI being granted powers relating to the use of surveillance devices, assumed identities, controlled operations, and telecommunications interception. The SIM exercises the oversight requirements with respect to surveillance devices and telecommunications interceptions. The 2004-2005 Annual Report did not cover that oversight as it had not commenced as at 30 June 2005. This Report does not cover that oversight as it took effect on 1 July 2006. A report on the relevant oversight will be included in the 2006-2007 Annual Report of the SIM. The SIM has no oversight role in relation to the use of assumed identities. This information is again provided in this Report by way of background.

4 *Major Crime (Investigative Powers) Act 2004*

This Act confers further powers on the Victoria Police and on the DPI.

The provisions amending the *Police Regulation Act* and the *Whistleblowers Protection Act* to confer further powers on the DPI commenced operation on 16 November 2004 and therefore were the subject of monitoring during the period under review and are the subject of review in this Report.

The provisions conferring further powers on the Victoria Police had not commenced operation during the period covered by the 2004-2005 Annual report. However, they commenced operation on 1 July 2005 and were therefore the subject of monitoring during the period under review and are the subject of review in this Report.

5 Director, Police Integrity – Coercive Questioning Powers

The Ombudsman Legislation (Police Ombudsman) Act 2004 gave the Police Ombudsman and consequently the DPI powers that are comparable to those that can be exercised by a Royal Commission.

As detailed in the 2004-2005 Annual Report, the *Major Crime (Investigative Powers) Act* extends those powers considerably:

- The DPI is empowered to prohibit disclosure of the contents of any summons issued by the DPI other than for limited specific purposes.
- The DPI is empowered to certify failure to produce a document or thing, refusal to be sworn, refusal or failure to answer a question as contempt of the DPI.
- The DPI is empowered to certify in writing the commission of contempt to the Supreme Court in such cases. The DPI has the power to issue a warrant for a person alleged to be in contempt to be brought by the police before the Supreme Court.
- If the Court is satisfied that the person is guilty of contempt it may imprison the person for an indefinite period which may involve the person being held in custody until the contempt is purged.
- The DPI is empowered to apply to the Magistrates' Court to issue a warrant for apprehension of a witness who has failed to answer a summons.
- The Act empowers the DPI to continue an investigation notwithstanding that criminal proceedings are on foot with respect to the same matter provided the DPI takes all reasonable steps not to prejudice those proceedings on account of the investigation.
- The Act empowers the DPI, his staff and persons engaged by him to enter any premises occupied or used by Victoria Police, a government department, public statutory body or municipal council. The DPI may search such premises and copy documents.

6 Role Of Special Investigations Monitor With Respect To Director, Police Integrity And Staff Of The Office Of Police Integrity

This role is set out in s 86ZA of the *Police Regulation Act*. It is to:

- Monitor compliance with the Act by the DPI and members of staff of OPI and other persons engaged by the DPI.
- Assess the questioning of persons attending the DPI in the course of an investigation under Part IVA of the Act concerning the relevance of the questioning and its appropriateness in relation to the purpose of the investigation.
- Assess requirements made by the DPI for persons to produce documents or other things in the course of an investigation under Part IVA concerning the relevance of the requirements and their appropriateness in relation to the purpose of the investigation.
- Investigate any complaints made to the SIM under Division 4 of Part IVA of the Act.
- Formulate recommendations and make reports as a result of performing the above functions.

7 Obligations Upon Director, Police Integrity To The Special Investigations Monitor

The *Police Regulation Act* imposes obligations upon the DPI. Briefly, they are as follows:

- to report the issue of summonses to the SIM – s 86ZB.
- to report the issue of arrest warrants to the SIM – s 86ZC.
- to report matters relating to the coercive questioning by the DPI or the obtaining of information or documents from a person in the course of an investigation under Part IVA of the Act – s 86ZD.

The Act provides for complaints to be made to the SIM and procedures to be followed by the SIM with respect to such complaints – ss 86ZE, 86ZF and 86ZG.

The Act empowers the SIM to make recommendations to the DPI, requires the DPI to provide assistance, gives the SIM powers of entry and access to offices and records of OPI and empowers the SIM to require the DPI and his staff to answer questions and produce documents – ss 86ZH, 86ZI, 86ZJ and 86ZK.

8 Annual Report Of The Special Investigations Monitor To Parliament

Section 86ZL of the *Police Regulation Act* provides that as soon as practicable after the end of each financial year, the SIM must cause a report to be laid before each House of the Parliament in relation to the performance of the SIM's functions under Part IVA of the Act.

This Annual Report is made pursuant to that provision.

Briefly, the Report must include details of the following:

- Compliance with the Act during the financial year by the DPI and members of his staff.
- The extent to which questions asked of persons summonsed and requirements to produce documents or other things under a summons were relevant to the investigation in relation to which the questions were asked or the requirements made.
- The comprehensiveness and adequacy of reports made to the SIM by the DPI during the financial year.
- The extent to which the DPI has taken action which has been recommended by the SIM.

The Report must not contain any information that identifies or is likely to identify a person who has attended the DPI in the course of an investigation under this part or the nature of any ongoing investigation under Part IVA of *Police Regulation Act* or by the Victoria Police Force or members of the Victoria Police Force.

Section 105L of the *Whistleblowers Protection Act* imposes the same requirements as s 86ZL of the *Police Regulation Act.*

9 The *Whistleblowers Protection Act 2001* (As Amended)

The purposes of this Act are:-

- To encourage and facilitate disclosures of improper conduct by police officers and public bodies.
- To provide protection for person(s) who make those disclosures and person(s) who may suffer reprisals in relation to those disclosures.
- To provide for the matters disclosed to be properly investigated and dealt with.

The Police Ombudsman had powers and duties to investigate matters under the *Whistleblowers Protection Act* including powers that are comparable to those that can be exercised by a Royal Commission such as obtaining search warrants, requiring people to provide information and demanding answers from witnesses.

The DPI has all the powers that the Police Ombudsman had under the *Whistleblowers Protection Act*.

Under s 43(1) of the *Whistleblowers Protection Act* the Ombudsman may refer a disclosed matter as defined by the Act if it relates to:-

- The Chief Commissioner of Police ; or
- Any other member of the police force.

The *Major Crime (Investigative Powers) Act* amended the *Whistleblowers Protection Act* to extend the DPI's coercive questioning powers under that Act in the same way that they were extended under the *Police Regulation Act.* (See paragraph 5 of this Report).

The role of the SIM with respect to the DPI and his staff under the *Whistleblowers Protection Act* is the same as the SIM's role under the *Police Regulation Act*. (See paragraph 6 of this Report).

The obligations of the DPI to the SIM under the *Whistleblowers Protection Act* are the same as the obligations under the *Police Regulation Act*. (See paragraph 7 of this Report).

The reporting obligations of the SIM under the *Whistleblowers Protection Act* are the same as those applicable under the *Police Regulation Act* – s 105L. (See paragraph 8 of this Report).

The SIM will continue to combine reports under s 86ZL of the *Police Regulation Act* and under s 105L of the *Whistleblowers Protection Act* in the one Report.

The DPI did not report any matters to the SIM under the *Whistleblowers Protection Act* in this reporting period.

10 *Major Crime (Investigative Powers) Act 2004* – Chief Examiner

This Act confers further powers on the Victoria Police. As already stated, those powers commenced operation on 1 July 2005 and are exercised through the Chief Examiner which office is established by the legislation.

The extent of these powers and the role of the Chief Examiner are reviewed in detail in this Report.

Central to the powers of the Chief Examiner is an order of the Supreme Court called a coercive powers order ("CPO"). Section 4 of the Act provides that such an order authorises the use in accordance with the Act of powers provided by the Act for the purposes of investigating the organised crime offence in respect of which the order is made.

Section 5 of the Act provides that a member of the police force may apply to the Supreme Court for a CPO if the member suspects on reasonable grounds that an organised crime offence has been, is being or is likely to be committed. Organised crime offence is defined in the legislation.

The Act provides that on application, if a CPO is in force, the Supreme Court may issue witness summonses to, *inter alia*, attend an examination before the Chief Examiner to give evidence and/or produce documents. The Chief Examiner may also issue witness summonses.

Part 4 of the Act sets out the circumstances relating to the conduct of an examination by the Chief Examiner of a person in relation to an organised crime offence. A person may be dealt with by the Supreme Court for contempt of the Chief Examiner. For example, if a person without reasonable excuse refuses or fails to answer any question relevant to the subject matter of the examination.

11 Role Of Special Investigations Monitor With Respect To The Chief Examiner And Victoria Police

The role is set out in s 51 of the *Major Crime (Investigate Powers) Act*. It is to:

- Monitor compliance with the Act by the Chief Examiner, Examiners, the Chief Commissioner and other members of the police force.
- Assess the relevance of any questions asked by the Chief Examiner or an Examiner during an examination to the investigation of the organised crime offence in relation to which the CPO was made or the relevance of any requirement for a person to produce any document or thing.
- Investigate any complaints made to the SIM under Part 5 of the Act.
- Formulate recommendations and make reports as a result of performing the above functions.

12 Obligations Upon Chief Examiner And Victoria Police To The Special Investigations Monitor

The *Major Crime (Investigative Powers) Act* imposes obligations upon the Chief Examiner and the Chief Commissioner of Police. Briefly, they are as follows:

- Chief Examiner must report witness summonses and orders to the SIM – s 52.
- Chief Examiner must report matters relating to the coercive questioning by the Chief Examiner – s 53.
- Chief Commissioner must ensure that certain prescribed records are kept and ensure that a prescribed register is kept and that register is available for inspection by the SIM – s 66.
- Chief Commissioner must report, in writing to the SIM every 6 months on prescribed matters and on any other matters the SIM considers appropriate for inclusion in the report – s 66.

The Act provides for complaints to be made to the SIM and procedures to be followed by the SIM with respect to such complaints – ss 54, 55 and 56.

The Act empowers the SIM to make recommendations to the Chief Examiner or the Chief Commissioner, requires each of them to provide assistance to the SIM, gives the SIM powers of entry and access to the offices and records of the Chief Examiner or the police force and empowers the SIM to require the Chief Examiner or a member of the police force to answer questions and produce documents – ss 57, 58, 59 and 60.

13 Annual Report Of The Special Investigations Monitor To Parliament – Chief Examiner – Victoria Police

Section 61 of the *Major Crime (Investigative Powers) Act* provides that as soon as practicable after the end of each financial year, the SIM must cause a report to be laid before each House of Parliament in relation to the performance of the SIM's functions under Part 5 of the Act.

This Annual Report is made pursuant to that provision.

Briefly the Report must include details of the following:

- Compliance with the Act during the financial year by the Chief Examiner, Examiners, Chief Commissioner and other members of the police force.
- The extent to which questions asked of persons summonsed and requirements to produce documents or other things under a summons were relevant to the investigation of the organised crime offence in relation to which the relevant CPO was made.
- The comprehensiveness and adequacy of reports made to the SIM by the Chief Examiner or the Chief Commissioner during the financial year.
- The extent to which the Chief Examiner or the Chief Commissioner has taken action which has been recommended by the SIM.

The Report must not contain any information that identifies or is likely to identify a person who has been examined under the Act or the nature of any ongoing investigations of an organised crime offence.

14 Office Of The Special Investigations Monitor

Details of the establishment and operation of the OSIM are set out in the 2004-2005 Annual report. There is no need to repeat them.

The OSIM continues to operate from premises in the central business district of Melbourne. During the year an independent review of the premises was carried out and recommendations made to alter them to better meet the needs of the SIM. Plans for the alterations have been completed and the project is being managed by independent expert consultants. It is expected that the work will be completed by the end of September 2006.

The staff of the SIM has continued to consist of Jaklin Trajkovski, Senior Legal Policy Officer and Lisa Farrell, Executive Assistant. Both have done an outstanding job during the year with the continuing development of the office and in the performance of the SIM's functions. Their efforts are much appreciated by the SIM.

Planning and preparation has commenced for additional staff positions for the 2006-2007 year. The need for those positions results from the SIM taking over from the Ombudsman the oversight of the telecommunications intercepts and surveillance device powers exercised by the Victoria Police and other government bodies. This change came into effect on 1 July 2006 and the SIM has been working on an implementation plan to ensure a smooth transition of resources from the Ombudsman's Office to the SIM's office occurs. At the time of writing this Report the SIM is recruiting two positions to enable him to carry out the new legislative requirements in relation to the oversight of telecommunications intercepts and surveillance devices for Victoria Police and other government bodies. It is also anticipated that the SIM will at some stage during the 2006-2007 year have the oversight of telecommunications intercepts and surveillance device powers exercised by the DPI and OPI. At the time of reporting these powers had not commenced.

15 The Exercise Of Coercive Powers By The Director, Police Integrity

Section 11 of the 2004-2005 Annual Report sets out a background and context for the exercise of those powers. There is no need to repeat all that is said there but it is important to address some matters that are referred to.

The OSIM was created to oversee the use of coercive and covert powers by the DPI.

The implementation of a rigorous oversighting system ensures that safeguards are introduced to balance the exercise of extraordinary powers in the pursuit of investigations in the public interest against the abrogation of rights of the individual which are central to the criminal justice system.

15.1 Understanding relevance

Of central importance to the work of the SIM is understanding relevance when it is applied to an investigative process.

The *Police Regulation Act* gives the DPI the power to regulate the procedure by which he conducts an investigation "as he thinks fit".[1] This includes the power to obtain information from any person and in any manner he thinks appropriate and whether or not to hold any hearing. The DPI also has the power to determine whether a person may have legal representation.[2]

The rules of evidence that apply in a court of law do not apply to an investigative body such as the OPI. This is because the function of an investigation is not to prove an allegation but to elucidate facts or matters that may assist an investigation.

For this reason, relevance has to be understood in a far broader context than when applied in a court of law. When applied to an inquisitorial process relevance should not be narrowly defined[3] and includes information which can be directly or indirectly relevant to the investigation.[4] The broad interpretation of the term "relevance" in an investigative process was confirmed in a joint judgment of the Full Federal Court in the matter of *Ross and Heap v Costigan and Ors (No. 2)*.[5] The Court in that case stated, "We should add that 'relevance' may not strictly be the appropriate term. What the Commissioner can look to is what he, *bona fide*, believes will assist his inquiry".

Therefore, as a starting point, relevance can be measured by comparing the nature of the evidence given or the document or thing to be produced against the stated purpose of an investigation. What was not apparent as a line of inquiry at the commencement of an investigation may become so as an investigation progresses. Expanding the lines of inquiry in this manner is a legitimate exercise of the power conferred on an investigative body by the legislature.

15.2 Why is the monitoring of relevance by the Special Investigations Monitor important?

In undertaking his function as a watchdog, the SIM is mindful of the fact that the progress of an investigation should not be unnecessarily fettered by interpreting relevance and appropriateness too strictly. After all, the provision of these extraordinary powers occurred in an environment where it was considered that the conferment of such powers was necessary in the public interest.

However, as equally important is the SIM's duty to scrutinise the exercise of such powers. Such scrutiny protects against an investigative body "going on a frolic of its own".[6] Such a situation may arise where coercive questioning is used as a means of fishing for information not related to the investigation at hand. In other words, to further another agenda not the subject of the investigation.

Maintaining the integrity of the system is crucial to the ongoing viability and utility of the new model. It also ensures that the Victorian public can feel confident that its interests are being served by the investigations being carried out by the DPI and the powers bestowed upon the DPI are being used for their intended purpose and therefore in the public interest.

[1] *Police Regulation Act* 1958 (Vic) s 86P(1)(d).
[2] *Ibid*. s 86P(1)(a) - (c).
[3] *Melbourne Home of Ford Pty Ltd v Trade Police Regulation Practices Commission (No. 3)* (1980) 47 FLR 163 at 173.
[4] *Ross and Anor v Costigan* (1982) 41 ALR 319 at 335 per Ellicott J.
[5] (1982) 41 ALR 337 at 351 per Fox, Toohey and Morling JJ.
[6] *Ross and Anor v Costigan* (1982) 41 ALR 319 at 335 per Ellicott J.

16 Section 86ZB Reports

Section 86ZB of the *Police Regulation Act* requires the DPI to provide the SIM with a written report within 3 days following the issue of a summons.

This requirement has enabled the SIM to keep track of the number and nature of summonses issued.

16.1 Overview of section 86ZB reports received by the Special Investigations Monitor

- A total of 202 s 86ZB reports were received by the OSIM in the 2005-2006 reporting year. (See chart 1 below).
- The DPI issued 123 summonses (61%) for the purpose of producing information, a document or thing and provided the SIM with the relevant reports within the relevant timeframe.
- The DPI issued 41 summonses (20%) for witnesses to attend for the purpose of giving evidence and provided the SIM with the relevant reports within the relevant time frame.
- The DPI issued 38 summonses (19%) for witnesses to attend for the purpose of giving evidence and producing a document or thing and provided the SIM with the relevant reports within the relevant timeframe.

16.2 Summons to produce information, a document or thing

Chart 2 below shows the breakdown of institutions or persons summonsed to produce information, a document or thing.

16.3 Financial institutions

Summonses to produce a document or thing served on financial institutions outnumbered all other types of summonses issued. This category of summons comprised 83% of the overall total of documents sought by the OPI in the year the subject of this Report.

Financial records that were sought and produced included bank accounts evidencing transactions, bank statements, bank vouchers, share portfolios and loans. Financial records belonging to investigation targets, spouses and family members were required to be produced. These records were sought to assist in establishing a financial profile and to identify any anomalous transactions.

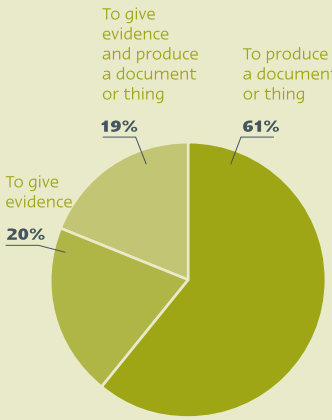


Chart 1
Summonses Issued by OPI

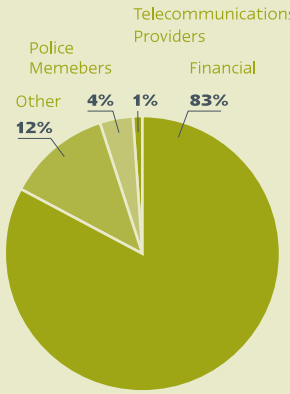


Chart 2
Summons to produce information, a document or thing

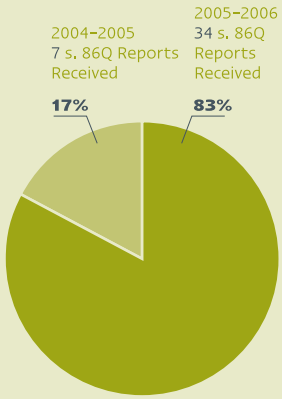
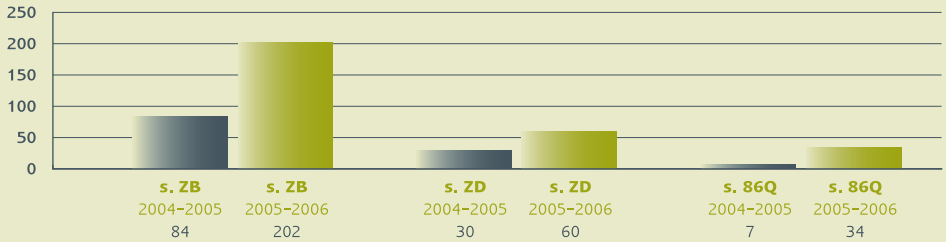


Chart 3
Section 86Q's reported to the SIM

Chart 4
Comparison of Reports Provided to the SIM by OPI



In the majority of cases where a summons was served on a financial institution, the investigation involved an allegation of unexplained betterment on the part of a police member. A central focus of these allegations is any connection between the betterment and the person's position as a serving member of Victoria Police.

Some of the alleged activities being investigated by the OPI include theft of money, money laundering, money-making enterprises with convicted criminals, malfeasance, purchasing of properties and serious misconduct.

Tracking and analysing financial activities related to alleged corrupt activity is an integral part of the investigatory procedure. Obtaining documents from financial institutions allows for the best evidence to be obtained by which to establish unexplained wealth. This is because the evidence is in documentary or electronic form and does not necessarily rely on the truthfulness of answers given by a witness.

The summonses served on financial institutions by the OPI in the year the subject of this Report evidence an appropriate use of the DPI's power to require the production of documents. Obtaining documents in the first instance reduces the need by the DPI to summon a witness for the giving of evidence unless there is no other avenue by which to obtain the necessary information.

Summonses detailing the financial activities of persons additional to the investigation target are appropriate and necessary when investigating unexplained wealth by a police member. In particular, the use of this power is a significant step in determining the direction that an investigation may take and as such falls within the objects of the legislation. It is also an important preparatory tool where the coercive examination of an investigation target may be necessary.

16.4 Other

Documents and other items were also sought from the following persons and/or bodies to assist with investigations being conducted by the OPI:

- Gaming records including player transaction reports/statements for racing accounts, sports-bet accounts or other accounts held by a gaming institution.
- Racing records including details of registration, horses owned and syndicated, details of individual owners and shares held within each syndicate promoted and betting records.
- Private company to provide employee records.
- Travel company to provide itinerary of flights and accommodation.
- Share registry to provide financial and computer records of share portfolio records.

This category of summons comprised 12% of the overall total of documents sought by the OPI in the year the subject of this Report.

16.5 Police members

Five police members were served with a summons to produce a document or thing relevant to the subject matters and period under investigation. This category of summons comprised 4% of the overall total of documents sought by the OPI in the year the subject of this Report.

16.6 Telecommunications carrier

Subscriber information, call charge records and reverse call charge records were sought from a telecommunications carrier in the year the subject of this Report. This category of summons comprised 1% of the overall total of documents sought by the OPI in the year the subject of this Report.

The documents sought fit within the subject matter of the investigation to which they apply. Accordingly, they are relevant and appropriate documents for production pursuant to summons.

The information is used in relation to the identification of user(s) of a mobile telephone number, the revealing of contacts between police members and other parties under investigation or known criminals.

17 Interviews Involving The Use Of Section 86Q Reported And Reviewed

Section 86ZD reports were also received for interviews conducted under s 86Q of the Act. A total of 34 reports were received relating to 12 investigations. Thirty three members were interviewed, (1 member interviewed twice), 30 of the interviews were video-recorded and 4 were audio-recorded due to video facilities malfunctioning. A number of incomplete and faulty recordings were received. These recordings were returned to the DPI and have since been replaced with audio recordings. The DPI has provided a satisfactory explanation as to how the recording problems occurred and has undertaken to have all recordings checked prior to being provided to the SIM's office.

An interview conducted under s 86Q is limited in its scope in that it can only relate to a complaint concerning a possible breach of discipline. A police member can be directed to furnish any relevant information, produce any document or answer any relevant question.

In many of the 34 s 86Q interviews reviewed by the SIM the police member did not ask for a direction before answering any questions. The delegate gave the direction without the direction being requested

on tape. This matter was raised with the DPI to determine whether the direction was requested by the member prior to the commencement of the recording or whether the delegate gave the direction to the member without a request being made. One member attended voluntarily and therefore was not required to request a direction, however a direction was given. The DPI has now provided a detailed explanation as to why a direction to answer was given although not requested by the police officer being interviewed. That explanation will be considered and if necessary the position discussed further. The DPI has also provided details of interviews where the direction was in response to a request but not recorded. In these circumstances, in the SIM's view, the making of the request should be confirmed on the recording.

The DPI considers it a necessary part of his reporting obligations to provide reports where a direction is given to a member. The reason for this is that whilst the attendance by the member at the interview may be considered voluntary, any answers given or documents produced are under direction and could not therefore be categorised as voluntary. Section 86ZD requires a report to be provided where a summons has been issued, where a certificate has been issued or where the person attends the DPI voluntarily and is required to answer a question or produce a document.

All of the reports received by the SIM relate to s 69 of the *Police Regulation Act* and relate to a possible breach of discipline namely engaging in conduct that is likely to bring the force into disrepute or diminish public confidence.

The SIM is satisfied that the questioning at the interviews was relevant to the investigations concerned as was the production of documents. It was not inappropriate or improper.

As reflected in Chart 3, page 10, there was a significant increase in the number of s 86Q reports received in 2005–2006 (34 received) compared to the previous year being 2004–2005 (7 received). It should be noted that whilst there has been a significant increase in the number of s 86Q reports received by the SIM for the year the subject of this report, the OPI was not established until November 2004 which does not cover a full 12 month period as this year's Annual Report does.

At paragraph 30 of the 2004–2005 Annual Report the utility of s 86Q to DPI was considered. There is no need to repeat what is contained there. Section 86Q is both appropriate and useful and in the SIM's view should continue to be part of the powers held by the DPI under the *Police Regulation Act*.

18 Persons Attending The Director, Police Integrity To Produce Documents

Persons falling into this category are:-

- Persons who had been summonsed to give evidence in addition to receiving a summons to produce; or
- Persons who object to comply with the summons.

In such cases the attendance is video-recorded. That is a video-recording made of the person attending the OPI office and providing the documents specified or stating the grounds upon which objection is made. Persons falling into these categories are usually police members providing documents such as day books or diaries. There was no case during the year under review where a person attended in answer to a summons to produce and objected to produce.

19 Coercive Examinations Reported To The Special Investigations Monitor

Sixty s 86ZD reports were provided to the SIM between 1 July 2005 and 30 June 2006. This does not include reports relating to s 86Q interviews which are reviewed at paragraph 17 of this Report.

Transcript was provided for 11 of the 59 examinations. All private hearings were accompanied by recordings.

A number of the recordings provided to the SIM were faulty and had to be returned to the DPI. In some cases, the recordings were recorded using software that the SIM does not have access to. In order to overcome this problem, the DPI gave the SIM two lap top computers on which these recordings could be viewed. The recordings were viewed on one lap top and notes made about the hearings on the other. The lap tops have now been returned to the DPI at his request.

In order to resolve this problem, the SIM has recently required the DPI pursuant to s 86ZI to provide all future recordings in video or DVD format so that they can be easily viewed. The viewing facilities at the SIM's office enable viewing of recordings on video or DVD through a television set and notes can then be made simultaneously of the hearing on a lap top. This is the most efficient and practical way to view and analyse an examination being carried out by the OPI. To date, the recordings have been provided in various formats making the viewing of them difficult and impractical. A detailed response has now been received from the DPI to the SIM's requirement. That response will be considered and discussed with the DPI. The SIM is confident that a mutually acceptable solution to the matter will be found.

20 Warrants To Arrest

A witness who has been served with a summons and has failed to attend in answer to the summons can be arrested under warrant to enforce his/her attendance on the DPI.

The DPI may apply to a Magistrate for the issue of a warrant to arrest. A warrant can be issued if the DPI believes on reasonable grounds, that there was proper service of the summons on the witness and that the witness has failed to attend before the DPI in answer to the summons.[7]

A Magistrate hearing an application can only issue a warrant if he or she is satisfied by evidence on oath that there are reasonable grounds for the DPI's belief described above. The evidence can be either oral or by affidavit.[8]

However, once a person has been arrested he or she must be brought before the DPI as soon as possible and may be detained in police custody until such time as he or she is excused from attendance.[9] If the DPI is of the view that a person may escape from police custody, he can direct that the person be detained in a prison or a police gaol so that his/her attendance at the hearing can be ensured.[10] A person who cannot be brought before the DPI as soon practicable after his/her arrest can apply for bail.

Certain safeguards were introduced to offer a measure of protection to a person arrested under warrant for an attendance on the DPI. The *Police (Amendment) Regulations 2005* (Vic)[11] ("the Regulations") prescribe that the DPI must also provide a s 86ZD report to the SIM following an attendance under warrant and where a certificate has been granted under s 86ZD(1)(c).

The Regulations stipulate a number of matters that the DPI must report on following the arrest of a recalcitrant witness. These matters include, *inter alia*, the place and length of detention, whether the person made an application for bail and the duration of the attendance on the DPI.

In relation to persons aged under 18 years and/or those believed to have a mental impairment at the time of the attendance, the Regulations require additional information to be provided to the SIM.

The Regulations in conjunction with the *Police Regulation Act* ensure that the SIM is provided with detailed information from which to scrutinise the circumstances surrounding the arrest and detention of a person. This oversight function is critical when young or mentally impaired persons are detained. It empowers the SIM with the ability to determine whether the detention of a person was justified in the circumstances and if so, whether the detention was carried out in accordance with the requirements set out by the Act and the Regulations.

It is important to note that a person is not exonerated from liability for non-compliance with the summons due to the fact that he or she has attended on the DPI after the issue of a warrant or following arrest.[12]

The DPI did not apply for any warrants during the year the subject of this Report.

21 The Need For The Use Of Coercive Powers

Compulsory examinations for the giving of evidence or the production of documents/things continued to be conducted by the DPI in this reporting period.

The use of coercive powers for the production of documents/things and/or the giving of evidence should only be used where the DPI determines that other information/evidence gathering techniques were exhausted or could not further the investigation.

The need for the use of coercive questioning was raised by the SIM in relation to 2 witnesses in this reporting period. In both cases, the witnesses objected to being summonsed for a compulsory hearing in circumstances they thought were unnecessary given their clear indications to the DPI that they would have provided the evidence on a voluntary basis without being subjected to coercive questioning. The objections of the witnesses appeared to the SIM to have merit.

The SIM therefore queried the need for the use of coercive questioning in relation to these witnesses. In particular, the SIM expressed the view to the DPI, by letter in May 2006, that the use of coercive questioning needs to be considered on a case by case basis. The use of a coercive power should be a last resort where voluntary or other non-intrusive options have been explored and even tested.

The DPI's view on this issue as stated to the SIM is that he would not necessarily agree that voluntary or other non-intrusive options must be explored and even tested prior to a decision being made about the suitability of the use of a coercive power.

[7] *Police Regulation Act 1958 (Vic)* s 86PD(1).
[8] *Ibid.* s 86PD(2).
[9] *Ibid.* s 86PD(4).
[10] *Ibid.* s 86PD(5).
[11] *The Police (Amendment) Regulations 2005 (Vic)* came into force on 28 June 2005.
[12] *Police Regulation Act 1958 (Vic)* s 86PD(10).

The DPI accepts that he must exercise his discretion to use coercive powers responsibly and sparingly, but a process whereby the DPI is first required to approach witnesses to assess whether they would be prepared to co-operate would not, in the DPI's view, be helpful in the conduct of secure, effective and fair investigations in certain circumstances.

The SIM notes these views of the DPI. The SIM raised the position of the two witnesses with the DPI because in the SIM's view, the witnesses were not such as to compromise the security, effectiveness or fairness of the investigation. The SIM agrees that it is a matter for the DPI when these powers should be used but will continue to raise cases where the exercise of the discretion does not appear to be justifiable in the circumstances.

The need to only use coercive powers where the circumstances are warranted is confirmed as part of the DPI's policy in his draft document, 'Guidelines for Delegates'. This document was provided to the SIM and expresses the view that consideration must be given to the need and likely outcome to be achieved when the discretion is exercised to use a coercive power.

Under the heading, 'Duty to be Fair and Reasonable' in section 3 of the Guidelines, the draft policy document states:

> "Delegates are advised that as a matter of general policy a coercive power should only be used where all other non-coercive alternatives have been exhausted, are reasonably believed to be unlikely to be effective, or are for some other reason unsuitable in the circumstances.
>
> Before a Delegate resorts to the use of a coercive power all reasonable attempts must be made to ensure that the person against whom such power is used is aware of the effect of the relevant power and its consequences and is given a reasonable opportunity to adopt a course which will avoid the use of any such power by the Director and any consequences of same."

The DPI has informed the SIM that the general principle referred to has been part of OPI's policy for some time and is referred to in the 'Summons Issue Procedures'. The SIM agrees with the policy in relation to the use of coercive powers as set out in the draft policy document. The SIM will monitor the application of the policy in the next reporting period and continue, where appropriate, to raise the exercise of this discretion by the DPI or his delegate as the monitoring of this discretion is important in the public interest.

22 Types of Investigations Conducted By The Director, Police Integrity Subject To Coercive Examinations

Compulsory examinations continued to be conducted by the DPI in this reporting period. The use of a coercive power for production and/or giving of evidence was used by the DPI in this reporting period.

A description of the investigations utilising compulsory powers are described in broad terms below. The descriptions do not include descriptions of investigations conducted pursuant to s 86Q. The descriptions given are intentionally general to give an understanding of the types of investigations conducted over the last year and at the same time ensuring compliance with s 86ZL of the Act. That is, to ensure that persons or investigations are not identified.

The DPI reported a total of 9 investigations to the SIM in this reporting period. Own motion investigations again dominated the overall number of investigations undertaken. The figures below do not include s 86Q investigations which are referred to separately in this report.

Investigation Type	Number
Own motion investigation (s 86NA)	6
Complaint generated investigation (s 86N)	2
Further investigation conducted by the DPI (s 86R)	1

23 Descriptions Of The Investigations Where Coercive Examinations Were Conducted

The use by the DPI of compulsory questioning greatly increased during this period as compared to the last reporting period. A total of 59 witnesses were examined[13]. Of these, 47 are serving police members, 2 are former police members and 10 are civilians.

A very general description of each of the investigations utilising coercive questioning is provided below. In order to comply with s 86ZL(4) of the Act, the descriptions contain very limited detail to protect against a person or investigation being identified.

23.1 Allegation of theft of money during a police search

An allegation was made by an accused person that monies went missing from a draw after police had executed a search warrant on his premises. This was a further investigation conducted by the DPI pursuant to s 86R of the *Police Regulation Act*. This investigation has now been completed.

[13] One witness was examined twice resulting in the provision of 2 s 86ZD reports for the same witness.

23.2 Allegation of theft of money from a vehicle

Part of this investigation was subject to a public hearing in January 2006. The DPI investigated an allegation that $40,000.00 was stolen from a vehicle left on the side of the road. Specifically, the investigation focused on whether the money was taken by police officers searching the vehicle. This investigation has now been completed.

23.3 Allegations of harassment, bullying and abuse of junior members at a large suburban police station in Melbourne

This own motion investigation looked into allegations of harassment, bullying and abuse of junior members in a large suburban police station. Included in the terms of reference for the investigation was the question of whether senior officers in command of the station should have known and taken action to combat these practices. Programmes, training and policies in place at the relevant times were also examined. The investigation is continuing.

23.4 Investigation into the financial affairs of a serving police member

This investigation arises from 2 complaints about a current serving police member. The complaints are that the member received money allegedly stolen during a drug raid and that the member was involved in the laundering of money through property developments. This investigation has been completed by the DPI.

23.5 Provision of information to Director, Police Integrity relating to criminal activity

An own motion investigation is currently being undertaken arising from information provided to the DPI. The investigation is continuing.

It is alleged police members failed to deal properly with drugs purchased for evidentiary buys.

The focus of the own motion investigation is the alleged failure of certain police members to properly deal with drugs purchased for use in an evidentiary buy relating to a drug investigation. The investigation is also examining allegations that the police members have or attempted to hinder the investigation into these matters.

23.6 Investigation into serious misconduct at a suburban Criminal Investigation Unit ("CIU")

An own motion investigation was instigated into allegations of serious misconduct by certain members of a CIU in suburban Melbourne. The investigation was broadened to include an investigation into the practices and procedures in place at the CIU prior to and at the time of the alleged misconduct occurring. The investigation is continuing.

23.7 Police member engaging in unlawful activity

The DPI instigated an own motion investigation into the alleged unlawful activities of a serving member. The allegations include theft and soliciting and receiving bribes amongst other things. This investigation is continuing.

23.8 Investigation of a complaint relating to an assault

The DPI is conducting an investigation following a complaint of an assault by a police member on a civilian. The investigation is continuing.

24 Summary Of Incoming Material From The Office Of Police Integrity To The Special Investigations Monitor

Chart 4, page 10, provides an overall summary of the incoming material from the OPI that relates to s 86ZB, 86ZD and 86Q reports under the *Police Regulation Act*.[14]

25 Issues Arising Out Of Examinations

25.1 Summons issue procedures

The procedures employed by OPI when summonses are issued and served continued to be reviewed by the SIM over the last year. As a result the procedures have been refined to ensure that OPI officers use coercive powers properly and in line with the rules of procedural fairness. The SIM has made some suggestions and recommended changes to some of these procedures which are discussed in greater detail in this Report. This section gives an overview of the matters that arose in this reporting period and the outcomes that flowed from these issues.

The DPI provided to the SIM copies of policies and guidelines entitled, 'Summons Issue Procedures', 'Hearings and Examinations of Summonsed Witnesses' and 'Guidelines for Delegates'. The summons issue and hearing policy documents were referred to but not reviewed in the 2004–2005 Annual Report. The delegate's document relates to the conduct of examinations under delegation from DPI which has been the position in all cases.

[14] The statistics for the 2004-2005 reporting period commence from November 2004 when OPI commenced operation, therefore these statistics are not based on a comparison of two full reporting periods and are included as a general guide to the increase in material received by the SIM.

The SIM reviewed these documents and provided feed-back to OPI. The SIM made both formal and informal recommendations which include:

- That the section on confidentiality notices be amended to make clear that the DPI has the discretion to issue confidentiality notices. Given that the power to issue a notice is a discretionary one, in each case there needs to be a decision that confidentiality is required having regard to the circumstances of the case rather than a notice being issued 'as a matter of course'. Confidentiality notices were also the subject of a formal recommendation, Recommendation 1 of 2006, in this reporting period.

- The policies did not address underage or impaired witnesses. The SIM suggested the requirements of s 86PC of the *Police Regulation Act* and regulation 4 made under that Act be included in the policies as they stipulate a number of important matters that affect the issue of a summons directed to a person under the age of 16 years, under the age of 18 years or believed to have a mental impairment.

- That all summonses be served on witnesses a reasonable time before the date requiring the attendance of a person before the DPI and/or the production of documents or other information and things (Recommendation 3 of 2006).

- All formal recommendations made by the SIM in this reporting period be included in the 'Guidelines for Delegates'. These recommendations are described under their particular topic headings in this Report.

The recommended amendments of the SIM to the policy documents were promptly implemented by OPI and the relevant policies, as amended, were provided to the SIM. In addition to this, all formal and informal recommendations made by the SIM are to be incorporated by the OPI in the 'Guidelines for Delegates' to ensure a consistent approach to procedures in investigations by delegates.

25.2 Production of documents without attendance before the Director, Police Integrity or his delegate

The DPI adopted a procedure in the previous reporting period whereby a person served with a summons for the production of documents can be excused from attendance if the required documents are provided prior to the return date and time and at the premises specified in the summons. A complete description of this procedure and its genesis can be found at paragraph 14 of the 2004–2005 Annual Report.

The SIM continues to be of the view that the policy adopted by the DPI in relation to this matter is a sensible one and is also effective. No concerns were raised in this reporting period that this procedure was causing problems, was onerous or ineffective and therefore the process is continuing.

25.3 Viewing of examinations from a remote hearing room

Section 86ZD(2)(b) requires reports provided to the SIM to record the name of each person granted leave to be present in the hearing room during an examination. However, it became evident that persons watching an examination from a remote room were not being listed in the s 86ZD reports.

This matter was raised with the DPI in October 2005. It was suggested that an attendance register be used to record the names and entry and exit times of all persons watching an examination from the viewing room. The basis for this suggestion was that these persons were not named in the report and nothing was stated formally on tape by the delegates directing that they are bound by the requirement of confidentiality set out in s 102G of the *Police Regulation Act*.

The SIM's primary concern was that in the absence of such a direction being given, there is no protection against potential breaches of confidentiality or other problems occurring outside of the hearing room. This is particularly so if there is no record of who has been in receipt of confidential evidence given during an examination.

In order to resolve this issue, at the invitation of the DPI, the remote viewing room at OPI was inspected. Following this inspection, the SIM was satisfied that a sign-in book would be adequate as OPI staff and technicians are the people using the room. The sign-in book is to record the names of the persons coming in and out of the room during a hearing, the date applicable and the time of entry and departure. This book is available to the SIM for inspection as is necessary.

25.4 Confidentiality notices

This matter was considered in the 2004-2005 Annual Report at paragraph 20.1. The DPI has the power to give a witness a confidentiality notice upon issuing a summons. This discretionary power is contained in s 86KA of the *Police Regulation Act*. A notice has the effect of prohibiting disclosure by a witness of the existence of the summons and the subject-matter of the investigation to which the summons relates unless the person has a reasonable excuse. A reasonable excuse includes disclosure for the purpose of obtaining legal advice and/or legal representation.[15]

[15] Examples of other reasonable excuses that arise in coercive examinations are outlined in the 2004–2005 Annual Report at paragraph 20. Section 86KA(4) provides other examples of reasonable excuses permitted under the *Police Regulation Act*.

Given that a breach of a confidentiality notice attracts a maximum penalty of 120 penalty units or imprisonment for 12 months or both, it is important that witnesses have a clear understanding of the requirements upon them of such notices.

It was noted that in hearings conducted in this reporting period delegates of the DPI were not explaining the requirements of a confidentiality notice at all, or in any detail to witnesses before the commencement of questioning. In some examinations witnesses were reminded of the requirement of confidentiality once questioning had concluded. However, on these occasions the requirement had not been explained to the witness before he/she answered questions. This can be contrasted to the position in the previous year where adequate explanation was given.

In the SIM's view, it is important that a witness has a clear understanding of the requirements and penalties for breach of a notice in every examination regardless of whether or not the witness is legally represented. This should occur prior to the commencement of questioning.

The SIM's concern about the lack of adequate explanation was communicated to the DPI in November 2005. It was requested that this situation be rectified to ensure that witnesses are completely aware of the requirements of a confidentiality notice and can raise any questions that relate to the notice before the commencement of questioning. The DPI agreed to remind delegates and examiners that this should occur.

Since raising this concern, the SIM has monitored whether the suggestion has been followed in all coercive examinations. This matter was again raised with the DPI as lack of adequate explanation continued to occur and was continuing as late as May 2006.

Consequently, a formal recommendation was made by the SIM to the DPI on 25 May 2006 pursuant to the SIM's power under s 86ZH. It is acknowledged by the SIM that the DPI has incorporated the suggested practice into the document 'Guidelines for Delegates'. However, given the importance of this requirement and the inconsistency amongst delegates, it was considered that a recommendation was necessary to ensure that adequate explanation was provided by all delegates. Recommendation 1 of 2006 states:

Recommendation by the Special Investigations Monitor to the Director, Police Integrity pursuant to s 86ZH(1) of the *Police Regulation Act 1958* as Amended

Recommendation 1 of 2006
Before any question is asked of a witness at an examination or the witness produces a document or other thing, the DPI or his delegate inform the witness of any confidentiality requirements applying to the evidence or the fact of the issue of the witness summons or the making of a direction under section 86PE, as the case may be.

Pursuant to section 86ZH(3) of the Act, the Special Investigations Monitor requires the Director, Police Integrity to give to the Special Investigations Monitor a report within 28 days stating:

(a) Whether or not the Director, Police Integrity has taken or proposes to take the action recommended by the Special Investigations Monitor; and
(b) If the Director, Police Integrity has not taken the recommended action or proposes not to take the recommended action, the reasons for not taking or proposing not to take the action.

The SIM will continue to monitor the DPI's compliance with Recommendation 1 of 2006 in the next reporting period.

In response to this recommendation, the DPI is of the view that an explanation of confidentiality should be given to a witness at the conclusion of the examination.

The SIM's view is that it is vital that a witness understand this requirement before giving evidence. A reminder given at the end of an examination is prudent and supported by the SIM. However, a thorough explanation in accordance with Recommendation 1 is to be given prior to the witness being examined.

25.5 Exclusion and non-publication orders

This matter was considered in the 2004-2005 Annual Report (see paragraph 20.2).

All examinations were conducted in private except for 1 investigation where, after other witnesses had been examined in private, 3 police members, 1 of whom was the subject of allegations that were being investigated by OPI, and a civilian witness were examined in public. Counsel for the police members objected to this course and submitted that the examinations should be held in private as had occurred with the other witnesses. They submitted, *inter alia*, that it was unfair in these circumstances that their clients were to be examined in public, particularly in the case of the police member who was the subject of allegations, when other persons had been examined in private.

In the SIM's view, the concerns expressed by counsel had substance. However, the delegate concluded that the examinations should take place in public. Counsel did not take the matter any further and the examinations proceeded in public. They were the subject of considerable media coverage.

An issue in relation to exclusion and non-publication orders arose in the context of public and private hearings conducted by the DPI. In one OPI investigation, hearings were conducted in the on-premises OPI hearing room. The delegate in the subject hearings determined not to make exclusion and non-publication orders because the hearings were held on OPI premises and therefore access to the hearing room was restricted.

The matter was raised with the DPI as it is the SIM's view that under s 19 of the *Evidence Act 1958*, the DPI is acting as if he were issued with a commission by the Governor -in-Council to conduct an investigation. Consequently, a hearing is to be conducted as a Royal Commission with public hearings unless otherwise specified by the Commissioner.

In the case of hearings conducted by the DPI, the making of an exclusion order and a non-publication order has the effect of changing the nature of the proceedings from public to private. The fact that a hearing is conducted on OPI's premises does not of itself make a hearing private or confidential. A hearing is a public one unless otherwise stated by the DPI or his delegate by the making of an exclusion and non-publication order.

The ability to make exclusion and non-publication orders is a discretionary power given to the DPI under the *Police Regulation Act*. This discretion exists to protect both the integrity of an investigation and the safety and reputation of a witness required to attend compulsorily. In the absence of an exercise of this discretion, in the SIM's view members of the public would be entitled to attend a hearing. Furthermore, without a non-publication order restricting access to all or part of the evidence, persons could seek access to the transcript of evidence.

The DPI has accepted the SIM's interpretation of the *Police Regulation Act* in relation to this issue. It has been incorporated into the 'Guidelines for Delegates' document for delegates conducting coercive examinations. If a hearing is to be conducted as a private hearing then the DPI or his delegate must make the necessary orders in order to achieve this.

25.6 Confidentiality, serving of summonses and protection of witnesses

This matter was considered in the 2004–2005 Annual Report at paragraph 21.

The issue of confidentiality also arose in the context of the service of summonses on witnesses. In 2 matters reviewed by the SIM police officers were served with summonses and confidentiality notices whilst in the presence of other members. Two potential problems were identified with the service procedures employed by OPI staff. They are the potential for breach of confidentiality by OPI staff under s 102G and the right of witnesses to be served in a manner in which their confidentiality is not compromised by procedures used by OPI staff.

The DPI was asked by the SIM to review the service procedures employed by investigators in these matters. In particular, the DPI was asked to address this issue with investigators to ensure that it is clear to them that it is desirable that witnesses be served in a way which minimises the potential for confidentiality to be compromised and where witnesses are forewarned of service, they are to be informed of the need to keep that information confidential.

The DPI agreed that service procedures should minimise any potentiality for confidentiality to be compromised. The particular matters raised by the SIM were brought to the attention of OPI operational managers by the DPI to ensure that service procedures followed are reviewed to minimise the risk of confidentiality being compromised. The SIM will continue to monitor this situation because a breach of confidentiality can have significant consequences for witnesses and the integrity of investigations.

25.7 Breaches of confidentiality

Instances of potential breaches of confidentiality were the subject of reporting in the 2004–2005 Annual Report at paragraph 21. This is a serious matter that is monitored by the SIM. A number of preventative measures were suggested by the SIM in last year's Annual Report that were followed up with the DPI.

There were a few matters in the last reporting period that identified concerns by witnesses subjected to coercive questioning that their attendance or evidence may be leaked thereby putting their safety at risk.

The SIM raised 2 matters with the DPI during this reporting period relating to breaches or potential breaches of security. Security issues that witnesses may face and the concern of the witness in this particular matter were discussed at a meeting with DPI and his staff. The DPI explained the current security procedures in place.

The SIM is satisfied with the approach taken by OPI with respect to witness security. It is accepted that this is an issue of high priority for the DPI and his office. The DPI will keep the SIM informed of any up-dates and/or revisions to the security policy in light of the suggestions made by the SIM in the 2004–2005 Annual Report.

25.8 Service of summonses on witnesses

It was apparent to the SIM that some witnesses were served with summonses to attend a hearing the day before their required attendance. In all cases, the summonses were for the production of documents and the giving of evidence. The issue of reasonable notice arose in the context of these situations.

The SIM is of the view that short service is appropriate in certain circumstances were evidence may be lost or the safety of a witness or other persons may be compromised. However, where these circumstances do not apply, a witness must be served in reasonable time to allow for compliance with a summons. Serious consequences may follow if a witness does not comply. In order to ensure that this practice is adopted as a standard procedure by OPI, the SIM made two recommendations under s 86ZH to the DPI as follows:

Recommendation by the Special Investigations Monitor to the DPI, Police Integrity pursuant to section 86ZH(1) of the *Police Regulation Act 1958* as Amended

Recommendation 2 of 2006
That the Summons Issue Procedures document state that a summons must be served a reasonable time before the date on which the person is required to attend.

Pursuant to section 86ZH(3) of the Act, the Special Investigations Monitor requires the Director, Police Integrity to give to the Special Investigations Monitor a report within 28 days stating:

(a) Whether or not the Director, Police Integrity has taken or proposes to take the action recommended by the Special Investigations Monitor; and
(b) If the Director, Police Integrity has not taken the recommended action or proposes not to take the recommended action, the reasons for not taking or proposing not to take the action.

Recommendation by the Special Investigations Monitor to the Director, Police Integrity pursuant to section 86ZH(1) of the *Police Regulation Act 1958* as Amended

Recommendation 3 of 2006
That the report by the Director, Police Integrity pursuant to section 86ZD of the Act, if a witness summons has been issued, state the date and time at which the summons was served on the person. Pursuant to section 86ZH(3) of the Act, the Special Investigations Monitor requires the Director, Police Integrity to give to the Special Investigations Monitor a report within 28 days stating:

(a) Whether or not the Director, Police Integrity has taken or proposes to take the action recommended by the Special Investigations Monitor; and
(b) If the Director, Police Integrity has not taken the recommended action or proposes not to take the recommended action, the reasons for not taking or proposing not to take the action.

The DPI agreed to adopt the above recommendations. Recommendation 2 has been adopted in the document, 'Summons Issue Procedures' and the time and date of service of a summons will be included in all future s 86ZD reports provided to the SIM by the DPI. This will allow the SIM to review compliance with the recommendations and procedural fairness.

26 Legal Representation

In the 2004-2005 Annual Report reference was made to the need to make free legal assistance available to witnesses summonsed to appear before the DPI. Of particular concern to the SIM was the appearance by unrepresented civilian witnesses before the DPI for coercive examinations. This concern also applies to unrepresented witnesses appearing before the Chief Examiner over the last 12 months.

The SIM highlighted in the 2004–2005 Report the need for funding to be given to a body such as Victoria Legal Aid (VLA) which can provide this assistance to witnesses.

The SIM has been informed that VLA has adopted a Guideline (Chapter 2 Legal Aid Handbook) and a table of fees (Table Y, Chapter 6 Legal Aid Handbook) for witnesses summonsed to appear before the DPI or the Chief Examiner. The assistance available to witnesses is the provision of legal advice and/or legal representation. The latter is available for witnesses that face a reasonable prospect of prosecution or are at risk of self-incrimination.

26.1 Legal representation and witnesses appearing before the Director, Police Integrity

The DPI or his delegate regulates the role played by legal representatives pursuant to his power under s 86P(1)(d).

Legal representatives representing witnesses during an examination are informed by the DPI or his delegate that they may be present during the examinations but may not interfere with questioning. Legal representatives are invited to make submissions on behalf of their clients once questioning is complete.

The invitation to legal representatives to make submissions at the conclusion of questioning is appropriate in the view of the SIM. The DPI is empowered under s 86P(5) to make a written report to the Chief Commissioner, the Minister or the Premier upon the completion of an investigation and may in a report request the taking of any action the DPI considers should be taken.

26.2 Who was represented and who was not

The DPI or his delegate granted leave to all witnesses making applications to be legally represented during a coercive examination. A total of 40 applications were granted in this reporting period.

Police witnesses continued to have a high rate of representation in the current reporting period with 81% of police witnesses being legally represented as compared to 19% of civilian witnesses being legally represented. The number of represented civilian witnesses may increase in the coming reporting year following the provision of legal assistance by VLA.

Legal Representation	Numbers
Police witnesses legally represented during examination	38
Police witnesses not legally represented during examination	9
Former police members legally represented during examination	0
Former police members not legally represented during examination	2
Civilian witnesses represented during examination	2
Civilian witnesses not represented during examination	8

27 Relevance

The assessment of the relevance of the questions asked by the DPI or his delegate of persons attending on the DPI is a core function of the SIM under s 86ZA(b) of the *Police Regulation Act*.

The meaning of relevance when applied to coercive questioning and its assessment by the SIM is explained in paragraph 27 of this Report. Relevance is assessed broadly when applied to coercive examinations conducted by both the DPI and the Chief Examiner because these investigative bodies are not bound by the rules of evidence that apply to courts.

The function of the DPI and the Chief Examiner is to question witnesses for the purpose of obtaining evidence for an investigation. These investigative bodies are not the final arbiters of facts as are courts. Rather, they act like inquisitorial bodies with the power to undertake broad questioning on matters considered to be pertinent to an investigation.

The SIM was satisfied that the questioning of nearly all witnesses in this reporting period was relevant to the investigations the subject-matter of the hearings. However, there were 2 instances where, in the SIM's view, some of the questions asked of witnesses did not appear to be relevant. Such matters did not dominate hearings and involved short questioning.

The questions in issue arose in the one OPI investigation. In each case the questions asked were of a personal nature about another witness. It is the SIM's view that the questions appeared to have no relation to the subject-matter of the investigation or any broader matters relating to the investigation. An added concern was that the questions were not put to the person to whom they related. Rather, other witnesses were asked to comment on personal matters about the witness in question which seemed to have no bearing, in the view of the SIM, on the allegations forming the basis of the investigation.

The matters were raised by the SIM with the DPI in writing and followed up at a meeting with the DPI and his staff. Information was sought as to the relevance of the questions to the investigation. The information provided did not, in the SIM's view, adequately address the question of relevance and consequently a written response was requested in relation to this issue.

The SIM received a general written response from the DPI acknowledging the importance of relevance in questioning. However, the response did not adequately address why, in the view of the DPI, the questions were relevant to the investigation. The SIM is not satisfied that the particular questions asked were relevant on the basis of the examination and the information provided by OPI. The SIM is not satisfied that they should have been asked. A sufficient, direct or even indirect link, between the questions and the subject-matter of the investigation was not established.

The SIM will continue to monitor questioning as to relevance and raise with the DPI any concerns arising over a particular line of questioning. Each recording of an examination provided by DPI is reviewed to ensure the integrity of the use of the coercive questioning power. This is one of the central functions of the SIM.

28 Length Of Hearings

It is important in the view of the SIM that examinations do not take longer than is reasonably necessary. The SIM has monitored this issue to ensure that the length of time spent by witnesses at OPI is not unduly long. Length includes both the examination length and the overall length of an attendance of a witness at OPI in answer to a summons.

Length of time was raised as an issue with the DPI in 2 cases. In particular, each examination was approximately an hour in length but the attendances by the respective witnesses at OPI lasted for considerably longer.

The DPI provided further details to the SIM as to why the witnesses were required to remain at OPI. The SIM was satisfied with the explanations provided in the particular circumstances. However, the SIM requested that where a witness's attendance on the DPI is unduly long, the s 86ZD report provide additional information with respect to the circumstances of that witness' lengthy attendance.

The DPI acknowledged that an explanation in such circumstances was necessary. The DPI agreed that additional information in these circumstances would be helpful and has agreed to provide this information in s 86ZD reports where length is an issue. Ongoing monitoring of length of attendance by the SIM will continue to ensure that witnesses only attend for as long as is reasonably necessary. This is particularly important where witnesses are attending under compulsion and serious consequences can follow if they fail to attend or fail to remain when required to do so.

29 Mental Impairment

Brief reference was made to this matter in the 2004–2005 Annual Report at paragraph 17.2. The *Police Regulation Act* provides for specific measures to be taken by the DPI or his delegate if they form a belief that a person has a mental impairment. Section 86PC(6) stipulates that where the DPI or his delegate forms such a belief, he must direct that an independent person be present during the person's attendance if the person so wishes and that the witness may confer with the independent person before providing any information, producing any document or thing or giving any evidence.

Mental impairment, as defined by the Act, includes impairment because of mental illness, intellectual disability, dementia or brain injury. In reference to mental illness, the SIM relies upon the definition provided under s 8(1A) of the *Mental Health Act 1986* ("MHA"). Under the MHA a person is mentally ill, "if he or she has a mental illness, being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory."

Where the DPI forms a belief that a witness has a mental impairment, he must, pursuant to regulation 4(g) of the *Police (Amendment) Regulations 2005*, report this information to the SIM in the s 86ZD report. This is to ensure that potentially vulnerable witnesses who are subjected to coercive powers are adequately protected and that the safeguards that are built into the legislation are complied with. Furthermore, this requirement also ensures that the SIM can monitor the DPI's compliance with the Act under s 86ZA(a).

All s 86ZD reports received by the SIM in this reporting period stated that the DPI or his delegate did not form a belief that any of the witnesses subject to the exercise of coercive powers was believed to have a mental impairment.

However, concern was raised by the SIM in respect of 1 witness following the review of examinations. The s 86ZD report for this witness stated that no belief was formed by the DPI or his delegate that the witness had a mental impairment. The evidence given by the witness and other witnesses examined in the investigation suggested the position might be different. That is, the witness was suffering from a mental impairment at the time of the alleged events the subject of the investigation and might continue to suffer from a mental impairment.

The SIM sought further information from the DPI in regard to how the belief was formed that the witness did not have a mental impairment. That is, the SIM requested clarification of the method/s by which the DPI or his delegate came to form the belief that the witness did not have a mental illness, being a medical condition, at the time of being examined.

It must be stressed that this witness was legally represented and therefore had an independent person in attendance on his behalf. The issue that the SIM raised did not relate to compliance with the procedure mandated by the Act and Regulations. Rather, the SIM's concern arose from the fact that the evidence reviewed by him did not appear to correspond with what was stated in the s 86ZD report regarding the delegate's belief.

A written response was received from the DPI in relation to this issue. The position of the DPI in relation to this witness, as understood by the SIM is:

- That the witness did suffer an earlier psychotic episode from which he had recovered. No evidence or further information was provided to the SIM explaining how the delegate in this matter knew that the psychosis had resolved other than he had formed the belief from his own observations.

- That the delegate formed his belief about whether or not the witness had a mental impairment at the time of the hearing on the basis of meetings with the examiner, investigators, legal staff and a psychologist engaged by OPI;

- That the delegate did not rely upon any medical reports or opinions to assist in his formation of the belief that the witness was not mentally impaired. OPI did not have the witness psychologically examined and did not obtain the relevant medical history prior to the hearing as there was no belief that the witness had a mental impairment. Therefore, it was not necessary to take these steps.

- That the non-existence of a belief is not an issue or a question posed by the legislation. However, the DPI is not of the view that the SIM is prevented from investigating an issue when such issue is relevant to monitoring compliance with the Act by the DPI in accordance with s 86ZA(a), or is within the contemplation of s 86ZM(3)(b).

The SIM further investigated this matter because the evidence reviewed by the SIM in this case clearly indicated that the witness had suffered from a serious psychotic episode at the time of the alleged events and may have continued to be mentally ill at the time of the examination. The matter was raised because the evidence from the examinations suggested that this may be the case and was consequently of concern to the SIM.

From the information provided in the s 86ZD report, the SIM was unable to determine whether the mental illness and consequently mental impairment was an ongoing one. In the absence of any further information, the SIM was unable to determine whether the information provided in the report was adequate and accurate and therefore sought clarification. In the SIM's view, this is clearly a matter of compliance. Where consideration of the examination raises an issue about the accuracy or adequacy of the report relating to it, the proper discharge of the SIM's statutory monitoring duty consequently requires that it be investigated further.

30 Witnesses In Custody

Section 86PE(2) of the *Police Regulation Act* gives the DPI the power to give a written direction allowing for a person who is in custody to be brought before the DPI to provide information, produce a document or thing or to give evidence.

The SIM reviewed a hearing where the witness was serving a term of imprisonment and was brought before the DPI's delegate for questioning. Upon reviewing the s 86ZD report, the SIM observed that the DPI answered 'no' to the question in the report, 'Has the person been brought before the DPI under a written direction under s 86PE(2)?'

At a meeting between the SIM and OPI, the DPI informed the SIM that the witness was brought before the delegate under a provision of the *Corrections Act 1986* ("*Corrections Act*"). The SIM sought further information from the DPI on this matter as to why this course was taken (assuming it could be taken) rather than the person being brought before the delegate under a written direction pursuant to the *Police Regulation Act*.

In correspondence, the SIM explained to the DPI that it is his view that where a specific power is provided in the Act for such a situation it should be utilised. As the exercise of that power is subject to monitoring the Regulations require that information be provided in the s 86ZD report. There is no such requirement if the prisoner is brought before the DPI as a result of an order under the *Corrections Act*. The SIM is further of the view that where the movement of a person in custody is involved, information be provided in the s 86ZD report about that regardless of what power was exercised. The SIM further expressed the view that in such circumstances the power provided in the Act should be exercised unless there is some special and compelling reason not to do so. A written response was requested by the SIM from the DPI on this matter and in particular on the circumstances which gave rise to the alternative procedure being used.

In responding to the SIM, the DPI agreed that information of the kind sought by the SIM would be provided in future s 86ZD reports even when alternative means of bringing a prisoner in for questioning are used. However, the DPI stated that he did not agree with the view of the SIM that there was an obligation on the DPI to use the procedure under s 86PE(2). Specifically, the position of the DPI is that, 's 86PE(2) is a facilitating provision and its existence imposes no duty or obligation on the DPI to use the facility it provides to the exclusion of all other options.'

In relation to why the alternative procedure was used, the DPI stated that the circumstances of the case in question were considered by the DPI to be special and compelling and further that such alternative means would only be used where there is good reason to do so.

OPI has explained to the SIM the circumstances relating to the witness. The SIM accepts that those circumstances are "special" and "compelling" and is satisfied that the prisoner in this case was brought before the DPI's delegate under the *Corrections Act* for good reason rather than by the use of the power under the *Police Regulation Act*.

The SIM will continue to monitor the use of alternative means by the DPI to the use of the powers provided to him under the *Police Regulation Act*. The powers under the *Police Regulation Act* were given to the DPI to enable him to carry out his functions under the Act. These powers are also subject to oversight by the SIM. The legislature clearly intended that the movement of prisoners for coercive examination be monitored by the SIM and consequently be the subject of reporting to the SIM.

31 Explanation Of The Complaints Procedure

It was noted that there was an inconsistent approach amongst delegates to explaining the complaint procedure to witnesses. Some witnesses appearing before delegates were not informed of their right to make a complaint to the SIM under s 86ZE. In other cases, witnesses were told that they could make a complaint but were not told of the form that a complaint can take (written or oral) and the time limit applicable. Some delegates told witnesses to ask their legal representative if they wanted further information.

This matter was raised with the DPI. The DPI stated that the practice of advising witnesses of their right to complain was started on the initiative of delegates. The DPI also stated that he and his delegates are under no legislative obligation to inform witnesses of this right.

The SIM takes a different position. Witnesses brought before the DPI are not always represented and therefore may not have access to the provisions of the Act and may not understand the provisions of the Act. Furthermore, their ability to make a complaint is confined to a 3 day time limit. For these reasons, it is not only a matter of good and fair practice that delegates inform witnesses of this right but also one of necessity. Whilst the section does not specifically state that the DPI or his delegates must inform witnesses of this right, the thrust and purpose of the legislation necessarily implies that this be the case. Persons should be informed of their rights under the legislation when they are being coercively examined.

Due to the inconsistencies and the view of the DPI, the SIM made the following recommendation under s 86ZH to the DPI to ensure that witnesses are informed of their right to complain whenever a coercive power is exercised:

Recommendation by the Special Investigations Monitor to the Director, Police Integrity, Police Integrity pursuant to section 86ZH(1) of the *Police Regulation Act 1958* as Amended

Recommendation 4 of 2006

Before any question is asked of a witness at an examination or the witness produces any document or other thing, the Director, Police Integrity or his delegate inform the witness of his or her right to complain to the Special Investigations Monitor that he or she was not afforded adequate opportunity to convey his or her appreciation of the relevant facts to the Director, Police Integrity and that the exercise of this right will not breach any confidentiality requirements applicable.

In informing the witness of this right the Director, Police Integrity or his delegate inform the witness that:

(a) The person may make a complaint within 3 days after the person was excused from attendance; and
(b) That the complaint may be made orally or in writing.

Pursuant to section 86ZH(3) of the Act, the Special Investigations Monitor requires the Director, Police Integrity to give to the Special Investigations Monitor a report within 28 days stating:

(a) Whether or not the Director, Police Integrity has taken or proposes to take the action recommended by the Special Investigations Monitor; and
(b) If the Director, Police Integrity has not taken the recommended action or proposes not to take the recommended action, the reasons for not taking or proposing not to take the action.

This recommendation has been accepted by the DPI and adherence to it will be monitored.

32 The Use Of Derivative Information

The use of derivative information was referred to in the 2004-2005 Annual Report at paragraph 25. The *Police Regulation Act* protects a witness who has produced documents or other things or given evidence at a hearing where a certificate has been granted. However, this protection does not extend to the use of derived information by investigators.

The issue of derivative use of information only arose in the context of one hearing. In that matter counsel for the witness was concerned that the evidence given by the witness may be used against him in future criminal proceedings. The witness had been the subject of a police interview where he exercised his right to silence. Counsel put to the delegate that the OPI hearing was an alternative means to obtain evidence where the witness had previously declined. The concern of the witness was that the evidence given by the witness could then be used in furtherance of the criminal investigation as it is a joint investigation between OPI and Victoria Police. There were no criminal proceedings initiated at the time of the hearing.

In this matter it was made clear to the witness by OPI that any questions asked of him were separate and distinct from any criminal investigations. A certificate was granted to the witness as it was determined by the delegate that the provision of his evidence was necessary in the public interest thereby providing the witness with immunity in respect of the evidence he gave. Whilst the witness was satisfied with this explanation, it should, in the view of the SIM, still be explained to the witness that whilst a 'use immunity' is provided under the Act where a certificate is granted, this immunity does not apply to information used derivatively by investigators. The SIM will continue to monitor this situation.

33 Certificates

The certification procedure provided under s 86PA of the *Police Regulation Act* was discussed in the 2004–2005 Annual Report at paragraph 22.

The potential for a witness to incriminate him or herself by providing information, producing a document or thing or giving evidence does not necessarily constitute a reasonable excuse under s 86PA of the *Police Regulation Act*. This risk of incriminating oneself is insufficient reason for failing to produce a document or thing or give evidence if the DPI or his delegate certifies in writing that in his opinion such provision or the giving of such evidence is necessary in the public interest.

A witness objecting to production or the giving of evidence on the ground that the information, document, thing or evidence may tend to incriminate can apply for a certificate from the DPI or his delegate. This section does not apply to examinations conducted under s 86Q.

A witness must be given a copy of the certificate prior to being required to produce information, a document or thing or to give evidence.

A certificate issued to a witness provides a statutory immunity against the use of such material or evidence in any civil or criminal court proceedings against the witness. The material or evidence is not admissible in evidence against the person before any court or person acting judicially.

The immunity does not apply in the following circumstances:[16]

- perjury or giving false information; or
- a breach of discipline under s 69; or
- failure to comply with a direction under s 86Q; or
- an offence against s 19 of the *Evidence Act 1958*[17]; or
- a contempt of the DPI under s 86KB.

[16] s 86PA(8) of the *Police Regulation Act 1958* (Vic)

[17] Section 19 provides that non-attendance, refusing to give evidence is an offence.

34 Issues Arising From Section 86PA

It is the view of the SIM that certificates should only be granted where they are required. The exercise of the discretion pursuant to s 86PA(4) of the *Police Regulation Act* should be justified and adequate reasons given in the report of the examination.

When considering whether a certificate should be granted, the DPI or his delegate must specifically turn his/her mind to whether having regard to the circumstances of each particular case and the witness, it is necessary in the public interest that the evidence /information/document be provided. Only when it is determined that the evidence is necessary in the public interest can a certificate be granted to a witness.

In every case where the privilege against self-incrimination is claimed by a witness, the DPI or his delegate must firstly deal with the issue of privilege. Only after the DPI or his delegate is satisfied that the privilege applies can the question of public interest and whether a certificate should be granted be considered. If the privilege does not apply then the witness should be compelled to answer and the issue of a certificate does not arise.

OPI is not in this regard in the same position as a Royal Commissioner or the Chief Examiner where no privilege applies but there is wide protection with respect to the use of the information against the witness. In the case of OPI examinations, the privilege applies as in a court unless the DPI or his delegate forms the opinion that the public interest requires the provision of the information. Sub-section (8) provides that where the DPI or his delegate has certified, the information is not admissible in evidence against the person before any court or person acting judicially except in specified proceedings referred to earlier. The SIM notes that this privilege is wider than the privilege that applies in courts under s 29 of the *Evidence Act 1958* (Vic), which is confined to the risk of punishment for an indictable offence rather than the imposition of any penalty.

This difference was the subject of considerable discussion between the SIM and OPI. OPI indicated that they considered the privilege to correspond with the protection provided by sub-section (8) and acted on that basis in all coercive hearings. In view of the way in which the legislation has been framed, it appeared that the privilege might be narrower than the protection.

Given the importance of this section and in light of a number of other issues that arose from the interpretation and application of this section, the SIM sought the advice of Mr John Butler, Crown Counsel (Advisings). OPI had obtained advice from independent counsel on the operation of the privilege and a copy of that advice was provided to the SIM and in turn provided to Mr Butler.

The issues can be divided into those relating to the substantive interpretation of the section and procedural issues. The SIM agrees with the views that Mr Butler has expressed in relation to these issues and expects that the provision will be administered in accordance with Mr Butler's advice. These matters have been communicated to DPI who has expressed appreciation for the assistance provided by Mr Butler's advice and the SIM's discussion of it. The matter has also been discussed in meeting.

The SIM's position in relation to the operation of s 86PA follows. It is an important provision but of some complexity.

35 Common Law Privilege Against Self-Incrimination Applies To Hearings Conducted By The Director, Police Integrity

On the basis of Mr Butler's advice, the common law privilege against self-incrimination applies in respect of hearings conducted by the DPI under the *Police Regulation Act*. This was the view of counsel retained by OPI. Therefore, a certificate can be granted to a witness where the witness is exposed to penalty rather than the more narrow application stipulated by s 29 of the *Evidence Act 1958*.

Whilst the common law privilege protects the witness in relation to most of the evidence, it does not protect the witness in respect of all of the evidence. This situation is clearly stated under s 86PA(8) of the Act which lists the exceptions that apply to evidence received where a certificate under sub-section (4) has been granted. These exceptions have been set out earlier in this Report.

If a certificate is granted to a witness, the DPI or his delegate should inform the witness that he/she is not protected by the certificate in respect of the exceptions listed under sub-section (8). This requirement has been incorporated into Recommendation 5 of 2006.

36 Procedural Issues

Advice was sought from Mr Butler regarding certain practices that were followed by the DPI or his delegates in some hearings. The practices include the methods by which applications for the granting of certificates are made and the handing of certificates to witnesses. Mr Butler has advised that s 86PA should be strictly followed in its administration. The SIM agrees.

36.1 Handing of certificates to witnesses

The following procedure was noted in some examinations reviewed by the SIM in this reporting period.

Practice Observed

A witness objects to answering a question on the ground that the answer/production may incriminate him/her. The Director's delegate states that a certificate will be given to the witness. However, the witness is not provided with a certificate before being required to answer and/or produce documents or other things. The certificate is provided after the incriminating evidence, document or thing is given.

Section 86PA(7) states that if the DPI or his delegate certifies under sub-section (4), he must give a copy of the written certificate to the person before requiring the person to provide information, produce a document or thing or give evidence. Sub-section (4) specifically states that the DPI must certify in writing.

In a number of cases witnesses were granted certificates after they had already given the incriminating evidence the subject of the application. In some matters, the delegate gave an undertaking that a certificate would be granted.

It is the view of the SIM and of Mr Butler, that a witness cannot be directed to provide information, produce a document/s or give evidence even where the grant of a certificate has been indicated orally, until such time as the DPI certifies in writing and the witness is handed a copy of the certificate itself. Sub-section (7) follows on from the requirement in sub-section (4) that certification be written to ensure that the witness has the protection afforded by the certificate before any incriminating information is produced or evidence given. The DPI has stated that he agrees that s 86PA certificates should be provided to witnesses prior to the beginning of the evidence protected by the certificate and he has ensured that the 'Delegate's Guidelines' are adjusted to make that requirement clear. The SIM will continue to monitor the application of this section. It is an integral part of the coercive powers that are granted and as stated by Mr Butler should be strictly followed.

36.2 The operation of section 86PA(4)

The way s 86PA(4) operates and should be administered is the subject of advice from Mr Butler. The SIM agrees with his advice.

Section 19C of the *Evidence Act*, which denies as an excuse from providing information, producing documents or giving evidence that doing so may tend to incriminate the person does not apply to an investigation conducted by the DPI. As pointed out by Mr Butler, the reason for this is that Parliament decided to include sub-section (4) and its associated provisions to deal with the issue of claims by persons that might be incriminated. The intention of sub-section (4) is to deny the privilege to persons who assert its application in those cases where the DPI or his delegate acts in accordance with the certification powers contained in the provisions. Consequently, if the DPI or his delegate certifies in writing that, in his or her opinion the provision of the information, production of the document or thing or the giving of the evidence is necessary in the public interest, that certification provides in law an exclusion of the privilege against incrimination.

In the SIM's view the following analysis might be applied to the procedure to be followed in sub-section (4).

If a witness objects to answer on the basis of self-incrimination the duty of the DPI or his delegate is to decide whether the claim has been made out. If it is not, the witness is directed to answer and if the witness continues to refuse action can be taken for contempt. If the claim is made out, the witness cannot be directed to answer unless the DPI or his delegate certifies pursuant to s 86PA(4) and until the witness has been given a certificate in writing.

Mr Butler agrees with this analysis. He is also of the view that there is not any obligation on the DPI or his delegate to raise the matter of privilege with a witness or other person to whom requests have been made which put that person into the framework of s 86PA(4). Although agreeing with that view the SIM considers that it would be appropriate as a matter of fairness for the DPI or his delegate to raise the matter of self-incrimination even though it is not raised by the witness. The DPI or his delegate might be in possession of information to which the witness is not privy that raises a risk of self-incrimination.

The DPI agrees with this view.

In sum, for a certificate to be granted by the DPI or his delegate pursuant to s 86PA(4) the issue of self-incrimination has to arise. That will be usually raised by the witness but may be raised by the DPI or his delegate. If the issue does not arise the need for a certificate does not arise. If the DPI or his delegate is of the view that the privilege against self-incrimination does not apply the witness is obliged to answer. If they are of the view that it does the witness cannot be required to answer unless a certificate is granted and provided to him or her.

The certificate, if granted, should only apply to the particular evidence that will incriminate and should not extend to evidence that will not. It may be a discrete piece of evidence or evidence of a particular class. It is possible but unlikely that it will be all the evidence of the witness. What is important is that the certificate, if granted, only extend to the incriminating evidence.

There has been a practice of delegates granting blanket certificates prior to the commencement of questioning. The rationale appears to be that such a course protects the witness against any potentially incriminating answers from the outset. By adopting this procedure, the delegate eliminates the need to consider the question of the privilege and consequently whether there is a need to grant a certificate in the public interest. All evidence is then subject to the protection of the certificate not just the incriminating evidence.

As has already been explained, this is contrary to the intended purpose of the section. The SIM expects that the provision will be applied in the way that has been described above.

The SIM will monitor the application of the section in the light of the advice of Mr Butler and the analysis that has been provided of the section's operation.

In order to ensure that every witness is properly informed of his/her rights prior to being examined or producing documents, information or things, the SIM made Recommendation 5 of 2006 to the DPI. The recommendation also specifies that all witnesses attending before the DPI be told that legal professional privilege applies to coercive examinations and the production of documents, information and things. Witnesses attending the DPI in response to summonses have not been informed of this right to date. The procedure recommended in Recommendation 5 of 2006 reproduced below, is similar to that required of the Chief Examiner. It will ensure that witnesses are fully informed of their rights and obligations prior to them answering a summons. It will also ensure that if a witness is unsure or does not understand a right or obligation, the witness has the opportunity to seek clarification either from the DPI or his delegate or a legal representative of his/her own choosing prior to being required to comply.

Recommendation by the Special Investigations Monitor to the Director, Police Integrity pursuant to s 86ZH(1) of the *Police Regulation Act 1958* as Amended

Recommendation 5 of 2006
Before any question is asked of a witness at an examination or the witness produces a document or other thing, the Director, Police Integrity or his delegate inform the witness:

1. That the privilege against self-incrimination applies and the effect of that privilege including that where the privilege applies the witness may be compelled to answer and/or produce documents where the Director, Police Integrity or his delegate certifies in writing that in his or her opinion the provision of the information or production of the document is necessary in the public interest.
2. Where a certificate has been granted, the use that may be made of the evidence of the witness or the documents produced.
3. That legal professional privilege applies and the effect of that privilege.
4. That subject to the privilege of self-incrimination where applicable and not abrogated by a certificate and subject to legal professional privilege, it is an offence not to answer questions or produce documents or other things when required to do so or to give false evidence.

Pursuant to section 86ZH(3) of the Act, the Special Investigations Monitor requires the Director, Police Integrity to give to the Special Investigations Monitor a report within 28 days stating:

(a) Whether or not the Director, Police Integrity has taken or proposes to take the action recommended by the Special Investigations Monitor; and
(b) If the Director, Police Integrity has not taken the recommended action or proposes not to take the recommended action, the reasons for not taking or proposing not to take the action.

The DPI has stated that Recommendation 5 of 2006 has been adopted by OPI. The Recommendation will be inserted into the document 'Guidelines for Delegates'. The SIM will monitor adherence to Recommendation 5 of 2006. The DPI has discussed with the SIM a procedure whereby the matters the subject of recommendation 5 are conveyed to the witness in writing at the time of the service of the summons. It is suggested that if that course is followed it may only be necessary to confirm at the hearing that the witness has received the information and understood it. The DPI will investigate this procedure further and then discuss it with the SIM. Until any change is agreed, Recommendation 5 will apply and be followed by the DPI or his delegate.

36.3 Certificates issued

A total of 59 witnesses were compulsorily examined in the 2005-2006 reporting period.[18] Of these witnesses, 47 are serving Victoria Police members at the time of questioning. Two of the witnesses are former members and the remaining 10 are civilian witnesses.

The methods by which applications were granted are discussed above. All examinations in this reporting period were conducted by delegates of the DPI. In all hearings, the delegate was assisted by an examiner. Some examiners were outside counsel engaged by OPI. Others were staff of OPI. The majority of examiners and delegates in this reporting period were staff members of OPI. Outside Counsel was used in 1 case as delegate.

Where certificates were refused, the delegate did not consider the evidence to be given by the witness to be incriminatory and therefore the claim for the privilege was not justified. The witnesses were compelled to answer the examiner's and delegate's questions in these instances.

Certificates	Numbers
Blanket certificates granted on the application of witness	**15**
Blanket certificates granted on the initiative of delegate	**8**
Confined certificates granted on the application of witness	**1**
Confined certificates granted on the initiative of delegate	**0**
Certificates refused by delegate	**4**
Application not made for certificate	**31**

37 Complaints

Reference to the matter of complaints is made in the 2004-2005 Annual Report at paragraph 28. The SIM can receive complaints from persons attending the DPI in the course of an investigation. A complaint can be made under s 86ZE of the *Police Regulation Act*. However, sub-section (2) limits the subject-matter of the complaint to a complaint that he/she was not afforded adequate opportunity to convey his/her appreciation of the relevant facts to the DPI or his delegate.

Section 86ZE specifies that a complaint must be made by a person within 3 days after he/she is excused from attendance by the DPI or his delegate. A complaint can be oral or written.

The SIM is not required to investigate every complaint received. Section 86ZF provides the SIM with the discretion to refuse to investigate complaints that are considered to be trivial, frivolous, vexatious or not made in good faith.

[18] This total is exclusive of s 86Q examinations.

The SIM received a total of 3 complaints in this reporting period. However, the complaints were not made pursuant to s 86ZE. They related to other matters concerning OPI.

The SIM reviewed these matters pursuant to his function to monitor compliance with the Act under s 86ZA(a) by the DPI, members of staff of OPI and persons engaged by the DPI under s 102(1)(b).

37.1 Complaint regarding service of a summons
In March 2006 a complaint was received from a police officer in relation to an investigation being carried out by OPI in which he was involved.

The complaint concerned a number of matters including alleged short service of a summons, to attend for examination and to produce documents, on the officer and the circumstances of the service.

The officer has been coercively examined as part of the investigation and that examination has been reviewed.

The summons was served at 3.20pm and required the witness to attend and produce documents at midday on the next day. He states that he is aggrieved at the short service of the summons and believes that he was not afforded sufficient time to adequately brief counsel or collect required documents. The officer also complains that the summons and a confidentiality notice were served on him at his home when he had informed OPI that he did not want documents served on him at home and preferred service at work.

By letter in May 2006 these matters were taken up with DPI. It was stated that *prima facie* it appeared that the service was late in terms of the adequacy of notice given to the witness and the fact that documents were involved. The DPI's comments were requested in relation to these matters and particularly why it was necessary to serve the witness at his home and why earlier service was not effected.

The DPI responded that in his view the complaint would not be considered as coming under the complaint provisions (s 86ZE). He further stated that if the officer desired his complaint to be investigated it should be referred to OPI in the first instance or the Deputy Ombudsman.

The DPI added that to the extent that the inquiry was directed to s 86ZM he had asked for a report to be prepared and would write again.

In response, it was pointed out to the DPI that the request was not raised as a complaint pursuant to s 86ZE but "as it relates to the exercise of one of your coercive powers in addition to it being relevant to the s 86ZM report".

The DPI forwarded a report addressing the issues raised and re-iterating that the complaint did not fall within the SIM's complaint jurisdiction and that the Deputy Ombudsman would deal with the matter if it was referred to him.

The report detailed the circumstances relating to the service of the summons. It acknowledged that the officer had not received the same amount of time to respond as some others who had received at least 4 days notice. It was pointed out that neither the officer nor his legal representative had sought an adjournment of the examination which had been sought and granted to others. It was stated that although the *Police Regulation Act* did not address length of service, OPI always sought to give reasonable notice to witnesses. It was considered in all the circumstances that the time allowed was reasonable.

The report was considered and the view of the SIM conveyed to DPI by letter. A response to that letter has been received.

So that the issues can be properly understood it is necessary to set out the substance of the SIM's letter and the DPI's response. They are Appendix A. Names of persons concerned have been removed.

After considering the DPI's response, the SIM maintains the view expressed in the letter to DPI. There is a need to further comment on matters raised in the response.

The SIM rejects the contention that the matter does not involve compliance with the Act, which the SIM is required to monitor pursuant to s 86ZA(a).

The ability to summons a witness is one of the main coercive powers given to DPI. Consequently, it is subject to monitoring by the SIM. The narrow interpretation of the legislation advanced by the DPI cannot be accepted. Compliance with the Act must extend in this context to the service of a summons. The consequences for a summonsed witness are potentially serious. If the witness does not attend DPI can seek a warrant for his arrest. On attendance a witness can be compelled to answer questions or produce documents even if they incriminate the witness. Thus, a witness must be afforded reasonable opportunity to prepare including the obtaining of legal advice before compulsory attendance.

In the public interest, it is the SIM's duty to monitor that this is occurring. Otherwise, the public could well ask 'Why have a SIM?'.

Taking an extreme example, on the interpretation suggested by DPI, if OPI gave a witness 30 minutes to attend an examination that matter could not be reviewed by the SIM.

This would not be an acceptable situation in the public interest. There has to be independent oversight. In court proceedings service that only allowed such a short time would be likely to be set aside as an abuse of process.

Further, the SIM has a statutory obligation to report to the Parliament before 16 November 2007 on the operation of Part IVA of the *Police Regulation Act*. That report must include the opinion of the SIM on the adequacy of the performance of the DPI and his staff in exercising the coercive powers which includes the power to summons.

Consequently, the SIM has a statutory obligation to monitor at all times the performance of DPI in the exercise of the power to summons in order to report to Parliament. That is another objective for the SIM in investigating this matter and as it has been raised during the period under review it is appropriate to refer to it in this Report.

The contention by DPI that, as there is no reference to time of service in the legislation, the period allowed for service by him cannot be challenged is rejected. The power cannot be exercised arbitrarily. It has to be exercised in accordance with principle. That means the time for service must be reasonable in all the circumstances. That may vary and there could be a case where a very short time is reasonable. Further, the *Police Regulation Act* provides that to obtain a warrant for the arrest of a person who has not answered a summons, the DPI must believe on reasonable grounds that there was proper service and failure to attend. However, the fact that a Magistrate has a role in relation to the issue of a warrant does not, in the SIM's view, lessen the importance of the SIM's monitoring power in relation to the exercise of this coercive power.

Returning to this particular case, the starting point would be to say that *prima facie* about 21 hours would not be a reasonable time to allow a police officer to obtain documents, obtain legal advice and then attend. However, there may be circumstances relating to the attendance that make such a short time reasonable. In the SIM's view, they are not present in this case. Greater time could have been reasonably allowed, and should have been allowed. It is not to the point that the witness did obtain the assistance of counsel and did not apply for an adjournment. The witness did complain at the hearing about the short notice. The witness did complain about the short notice to the SIM.

As to place of service, there is no statutory obligation and the wish of the witness is not binding on DPI. There can be other considerations. However, in the SIM's view, the fair and appropriate exercise of this power means that where reasonable and practicable any request of the witness as to place of service should be respected.

Issues relating to the service of a summons are also discussed elsewhere in this Report. This matter has been reviewed in some detail because the SIM considers it goes to the heart of the SIM's functions and is important in the public interest.

37.2 Office of Police Integrity Report – Review of Fatal Shootings by Victoria Police

This Report was tabled with the Parliament of Victoria in November 2005.

Correspondence from the Police Association Victoria regarding the Report was received by the SIM. The correspondence raised a number of issues regarding the contents and release of the Report. In an endeavour to further clarify the issues concerning the Association a meeting was held with representatives of the Association. A letter was also received from a police member raising similar issues.

Following the meeting, the SIM considered it appropriate to raise the matter with the DPI and did so by letter in February 2006. The issue raised was whether procedural fairness had been accorded to members of the police force who are the subject of adverse comment in the observations contained in the Report. The letter set out the background and the issues that appeared to arise.

A meeting was held with DPI and staff in April 2006 which discussed the matter in some detail and which was helpful and constructive.

Following that meeting further information was requested from DPI. That information was provided.

In June 2006 the DPI was provided with a draft of a proposed reference to this matter for this Annual Report. It was provided for the DPI's consideration and comment which would be taken into account in deciding what is to be included in the Report.

The DPI responded in detail to the proposed reference. That response has been considered.

So that the issues can be properly understood it is necessary to set out the proposed reference and the substance of the DPI's response. They are Appendix B.

As will be apparent from the reasons set out in his letter, the DPI is firmly of the view that there was no breach of procedural fairness in this instance.

After considering the DPI's response, the SIM is not persuaded that the proposed reference should be changed and confirms its content.

The DPI accepts that procedural fairness applies. What is in issue is what that required in this case and whether it was provided.

The DPI refers at length to limitations on providing a draft report or extracts from it to other persons such as police officers affected. Clearly, it would not have been necessary to provide a copy of the draft report.

In the SIM's view, in accordance with the principle of procedural fairness, the police officers concerned should have been given notice of what was proposed to be said about their conduct so that they could have the opportunity to be heard before the Report was finalised and published. Doing that would not have involved any breach of the legislation or contempt of the Parliament. The SIM also fails to see how in this case the provision of this information to the officers or their Association would have been potentially dangerous to the security of the Report or otherwise inappropriate. In a letter in July 2005 to the DPI, the Association expressed the view that members should not be re-interviewed about the shootings. However, what procedural fairness required was not that they be re-interviewed but that they be given an opportunity to respond to the findings proposed to be made about their conduct by giving them appropriate notice. That could have been done directly to the members concerned or through their Association.

The DPI refers to the contact with the Chief Commissioner, superiors and the Police Association in support of his contention that procedural fairness was accorded in this case. However, in the SIM's view, that contact did not meet the requirements of procedural fairness in this case. Clear notice of the proposed adverse findings needed to be given to the officers affected before the Report was finalised and published so that they could have the opportunity to be heard before that occurred.

In the SIM's view such notice was not given.

The SIM accepts that the DPI and OPI at all times acted in good faith and in the belief that their actions were appropriate and in accordance with the principle of procedural fairness. The SIM welcomes the comments of the DPI in relation to working with the SIM as to acceptable guidelines, within the statutory framework, relating to procedural fairness for use in future investigations and will do so.

However, this matter has been reviewed in some detail as it is considered to involve an important principle relating to investigations such as this and because it is apparent that it is also important to the police officers concerned.

38 Search Warrants

Division 3 of Part IV of the *Police Regulation Act* gives the DPI powers of entry, search and seizure.

Section 86VB authorises the DPI and his staff to enter the premises of public authorities for the purpose of seizing and inspecting documents or things.

In addition to the above power, the DPI can apply to a magistrate under s 86W for the issue of a warrant in relation to particular premises if the DPI believes, on reasonable grounds, that the entry to the premises is necessary for the purpose of an investigation.

It is important to note that Parliament did not give the DPI the power to break, enter and search any place as is provided to Victoria Police under s 78 of the *Magistrates' Court Act 1989*.

A warrant issued to the DPI under s 86W authorises the person named in the warrant to do the following:

- Enter and search the premises named in the warrant and inspect any document or thing at those premises; and
- To make a copy of any document relevant or considered relevant to the investigation; and
- Take possession of any document or thing that is considered relevant to the investigation.

The SIM has been informed by the DPI that in the reporting period the subject of this Report, OPI executed 1 warrant. OPI was involved in the execution of 2 other warrants in this period as part of joint operations with Victoria Police. In both of the joint operations, the relevant warrants were issued to Victoria Police and not to OPI.

The procedure to be applied in the execution of a search warrant is outlined in s 86X of the Act. This section and its interpretation has been the subject of some preliminary discussions between the SIM and OPI.

One of the issues under discussion is whether under s 86X, the person named in the warrant can enter premises where the occupier is not present and where another person is also not present at the premises? That is, does the warrant authorise entry onto premises where a person is not present? These discussions will continue in the next reporting period and will be the subject of comment in the next Annual Report.

The SIM is also in the process of reviewing the exercise of the power of entry, search and seizure by the DPI for the purposes of the s 86ZM report as referred to earlier.

The DPI has provided the SIM with a copy of the document, 'Search Warrant Policy and Procedures'. The SIM will review this document for the purposes of providing input into the interpretation of sections of Division 3 and the procedures that are employed by OPI under this Division.

An in-depth analysis of this Division is required for the purposes of the s 86ZM report. In particular, s 86ZM requires the SIM to provide, *inter alia*, an opinion on two discrete issues in relation to the powers under Division 3 of the Act. They are:

- The need for the Director to have the powers conferred by Division 3 of Part IVA of the Act. Namely, the powers of entry search and seizure in relation to public authority premises and the powers with search warrants; and
- The adequacy of the performance of the Director and his staff in exercising the powers under Division 3 of Part IVA of the Act.

39 Meetings With The Director, Police Integrity And Co-Operation Of The Director, Police Integrity

The SIM and his staff continued to have meetings with the DPI and his staff in this period. The SIM has instigated a practice whereby reports and recordings relating to attendances by persons on the DPI will be reviewed and a letter outlining any issues or other matters arising from the SIM's review provided to the DPI on a quarterly basis.

The quarterly letter enables any issues arising from examinations or the use of coercive and other powers under the Act to be addressed within an appropriate timeframe and through a consultative process. Furthermore, by addressing issues on an ongoing basis, the SIM is in a better position to monitor compliance with any informal recommendations made and determine whether formal recommendations are necessary to achieve compliance.

The SIM has provided the DPI with three such letters in the last reporting period. Some of the issues that arose from these reviews have been discussed in this Report and do not require further discussion.

Other procedures implemented by the SIM in this period include a request by the SIM that OPI provide the SIM with final and interim reports on investigations. The SIM requests these reports so that he is able to be up-dated as to the progress of the investigations utilising coercive powers that are subject to monitoring under the *Police Regulation Act*. The SIM requested that final and interim reports on investigations be provided on a 6 monthly basis.

In addition to the above, the SIM also provides a report to the DPI detailing the number of s 86ZB, s 86ZD and s 86Q reports received by the SIM from the DPI on a monthly basis. This procedure enables the SIM to maintain an ongoing audit trail of materials received by the SIM. The reports are checked by OPI and signed to confirm that they are accurate before they are returned to the SIM.

40 Compliance With The Act

40.1 Section 86ZB reports

Section 86ZB provides that the DPI must give a written report to the SIM within 3 days after the issue of a summons.

All s 86ZB reports received during this reporting period were prepared and signed by the DPI within 3 days of the issue of the summons. The SIM is satisfied that the DPI and his staff complied with the requirements of s 86ZB in relation to the delivery of reports in the period under review.

40.2 Section 86ZD reports

All s 86ZD reports in respect of attendances on the DPI and s 86Q interviews were prepared and signed by the DPI and provided to the SIM as soon as practicable after the person had been excused from attendance. The procedure in place between offices is that OPI notifies SIM of an impending delivery and the documents are then provided by safe hand to the SIM. This same procedure applies to the delivery of all s 86ZB reports.

40.3 Other matters

Section 86L requires the DPI to provide assistance to the SIM. The DPI and his staff were asked for assistance under this section in respect of the provision of video-recordings as discussed under paragraph 19 of this Report. As stated, the SIM is in discussions with the DPI about this matter and expects that it can be resolved to the satisfaction of both parties.

The SIM has not exercised any powers of entry or access pursuant to s 86ZJ.

The SIM has not made any written requirement to answer questions or produce documents pursuant to s 86ZK.

The matters relating to the service of a summons and the OPI Report on Police Shootings have been reviewed earlier. There is no need to add to what has already been said about these matters.

The administration of s 86PA as it relates to the privilege against self-incrimination and the public interest has been reviewed earlier and there is no need to add to what has been said.

40.4 Relevance

This matter has already been reviewed in some detail.

With respect to two witnesses the SIM is not satisfied that some questioning was relevant and appropriate to the purpose of the investigation in relation to which the questions were asked.

Otherwise, the SIM is so satisfied with respect to the questioning or interview of persons.

The SIM is satisfied that any requirements to produce documents or other things under a summons or pursuant to s 86Q during the year the subject of this Report were relevant and appropriate to the purpose of the investigation in relation to which the requests were made.

41 Comprehensiveness And Adequacy Of Reports

This matter has already been referred to.

The adequacy of information contained in reports continued to vary in this reporting period. However, through consultation with the DPI and his staff, the SIM has been able to address these issues and the comprehensiveness of the reports has improved as a result. This is an ongoing process that is greatly facilitated through a cooperative approach between the offices.

41.1 Section 86ZB reports

The SIM requested the DPI to include additional information in s 86ZB reports to assist in the collation of statistics and to make cross-referencing summonses with investigations more manageable.

The DPI agreed to this request and has incorporated this further information into all reports which has been very helpful to the SIM. The SIM is grateful for the prompt response to this request. The additional information requested in s 86ZB reports includes:

- The name of the organisation to which the witness belongs, i.e. if from a financial institution, the name of the institution.
- Information specifying whether the witness is a police member, former member, civilian or other professional.
- The OPI investigation name and number to which the report relates.
- The name and summons number of the primary target to enable OSIM staff to link the summons to an investigation.
- A copy of the determination, where applicable.
- Details of how a person's attendance before the DPI is relevant to an investigation.
- Notification on the summons if a witness is a prisoner.
- Details of when a summons was served.

The additional information included in the s 86ZB reports has enabled the SIM to make a proper assessment of the requests made by the DPI for the production of documents concerning the relevance of the requests and their appropriateness in relation to the purpose of the investigation.

41.2 Section 86ZD reports

Overall, s 86ZD reports were sufficiently adequate and comprehensive when considered in conjunction with the video-recording and in some cases the transcript to assess the questioning of persons concerning its relevance and appropriateness in relation to the purpose of the investigation. However, the adequacy of information contained in s 86ZD reports provided to the SIM was lacking in respect of some matters. These matters were raised with the DPI and some informal recommendations made to deal with the situation. The matters raised are as follows:

- Not sufficient information was provided in s 86ZD reports where a certificate was issued by a delegate under s 86PA(4) of the Act. The reasons provided to the SIM in the report generally followed a generic formula and provided insufficient detail on the method used by a delegate to arrive at a decision to issue a certificate. The SIM raised this matter with the DPI because such generic reasons make it difficult for the SIM to carry out the function of monitoring the proper exercise of this discretionary power. The 2004-2005 Annual Report referred to the lack of detail regarding public interest.
- In some reports, there was an inconsistency between the circumstances giving rise to the grant of certificates as evidenced in the recordings provided to the SIM and what was stated in the s 86ZD reports. OPI was provided with details of the cases in which this occurred.
- The SIM also requested that reasons be provided in reports as to why a person has been required to answer without the protection of a certificate where the self-incrimination objection has been taken.
- Other information requested by the SIM in s 86ZD reports has been referred to earlier regarding the assessment of the mental state of witnesses and the use of alternative means to bring prisoners before the Director.
- The SIM inquired why s 86ZD reports were signed by the DPI even though the examinations the subject of the reports had been conducted under delegation. The SIM is not concerned about the matters in the report that are factual in nature. Rather, the SIM is of the view that where a discretion is exercised by a delegate, it would be more appropriate for the s 86ZD report to be signed by the delegate who is the person exercising the discretion.

The DPI has agreed that the further information sought by the SIM will be included in s 86ZD reports. In relation to reasons for the grant or refusal of a certificate, the SIM has noticed a significant improvement in the quality of the reports provided by OPI since the making of the request for the delegate exercising the discretion to complete this section of the report.

The introduction of the Delegates' Manual is an important initiative fully supported by the SIM. The role is an important one exercised by a number of people. The manual facilitates consistency of approach and adherence to the legislation and the recommendations of the SIM.

Furthermore, the DPI proposes to include in the Delegates' Manual the responsibility of delegates for the content of s 86ZD reports. The delegates will address in reports the exercise of their judgement in the light of the requirement to provide a full explanation of the reasons why a certificate was granted. The reports will also be signed by the delegates preparing them in addition to the DPI. The SIM considers this a positive step which will greatly assist in carrying out his functions under the *Police Regulation Act.*

42 Recommendations Made By The Special Investigations Monitor To Office Of Police Integrity

The SIM made 5 formal recommendations in this reporting period to OPI pursuant to the SIM's power under s 86ZH. These recommendations have been reproduced and explained above. There is no need to repeat them. The context in which the recommendations were made has been set out.

The DPI has agreed to adopt all of the formal recommendations made by the SIM. In addition to this, the informal recommendations suggesting amendments to policies and procedures have been adopted by the DPI. Overall, there has been co-operation from the DPI and his staff where informal and formal recommendations have been made.

43 Generally

Co-operation has continued to be provided by the DPI and his staff which has been appreciated by the SIM and his staff.

In the 2004–2005 Annual Report it was pointed out that both offices are feeling their way to some extent as this is a new investigative model. That has continued to be the position in the year under review.

As OPI's operations have developed and increased it is understandable that more issues have arisen and been the subject of review in this Report than the 2004–2005 Annual Report.

The investigation of alleged police corruption and related matters is difficult and complex. That is why coercive powers have been given to OPI. The SIM's role is to monitor the use of those powers in the public interest. The purpose of this Report is to explain what has been done in the exercise of that role.

It will be apparent that on some issues the SIM has taken a different position to the DPI. Frank and robust exchange of views on various issues has occurred. Having regard to their respective roles it is not surprising that this should occur. They each have important but different functions to perform. It is not easy to be monitored when exercising powers and functions and it is not easy to monitor that exercise. However, both parties recognise that it is necessary in the public interest.

It is important that each party respects the role of the other. The SIM believes that that is the case. Differences of views will continue to occur but that is inevitable in the circumstances.

The SIM's objective is to ensure that the spirit of the legislation is carried out.

44 Chief Examiner – *Major Crime (Investigative Powers) Act 2004*

The provisions in the *Major Crime (Investigative Powers) Act* that give further powers to Victoria Police came into operation on 1 July 2005.

The Act is part of the Victorian Government's major crime legislative package which is designed to equip Victoria Police with the power to respond to organised crime and the gangland murders. The legislation gives far reaching powers to Victoria Police for use in investigations into such crimes.

The Government's stated purpose for the Act is, "to provide a regime for the authorisation and oversight of the use of coercive powers to investigate organised crime offences."[19] The most significant and controversial aspect of this legislation is the authority given to Victoria Police to use coercive powers to investigate organised crime offences. That is, witnesses can be compelled under the Act to give evidence or produce documents or other things.

Whilst granting Victoria Police these powers the Act does, however, place the police 'at arms length' from the examination hearing process by the establishment of the position of Chief Examiner under Part 3 of the Act. It is the Chief Examiner who controls and conducts the examination hearing. Thus the position is a statutory office, independent of Victoria Police. That independence is fundamental to the grant and exercise of the coercive powers.

[19] Section 1(a) *Major Crime (Investigative Powers) Act 2004.*

Damien Brian Maguire was appointed to the statutory office of Chief Examiner by the Governor-in-Council on 25 January 2005 for a period of 5 years. Mr Maguire is an Australian lawyer of 34 years standing who practised at the Victorian Bar as a member of counsel from 1973 until his current appointment. Mr Maguire brings to the position extensive experience in the criminal law having been engaged in major criminal trial work for the last 20 years. This experience well qualifies him for the office of Chief Examiner ("OCE").

As with OPI, the Government has made the use of coercive powers by Victoria Police and the conduct of the Chief Examiner the subject of oversight by the SIM.

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[20] and academics about the undermining of traditional rights of citizens and the use of coercive powers.[21] Chris Corns queried whether the loss of civil liberties can be justified[22] in order to achieve the stated aim of combating organised crime. Corns also comments that the trend in favour of the reduction of traditional common law rights paves the way for the "crisis Commission" model to "become the norm for what used to be regarded as 'conventional' crimes."[23] This may occur due to the broad definition of 'organised crime' which may incorporate ordinary crimes for which the use of coercive powers as an investigative tool cannot be justified or is even necessary.

The Criminal Law Section of the Law Institute ("LIV") echoed similar sentiments in a submission to the Government about certain aspects of the *Major Crime (Investigative Powers) Bill*.[24] The submission states that:

> 'The LIV is extremely concerned about the scope of the coercive powers conferred on the Chief Examiner, Chief Commissioner and other members of the police force in the *Major Crime (Investigative Powers) Bill*. This Bill will give unprecedented powers of coercive questioning and removes an individual's right to silence. The Bill also removes the related right to claim the privilege against self-incrimination as a defence during questioning.'[25]

The LIV submits that additional safeguards should apply where people are the subject of compulsory questioning. In particular, the LIV recommended that firstly that the period of questioning be limited and this should be enunciated in the legislation. Secondly, a person should maintain the right, without question, to receive advice from a lawyer prior to and during the questioning process.[26]

[20] On 29 October 2004 a coalition of legal organisations including the Victorian Bar, the Criminal Bar Association, Liberty Victoria and the Law Institute of Victoria released a media release outlining concerns they held about the legislation.
[21] Corns, C., "Combating Organised Crime in Victoria: Old Problems and New Solutions', *Criminal Law Journal*, Vol. 29, 2005, pp. 154-168.
[22] Ibid., p.166.
[23] Ibid.
[24] Submission on the Major Crime Legislation currently before the Victorian Parliament, Criminal Law Section, Law Institute of Victoria, 11 October 2004.
[25] Ibid, p.3.
[26] Ibid. p.8.

The Government responded to the submissions of the LIV by providing a response to the various areas of concern raised.[27] The Minister acknowledges in the response that the powers conferred by the Act are unprecedented and far-reaching but states that the legislative package was "developed as a matter of some urgency, to address serious issues of organized crime and corruption."[28]

Furthermore, the Minister highlights that the powers of both the Chief Examiner and the Director, Police Integrity will be subject to review by the SIM within 3 years of commencement. The reviews will result in reports being laid before Parliament by the SIM on how the powers are being exercised and whether there is an ongoing need for these powers. This safeguard is to ensure that the use and breadth of the powers cannot be extended without justification and Parliamentary review.

45 Organised Crime Offences And The Use Of Coercive Powers

The use of coercive powers is limited to those offences which fit within the definition of an organised crime offence as defined by s 3 of the Act.

An organised crime offence is defined as an indictable offence committed against Victorian law, irrespective of when it is suspected of being committed, and that is punishable by Level 5 imprisonment (10 years maximum) or more. In addition to these requirements, an organised crime offence must –

(a) involve 2 or more offenders; and
(b) involve substantial planning and organisation; and
(c) forms part of systemic and continuing criminal activity; and
(d) has a purpose of obtaining profit, gain, power or influence.

46 Applications for Coercive Powers Orders

A coercive power can only be exercised upon the making of a coercive powers order ("CPO") by the Supreme Court of Victoria under s 4. A CPO approves the use of coercive powers to investigate an organised crime offence.

[27] Letter from Mr Andre Haermeyer, Minister for Police and Emergency Services to the President of the Law Institute of Victoria dated 24 January 2005.
[28] Ibid.

The Supreme Court is the only body that can grant a CPO. All applications for a CPO must be heard in closed court.[29] Section 7 prohibits the publication or reporting of an application for a CPO unless the Court considers publication appropriate.[30]

An application to the Supreme Court for a CPO can be made by a member of the police force only after approval for the application has been granted by the Chief Commissioner or her delegate.[31] The application can be made if the member, "suspects on reasonable grounds that an organised crime offence has been, is being or is likely to be committed".[32]

The legislation prescribes that an application must be in writing and that it must contain the following information pursuant to sub-section (3):

(a) the name and rank of the applicant; and
(b) the name and rank of the person who approved the application; and
(c) particulars of the organised crime offence; and
(d) the name of each alleged offender or a statement that these names are unknown; and
(e) the period that is sought for the duration of the CPO. A CPO can not exceed 12 months.

Every application must be supported by an affidavit prepared by the applicant stating the reason for the suspicion, the grounds on which this suspicion is held and the reason why the use of a CPO is sought. The applicant must also provide any additional information that may be required by the Supreme Court.

The Act also provides a procedure under sub-section (6) whereby an application for a CPO can be made before an affidavit is prepared and sworn. This procedure can only be employed in circumstances where a delay in complying with the above requirements may prejudice the success of the investigation or it is impracticable for the affidavit to be provided before the application is made. However, the sworn affidavit must be provided to the Supreme Court no later than the day following the making of the application.

The Act also allows remote applications to be made under s 5 in specified circumstances.[33]

46.1 The circumstances under which a CPO can be granted

Due to the invasive and unprecedented nature of the powers authorised under the Act, the judicial scrutiny by the Supreme Court of every application provides a mechanism by which only those applications meeting all the criteria will be granted.

The specific matters that the Court must be satisfied of prior to granting a CPO are:

(a) that there are reasonable grounds for the suspicion founding the application; and
(b) that it is in the public interest to make the CPO.

In considering whether the making of the order is in the public interest the Court must have regard to the nature and gravity of the organised crime offence and the impact of the coercive powers on the rights of members of the community.

A significant factor for the Court when considering each application is the need for the order to be in the public interest in addition to there being a well-founded belief that an organised crime offence is, has or is about to be committed.

This requirement adds a further protection for the community in that only investigations in the public interest get the benefit of having coercive powers available to investigators. The legislation is clear in requiring both tests to be met before the Court can make a grant. The legislature has clearly stated that a well-founded suspicion on its own is insufficient reason to allow the use of such intrusive powers against members of the community.

Only when the Supreme Court is satisfied that an application meets each criterion specified under ss 8(a) and (b) can it grant a CPO. Each order must include the name and signature of the judge making it and must specify the following information:

(a) the organised crime offence for which it was made; and
(b) the name of each alleged offender or a statement that the names are unknown; and
(c) the name and rank of the applicant; and
(d) the name and rank of the person who approved the application; and
(e) the date on which the order is made; and
(f) the period for which the order remains in force; and
(g) any conditions on the use of the coercive powers under the order.

Once an order is made the applicant must give a copy of the order to the Chief Examiner as soon as practicable after it is made.

The legislation allows for orders to be extended, varied and revoked.[34]

[29] Section 5(8) *Major Crime (Investigative Powers) Act 2004*.
[30] The unauthorised publication of a report of a proceeding is an indictable offence under s 7 of the Act with a penalty of Level 6 imprisonment (5 years maximum).
[31] Section 5(2) *Major Crime (Investigative Powers) Act 2004*.
[32] Ibid. s 5(1).
[33] Ibid. s 6 .
[34] Ibid ss 10 & 11.

An extension of an original order can only be made for a period of not more than 12 months from the day on which the CPO would expire. The process to be applied is the same as that which applies for an application under s 5. A CPO can be extended or varied more than once.

The Chief Commissioner or her delegate can seek to revoke an order at any time where the powers are no longer required by issuing a notice to the Supreme Court. Upon receipt of notice, the Supreme Court can revoke an order at any time prior to it expiring. Once a revocation order is made the Supreme Court must revoke any witness summons issued by the court relating to the order and must immediately provide a copy of the order to the Chief Examiner who must also revoke any summons issued by him.

The SIM does not have any oversight role in the application and grant process. The SIM only becomes involved after a coercive power has been exercised pursuant to a CPO. In order to assist the SIM with his monitoring function, the SIM has requested the Chief Examiner to provide him with a copy of CPOs applicable to each summons issued.

Number of CPO's issued by the Supreme Court	Duration of Orders Attached	Number of Orders with Conditions
4	6 months	1

47 The Role Of The Special Investigations Monitor

The SIM plays an important role in the oversight of how coercive powers are exercised by the Chief Examiner and the Chief Commissioner. Both are required to report certain matters to the SIM.

The SIM's function in respect of the Chief Examiner is much the same as that exercised in relation to the Director, Police Integrity. These functions are stated in s 51 of the Act and are set out at paragraph 11 of this Report.

48 Reporting Requirements Of The Chief Examiner

48.1 Section 52 reports

The reporting requirements on the Chief Examiner are similar to those that apply to the DPI. Section 52 requires the Chief Examiner to give a written report to the SIM within 3 days after the issue of a witness summons or the making of a s 18 order.

Every s 52 report must state the name of the person the subject of the summons or order and the reasons the summons was issued or the order made. In addition to this requirement, the SIM also monitors whether the summons is in the prescribed form and contains the information specified under s 15 (10) of the Act.

Although the Act does not require it, the Chief Examiner has implemented a practice of video-recording all applications made to him for the issue of summonses or the making of custody orders under s 15 of the Act and has provided a copy of the video-recording to the SIM with the s 52 report on all but 5 applications when the video-recording equipment malfunctioned.

The SIM requested that additional information and documentation be provided with s 52 reports. Whilst the s 52 reports contained the matters prescribed in the Act, the additional information and documents requested would further assist the SIM in monitoring compliance with the Act and Regulations and provide the SIM with additional information for the collation of statistics. The additional information and documents requested include:

- A copy of the CPO applicable to each summons.
- Details of the date on which the Chief Examiner was provided with a CPO issued by the Supreme Court.
- Whether a summons or s 18 order issued by the Chief Examiner was issued on his own motion or on the application of a police member.
- The reasons why the summons/order was issued.
- The type of summons issued, i.e. to give evidence, to produce a document, thing or information or both.
- A statement about the general nature of the matters about which the person is to be questioned or the relevance of the documents or things to the investigation.
- Copies of confidentiality notices issued with summonses.
- A copy of a confined confidentiality notice, if any, issued with a summons/order.
- The investigation name and/or identifier used by the Chief Examiner to which each report relates. This is to ensure that summonses can easily be linked to the investigation to which they relate for statistical purposes.
- A copy of every summons issued or order made.

The Chief Examiner agreed to provide this further information. At the time of the request the Chief Examiner had been providing some of the information sought as part of his procedures and when the request was made incorporated the additional matters into his procedures. The information has been included in every s 52 report provided to the SIM since being requested. The provision of this information has been of great assistance in the collation of statistics and other data required for the SIM to carry out his oversight and reporting functions.

48.2 Section 52 reports received

A total of 14 s 52 reports were received for the 2005–2006 financial year.[35] Every s 52 report received by the SIM during the period under review was prepared and signed by the Chief Examiner within 3 days after the issue of a summons.

The s 52 reports were delivered by the Chief Examiner or staff by hand to the OSIM.

The SIM does not receive s 52 reports for summonses issued by the Supreme Court. Reference to the procedure employed in these cases is made at paragraph 54.4 of this Report.

48.3 Section 53 reports

A written report must be provided to the SIM under s 53, as soon as practicable after an examination has been completed. A s 53 report must set out the following matters:

- the reasons for the examination; and
- place and time of the examination; and
- the name of the witness and any other person present during the examination. This includes persons watching the examination from a remote location; and
- the relevance of the examination to the organised crime offence; and
- Matters prescribed under clause 10 (1) (a) – (l) of the Regulations.[36]

  The prescribed matters include the date and time of service of witness summonses, compliance by the Chief Examiner with s 31 of the Act, the duration of every examination and further information about witnesses aged under 18 years or believed to have a mental impairment and whether a witness had legal representation.

Every report must also be accompanied by a copy of a video-recording of the examination and transcript, if it is prepared.

The SIM requested further information to be included in s 53 reports that would assist the OSIM with the management and organisation of the information received. The inclusion of the following information in s 53 reports was requested:

- The investigation name or other identifier used by the OCE.
- The summons number to which each report relates.
- Whether a confidentiality notice was issued with a summons and if so, the reasons for the issue of the notice. In particular, the section under which the notice was issued.
- If a confidentiality notice is issued, whether confidentiality attaches to all matters including the issue of the summons and the organised crime offence to which it relates, or whether confidentiality is confined to certain matters only.

The Chief Examiner includes this information in every s 53 report provided to the SIM since receiving the request for further information. The further information provided in relation to confidentiality notices assists the SIM in reviewing the use of the discretionary power available to the Chief Examiner to issue such notices.

48.4 Section 53 reports received

The SIM received 16 s 53 reports relating to 4 CPOs for the 2005-2006 reporting period.

All s 53 reports provided to the SIM in this reporting period were prepared and signed by the Chief Examiner as soon as practicable after a person had been excused from attendance. The s 53 reports were delivered by the Chief Examiner or staff of the OCE by hand to the OSIM. The procedure for the delivery of s 53 reports is the same as that employed for the delivery of s 52 reports.

All s 53 reports provided to the SIM were accompanied by transcript. In one examination the recording provided to the SIM was incomplete. A complete copy of the recording of the examination in question was promptly provided to the SIM by the Chief Examiner upon being requested.

49 Complaints: Section 54

Section 54 provides the SIM with the authority to receive complaints arising in certain circumstances. The section applies to persons to whom a witness summons is directed or an order is made under s 18.

Complaints can be made orally or in writing. A complaint must be made within 3 days after the person was asked the question or required to produce the document or other thing.

The grounds on which a witness can complain to the SIM differ to those that apply to the DPI under the *Police Regulation Act*. Complaints arising from an examination conducted by the Chief Examiner encompass a broader range of matters and can be about either or both of the following:

(a) the relevance of any questions asked of the witness to the investigation of the organised crime offence;
(b) the relevance of any requirement to produce a document or other thing to the investigation of the organised crime offence.

The SIM can refuse to investigate a complaint under s 55 if the subject-matter of the complaint is considered to be trivial or the complaint is frivolous, vexatious or not made in good faith.

[35] Some reports included information for 2 or more witnesses in the same report.
[36] *Major Crime (Investigative Powers) Regulations 2005* (Vic).

If the SIM determines that a complaint is to be investigated, s 56 provides the SIM with great flexibility in the procedure employed to investigate the complaint. The only proviso under this section is that an investigation, including any hearing, is to be conducted in private.

Sections 55 and 56 are identical to the complaint investigation procedures provided for under the *Police Regulation Act* for complaints arising from the exercise of coercive powers by the DPI. In both cases, the SIM can commence or continue to investigate a complaint despite the fact that proceedings are commencing or underway in a court or tribunal that relate to the subject-matter of the complaint. The SIM is, however, required to take all necessary measures to ensure that any hearings are not prejudiced by the investigation of the complaint.

The SIM did not receive any complaints in the period under review.

50 Recommendations And Other Powers Of The Special Investigations Monitor: Sections 57 – 60

A recommendation can be made by the SIM to the Chief Examiner or the Chief Commissioner to take any action that the SIM considers necessary. The power of the SIM to make a recommendation is found in s 57. This power is identical to that contained in the *Police Regulation Act*.

Actions that may be recommended by the SIM include, but are not limited to, the taking of any steps to prevent conduct from continuing or occurring in the future and/or taking action to remedy any harm of loss arising from any conduct.

Upon making a recommendation, the SIM may require a written report to be provided to him within a specified period of time from the Chief Examiner or the Chief Commissioner stating:

(a) Whether or not the Chief Examiner or Chief Commissioner has taken, or proposes to take, any action recommended by the SIM; and
(b) If the Chief Examiner or the Chief Commissioner has not taken any recommended action, or proposes not to take any recommended action, the reasons for not taking or proposing not to take the action.

The SIM did not make any recommendations to the Chief Examiner or the Chief Commissioner in this reporting period.

51 Assistance To Be Provided To The Special Investigations Monitor

The *Major Crime Investigative Powers Act*, like the *Police Regulation Act*, requires the Chief Examiner and the Chief Commissioner to give the SIM any assistance that is reasonably necessary to enable the SIM to perform his functions.[37]

Section 59 also gives the SIM the power of entry and access to the offices and relevant records of the Chief Examiner and the police force under certain circumstances. The Chief Examiner or a member of the police force must provide to the SIM any information specified by the SIM that is considered to be necessary. Such information must be in the person's possession or must be information which the person has access to and must be relevant to the performance of the SIM's functions.

The SIM can, by written notice, compel the Chief Examiner or a member of the police force to attend the SIM to answer any questions or provide any information or produce any documents or other things in the person's possession.[38] It is an indictable offence under this section, for a person to refuse or fail to attend to produce documents, to answer questions or provide information that is requested by the SIM. A person must not provide information that he or she knows is false or misleading.[39]

Both the Chief Examiner and the Chief Commissioner have been fully co-operative with the SIM in this reporting period. All assistance, further information or actions requested by the SIM have been provided and undertaken promptly and efficiently. The positive responses from the Chief Examiner and the Chief Commissioner have facilitated the SIM in carrying out his function under the legislation.

52 Annual Report

Under s 61, the SIM is required to providean annual report to each House of Parliament, as soon as practicable after the end of each financial year, in relation to the performance of the SIM's functions under Part 5 of the Act. This Report has been prepared by the SIM in compliance with this requirement.

The information that must be included in the Annual Report is set out at paragraph 13.

Section 61 also empowers the SIM to provide Parliament with a report at any time on any matter relevant to the performance of the SIM's functions.

[37] Section 58 *Major Crime (Investigative Powers) Act 2004*.
[38] Ibid. s 60.
[39] The penalty for breach of these requirements is level 6 imprisonment (5 years maximum).

An annual report or any other report must not identify or be likely to identify any person who has been examined under this Act or the nature of any ongoing investigation into an organised crime offence.

53 Section 62 Report

In addition to the Annual Report and any other reports, the SIM is required to lay a report before each House of Parliament on the operation of Part 5 of the Act. This report is due on or before 1 July 2008.

The s 62 report must include the opinion of the SIM on the following matters:

- The need for the *Major Crime (Investigative Powers) Act*; and
- The adequacy of the performance of the Chief Examiner, Examiners and members of the police force of functions and powers under this Act.

The report must not, however, contain any information that identifies or is likely to identify any person who has been examined or the nature of any ongoing investigation of an organised crime offence.

54 The Power To Summons Witnesses

Both the Supreme Court and the Chief Examiner have the power to issue witness summonses.

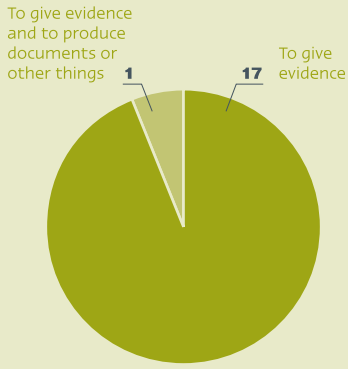
The following summonses may be issued by the Supreme Court or the Chief Examiner which compel the attendance of the person before the Chief Examiner:

(a) a summons to attend an examination before the Chief Examiner to give evidence; or
(b) a summons to attend at a specified time and place to produce specified documents or other things to the Chief Examiner; or
(c) a summons to attend an examination before the Chief Examiner to give evidence and produce specified documents or other things.
(d) A summons to attend for any of the above purposes but the attendance is required immediately. A summons requiring the immediate attendance of a person before the Chief Examiner can only be issued if the Court or the Chief Examiner reasonably believes that a delay may result in any one or more of the following situations: evidence being lost or destroyed; the commission of an offence; the escape of an offender or the serious prejudice to the conduct of the investigation of the organised crime offence.[40]

[40] Sections 14(10) and 15(9) *Major Crime (Investigative Powers) Act 2004*.

54.1 Types of summonses issued

In the reporting period 1 July 2005 to 30 June 2006 a total of 17 summonses were issued. Of these, 16 summonses were to give evidence, and 1 was to give evidence and to produce documents or other things. There were no summonses to produce specified documents or other things, or summonses for immediate attendance during this period. The chart below reflects this representation.



Types of Summonses Issued

It is important to note that the Supreme Court and the Chief Examiner are prohibited from issuing a summons to a person known to be under the age of 16 years. A summons served on a person under the age of 16 years at the date of issue has no effect.[41]

54.2 When a summons can be issued

The Supreme Court can only issue a summons once an application has been made by a police member. An application to the Supreme Court can be made at the time of the making of a CPO or at any later time while the CPO is in force.[42]

Every application to the Supreme Court must be in writing and must include the information specified in ss 14(a)-(f) and any additional information required by the Court.

The Chief Examiner can issue a summons at any time whilst a CPO is in force either on the application of a police member or on his or her own motion. The Chief Examiner can also determine the procedure to be applied when an application is made for the issue of a summons.[43] The Chief Examiner has implemented a procedure for such applications which are contained in a 'Procedural Guidelines' handbook.

[41] Ibid. s 16.
[42] Ibid. s 14(3).
[43] Ibid. s 15(3)

Prior to the issue of a summons, the Supreme Court or the Chief Examiner must be satisfied that it is reasonable in the circumstances to do so. In exercising this power, the Court or the Chief Examiner, must take the following matters into consideration:

- the evidentiary or intelligence value of the information sought to be obtained from the person; and
- the age of the person, and any mental impairment to which the person is known to be subject.

54.3 Summons issue procedure

The Chief Examiner provides the SIM with a video-recording of each application for the issue of a summons or s 18 order by a police member.[44] Reference has already been made to this.

The recordings greatly assist the SIM in understanding why a summons or order has been granted and whether the Chief Examiner has complied with all the requirements of the Act. It also enables the SIM to review the application procedure adopted by the Chief Examiner.

In every application for the issue of a summons or order by a member of the police force to the Chief Examiner, the member is required to make submissions about the following matters:

- The connection between the witness and the organised crime offence.
- The nature and relevance of the evidence that the witness can give.
- Confirmation of the materials provided to the Chief Examiner about the investigation including affidavits and briefs of evidence.
- Whether normal service or immediate service is required and the reasons for the need for immediate service where applicable.
- Whether the summons should state the general nature of what the questioning is to be about. If the member submits that such information should not be in the summons, the reasons for this.
- Whether a confidentiality notice should be served with a summons and why or why not.
- Whether the member is aware of any issues in respect of the witness relating to age, mental impairment, level of understanding of English and other matters. The police member is required to provide sufficient information to the Chief Examiner if any of these issues exist or may arise.
- Whether the summons should have attached a notice explaining the right of the witness to be legally represented and why or why not.
- In relation to an order, the custody details of the prisoner and the arrangements that will be made to bring the person before the Chief Examiner.

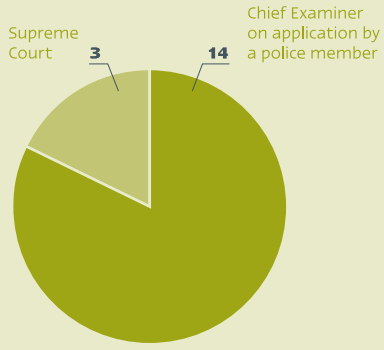
The procedure employed by the Chief Examiner in every application made to him by a police member for a summons or s 18 order is both thorough and very informative. The Chief Examiner explores in detail the basis for the police member's application and how the person and the evidence that he/she can give is relevant to the investigation. It is important to note that prior to every application the Chief Examiner has read the materials relating to the investigation. Therefore, the Chief Examiner is appraised of any issues that may need further exploration at the time of hearing the application.

A summons was only issued by the Chief Examiner, in the matters reviewed by the SIM in this reporting period, after he was satisfied that it was reasonable in the circumstances to do so.

A summons or s 18 order issued by the Chief Examiner attracts additional reporting requirements due to the exercise of this discretion not being subject to scrutiny by a court. For this reason, s 15(6) requires the Chief Examiner to record in writing the grounds on which each summons is issued and if a summons is issued to a person under 18 years, the reason for the belief by the Chief Examiner that the person is aged 16 years or above.

The information must then be provided to the SIM as part of the Chief Examiner's reporting obligations under s 52. Furthermore, clause 10 (a) of the Regulations also requires the Chief Examiner to notify the SIM of the date and time of service of each summons issued or order made and if a summons is directed to a person under 18 years of age, the reason recorded under s 15(6)(b) of the Act.

In the reporting period 1 July 2005 to 30 June 2006 a total of 17 summonses were issued. Of these, 14 were issued by the Chief Examiner on application by a member of the police force. The Supreme Court issued the remaining 3 summonses. The Chief Examiner did not issue any summonses on his own motion during this period.



Summonses Issued for 2005–2006

[44] A video-recording has been provided for all but one application made to the Chief Examiner due to a malfunction with the recording equipment.

54.4 Procedure relating to summonses issued by the Supreme Court

The Supreme Court is not required to notify the SIM when it has issued a summons. Therefore, where a summons is issued by the Court the SIM does not receive a s 52 report.

This matter has been discussed by the OSIM and OCE so that an appropriate practice can be developed to avoid discrepancies that can arise in the statistics when the OSIM is unaware that the Supreme Court has issued a summons.

The OCE has suggested that a report notifying the SIM of the issue of a summons by the Supreme Court be provided by the Chief Examiner in these circumstances. This will ensure that the statistics and information kept by the OSIM are complete and accord with those held by the OCE. The SIM is pleased with this outcome which will greatly assist his staff in carrying out their functions to ensure that reports are accurate.

55 Reasonable Service

Sections 14(9) and 15(8) specify that where a summons is issued by either the Supreme Court or the Chief Examiner, it must be served a reasonable time before the attendance date. The only exception to this requirement is where the summons is one requiring the immediate attendance of the witness before the Chief Examiner.

This is a matter that the SIM monitors carefully to ensure that witnesses are given sufficient time to comply with the summons and are able to obtain legal advice. It is also an issue that has been discussed in this report in relation to OPI at paragraph 25.8.

It is noted that the Chief Examiner has acceded to adjournment applications by witnesses where they were warranted by the circumstances. The SIM considered that all summonses issued by the Chief Examiner within this reporting period were served within a reasonable time.[45]

56 Contents of Each Summons

The Act and the Regulations are very specific about the contents of each summons. Section 15 (10) specifies that each summons must be in the prescribed form and must contain the following information:

- a direction to the person to attend at a specific place on a specific date at a specific time.
- that the person's attendance is ongoing until excused or released.
- the purpose of the attendance. That is, to give evidence or produce documents or other things or both.
- the general nature of the matters about which the person is to be questioned unless this information may prejudice the conduct of the investigation.
- that a CPO has been made and the date on which the order was made.
- A statement that if a person is under 16 years of age at the date of issue of the summons, he or she is not required to comply. A person in this situation must give written notice and proof of age.[46]

The Chief Examiner is only required to give a general description of the proposed subject-matter of the investigation. The generality of such a description was raised by counsel assisting a witness during an examination. Counsel stated that he was unable to obtain adequate instructions from his client due to the paucity of information contained in the summons. The Chief Examiner informed counsel that the description was intentionally general so that a witness can have a general idea about the likely subject/s he will be questioned about.

The Chief Examiner further explained that under s 15 (10), he is not required to provide any further details for the purpose of a summons. The Chief Examiner explained that proceedings are inquisitorial in nature and the areas about which a witness can be questioned are far ranging and may appear peripheral to the description given in the summons. The explanation given by the Chief Examiner is in accordance with the requirements of the Act. In the case in question, the general description provided in the summons was sufficient for the witness to identify the alleged crime and surrounding matters that will be the subject of the examination.

[45] The SIM has no monitoring function over summonses issued by the Supreme Court and therefore, makes no comment about whether summonses issued by the Court were served within a reasonable time before the date of attendance.

[46] The notice in writing and proof of age must be given to both the Supreme Court and the Chief Examiner where the summons was issued by the Supreme Court. If the summons was issued by the Chief Examiner, the notice and proof of age need only be given to him.

57 The Power To Compel The Attendance Of A Person In Custody: Section 18 Orders

A person being held in prison or a police gaol can be compelled under s 18 of the Act, to attend before the Chief Examiner if a CPO is in force. In such a situation a member of the police force can apply to the Supreme Court or the Chief Examiner for an order, "that the person be delivered into the custody of the member for the purpose of bringing the person before the Chief Examiner to give evidence at an examination".

An application for a s 18 order essentially follows the same procedure as that which applies to applications for the issue of a summons to the Supreme Court and the Chief Examiner described above. However, it is to be noted that a s 18 order cannot require the immediate attendance of a person before the Chief Examiner. The person to whom the order is directed can only be compelled for the purpose of giving evidence.

The SIM received notification from the Chief Examiner of only 1 s 18 order being made for the 2005-2006 reporting period. This order was made by the Chief Examiner and subsequently revoked by him upon receipt of further information about the witness' custodial status.

58 Confidentiality Notices: Section 20

Like the DPI, both the Supreme Court and the Chief Examiner may issue a confidentiality notice that can be served with a witness summons or s 18 order. A written notice can be given to the summonsed person, a person the subject of a s 18 order or the person executing a s 18 order.

A confidentiality notice may state the following matters:

- That the summons or order is a confidential document; and
- It is an offence to disclose the existence of the summons or order and the subject-matter of the summons or order unless the person has a reasonable excuse.[47] The circumstances under which disclosure may occur must be specified in the notice itself.

[47] The penalty for disclosing the existence or subject-matter of a summons or s 18 order issued under s 20 (1) or any official matter connected with the summons or order is 120 penalty units or 12 months imprisonment or both. An 'official matter' is defined by sub-section (9).

A reasonable excuse under sub-section (6) (a) includes seeking legal advice, obtaining information in order to comply with a summons where it is for production or where the disclosure is made for the purpose of the administration of the Act. In any of those circumstances, it will be a reasonable excuse if the person to whom the summons or order is directed informs the person to whom the disclosure is made that it is an offence to disclose the existence of the summons or order or the subject-matter of the investigation unless that person has a reasonable excuse.

The Chief Examiner amended the form of the original notice which he had drafted and implemented to include a short explanation as to the term "reasonable excuse". The explanation advises the person named in the summons or s 18 order that the circumstances which may give rise to a reasonable excuse are explained by s 20 (6) of the *Major Crime (Investigative Powers) Act* and include seeking legal advice in relation to a summons or order.

The inclusion of this explanation is very helpful to witnesses who are unfamiliar with the Act and the powers contained in it. Without such an explanation, a person served with a summons or order may not seek legal advice for fear of breaching the requirements of the notice. The explanation included by the Chief Examiner makes it clear that the seeking of legal advice is permitted and may encourage persons to seek such advice.

Confidentiality notices were served with all witness summonses issued by the Chief Examiner in this reporting period. Given the serious and sensitive nature of the investigations, it is the SIM's view that the exercise of the discretion was justified in all cases.

Confidentiality is also protected by the Chief Examiner requiring legal representatives to destroy notes or alternatively having the notes sealed and kept securely at the OCE.

59 When Confidentiality Notices May Or Must Be Issued

The Chief Examiner must issue a confidentiality notice under s 20 (2) if he is of the belief that failure to do so would reasonably be expected to prejudice:

- the safety or reputation of a person; or
- the fair trial of a person/s who has or may be charged with an offence; or
- the effectiveness of an investigation.

Section 20 (3) also empowers the Court or the Chief Examiner to issue a confidentiality notice where any of the above three situations might occur or where failure to do so might otherwise be contrary to the public interest.

The majority of notices issued in this reporting period were issued under ss 20 (2) (a) and (c).

60 Powers That Can Be Exercised By The Chief Examiner

Section 29 permits the Chief Examiner to conduct an examination only after the following conditions have been met:

(a) The Chief Examiner receives a copy of a CPO in relation to a specific organised crime offence; and

(b) Any of the following occur:
- The Chief Examiner has received a copy of a summons issued by the Supreme Court directing a person to attend before the Chief Examiner to give evidence, for production or both; or
- The Chief Examiner has issued a summons; or
- The Chief Examiner has received a s 18 order; or
- The Chief Examiner has made a s 18 order.

Once a summons or s 18 order has been issued by the Chief Examiner or the Supreme Court, the Chief Examiner can exercise the following coercive powers:
- The power to compel a witness to answer questions at an examination.
- The power to compel the production of documents or other things from a witness that are not subject to legal professional privilege.
- The power to commence or continue an examination of a person despite the fact that proceedings are on foot or are instituted in relation to the organised crime offence which is being investigated.
- The Chief Examiner may issue a written certificate of charge and issue an arrest warrant for contempt of the Chief Examiner. This situation arises if a person has failed to comply with the requirements of a summons and is elaborated on below.[48]
- The power to order the retention of documents or other things by police after application has been made for not more than 7 days.

The consequences for persons failing to comply with a direction of the Chief Examiner in the exercise of his coercive powers can be far-reaching and may involve imprisonment.

Section 37 makes it an offence for a person served with a summons under the Act to fail to attend an examination as required, refuse or fail to answer a question as required or refuse or fail to produce a document or thing as required without a reasonable excuse.[49] A person is not in breach of the section if he/she is under the age of 16 years at the date of the issue of the summons, the Chief Examiner withdraws the requirement to produce a document or other thing or the person seals the document or other thing and gives it to the Chief Examiner.

Section 38 provides for the imposition of a penalty of level 6 imprisonment (5 years maximum) where a person gives false or misleading evidence in a material particular or produces a document that the person knows to be false or misleading.

Section 44 makes it an offence to hinder or obstruct the Chief Examiner in the exercise of his functions, powers or duties or to disrupt an examination before the Chief Examiner. The penalty, if a person is found guilty of this offence, is 10 penalty units, imprisonment for 12 months or both.

In the period under review, the SIM was not notified of any instances where a witness was in breach of ss 37, 38 or 44.

61 Contempt of the Chief Examiner

The Chief Examiner can issue a written certificate charging a person with contempt and issue a warrant to arrest a person where it is alleged or it appears to the Chief Examiner that a person is guilty of contempt of the Chief Examiner. This power is found in s 49 of the Act.

A person is guilty of contempt of the Chief Examiner if the person, when attending before the Chief Examiner:
- Fails, without reasonable excuse, to produce any document or other thing required under a summons; or
- Refuses to be sworn, to make an affirmation or without reasonable excuse, refuses or fails to answer any relevant question when being called or examined as a witness; or
- Engages in any other conduct that would constitute, if the Chief Examiner were the Supreme Court, a contempt of court.

The Supreme Court deals with any contempt of the Chief Examiner. The SIM was not notified of any contempt proceedings being instigated by the Chief Examiner in this reporting period.

[48] Section 49 *Major Crime (Investigative Powers) Act 2004*.

[49] The penalty for breach of this section is level 6 imprisonment (5 years maximum).).

62 The Conduct Of Examinations By The Chief Examiner

The Chief Examiner, like the DPI, is not bound by the rules of evidence when conducting a coercive examination or compelling production from a witness. The proceedings may be regulated by the Chief Examiner as he thinks fit under s 30. However, the section expressly forbids an examination being conducted at a police station or a police gaol.

Section 35 requires every examination to be conducted in private and only those persons given leave by the Chief Examiner may be present.[50] The Chief Examiner gives a direction at the beginning of every examination stating which persons are entitled to be present during the examination. Any person not named as part of the direction is not entitled to remain during the examination.

Persons present during an examination in the absence of a direction authorising their presence can be charged with an indictable offence which carries a maximum penalty of level 6 imprisonment (5 years maximum).

Legal representatives, interpreters, parents, guardians and independent persons are the exceptions to this rule. The presence of these persons, when evidence is being taken at an examination before the Chief Examiner, cannot be prevented by the Chief Examiner under sub-section (2), subject to the Chief Examiner's inherent power to control who is present.

The SIM monitors and records the persons given leave by the Chief Examiner to be present during an examination.

The viewing of an examination can be done either in the examination room itself or from a remote location. Where a direction is given for persons to view an examination remotely, the direction is given in the absence of the witness. In all examinations reviewed by the SIM in this reporting period, only police members were allowed to watch an investigation from a remote location. Once the Chief Examiner made a direction to allow persons to watch remotely, he read out the name, rank and station of each member for the purposes of the video-recording. The SIM was then able to follow-up any concerns or queries with the Chief Examiner if required.

The SIM is satisfied that the directions given in respect of those persons permitted to watch an examination remotely were justified in the circumstances. The police members were either from the OCE or part of the team conducting the investigation into the organised crime offence.

[50] Section 35 *Major Crime (Investigative Powers) Act 2004*. The section states that legal representatives, interpreters and independent persons or guardians can be present and a direction excluding them can not be made.

The names, ranks and stations of police members or OCE staff permitted to be present in the examination room during an examination were also read out on the video-recording. However, in these situations the names were read out in the presence of the witness. This procedure allows the witness to raise any concerns or issues with the Chief Examiner prior to the commencement of questioning. No such issues were raised by the witnesses examined in the period under review.

63 Preliminary Requirements Monitored By The Special Investigations Monitor

Unlike the position under the *Police Regulation Act*, s 31 of the Major *Crime (Investigative Powers) Act* imposes a number of preliminary requirements on the Chief Examiner before he can commence the questioning of a witness or before a witness is made to produce a document or other thing. These requirements are a means by which every person attending the Chief Examiner can be fully informed of his/her rights and obligations before being compelled to produce or answer questions. This is regardless of whether the person is represented or not.

The process under s 31 also ensures that there is consistency in the information that every witness is given. Lack of a consistent approach can result in information being provided on a discretionary basis which can put witnesses at a disadvantage and even at risk of penalty.

The preliminary requirements under s 31 of the *Major Crime (Investigative Powers) Act* that the Chief Examiner must follow before any question is asked of a witness, or the witness produces a document or other thing are:

- Confirmation of the witness' age. This is to determine whether the witness is under the age of 18 years.
- If a witness is under 16 years of age the Chief Examiner must release this person from all compliance with a summons or a s 18 order.
- The witness must be informed that the privilege against self-incrimination does not apply. The Chief Examiner is required to explain to the witness the restrictions that apply to the use of any evidence given during an examination.
- The witness must be told that legal professional privilege applies to all examinations and the effect of the privilege. The witness must also be told that unless the privilege is claimed, it is an offence not to answer a question or to produce documents or other things when required or to give false or misleading evidence. The penalties that apply are also told to the witness.
- Confidentiality requirements are to be explained to the witness.

- All witnesses are to be told, where applicable, of their right to be legally represented during an examination, their right to have an interpreter or the right to have an independent person present where age or mental impairment is an issue.
- The right to make a complaint to the SIM must also be explained to the witness at the outset. When told of this right, the witness must also be advised that the making of a complaint to the SIM does not breach confidentiality.

The SIM closely monitored compliance with s 31 in all examinations viewed during this reporting period. The matters set out in s 31 provide every witness with important information about his or her rights and any requirements of him or her during an examination. It also provides the witness with the opportunity to ask for further clarification of any matters before evidence is given. This is of great importance given that the witness may not be aware of the use that can be made of evidence given by him or her at a later stage.

The explanations of the privilege against self-incrimination and legal professional privilege given to witnesses by the Chief Examiner have been very detailed and thorough. Examples were used by the Chief Examiner to illustrate to every witness the application of these privileges. These are important matters and every witness should understand the ramifications of the privileges to their evidence before any evidence is given be it oral or documentary. Every witness was also asked by the Chief Examiner to confirm that he/she understood what each privilege entailed and how it applied or did not apply in an examination. This step in the process is one that is encouraged by the SIM and should continue not only in those examinations conducted by the Chief Examiner but also by OPI. The privileges contain difficult concepts that must be understood by a witness and the best means by which to confirm this understanding is by obtaining the confirmation from the person.

64 Legal Representation

Section 34(1) allows a witness to be legally represented when giving evidence before the Chief Examiner.

The procedure regulating the role of legal practitioners is set out in s 36(1) of the Act. This section gives the Chief Examiner the discretion to decide whether he will allow examination or cross-examination on a relevant issue to be conducted by a legal representative appearing for a witness or any other person.

This section in combination with the power to regulate the proceedings as he thinks fit, gives the Chief Examiner great freedom to determine how an examination will be conducted including the part to be played by a legal representative during an examination.

The Chief Examiner provided the SIM with a copy of the procedural guidelines he has adopted applicable to legal representation[51]. The guidelines provide a thorough explanation of the requirements that exist under the Act and the procedures that are the appropriate procedures to be applied in an examination.

The procedural guidelines state that as a rule, legal representation should be allowed because it is an important part of procedural fairness. The issue to be determined by the Chief Examiner is the part to be played by a legal representative during an examination.

Given the intrusive nature of a coercive examination, the need for a witness to have received legal advice prior to his/her attendance before the Chief Examiner is essential so that the witness understands the confidentiality requirements that apply and how certain rights are abrogated.

In every case where a witness was not represented, the Chief Examiner reiterated to the witness his/her right to obtain advice and representation. The witness was also told that the proceedings could be adjourned to allow the witness to organise representation. Furthermore, the Chief Examiner told every witness that it would be in his/her interests to obtain legal advice and confirmed with every witness that he/she had sufficient time to seek such advice between being served with the summons and the date of the examination.

The witnesses who were not represented gave the following reasons for not seeking or wanting advice and representation:

- The witness was of the view that he/she had done nothing wrong and therefore did not require representation.
- The witness elected to continue with the examination because the witness could not afford to take any more time off work.
- The witness did not think legal advice was necessary in the circumstances.

An understanding of one's legal rights prior to an examination and being represented during an examination are of vital importance given that an examination is conducted in an inquisitorial setting for the purpose of obtaining evidence to assist in the investigation of an organised crime.

So important is the examination function to the investigative process that the privilege against self-incrimination has expressly been abrogated by the legislation. Persons summonsed to attend an examination must answer questions asked of them under penalty of imprisonment.

[51] These procedural guidelines form part of a detailed document prepared by the Chief Examiner.

Legal representation during an examination is also crucial as other matters of significance to the rights of witnesses arise including ongoing confidentiality requirements and claims for legal professional privilege. The consequences of failing to comply with a direction of the Chief Examiner can also be very severe for a witness placing even more importance on the need for representation.

Concern was expressed in the 2004–2005 Annual Report about unrepresented civilian witnesses and a lack of access to free legal advice. Unlike the DPI, the Chief Examiner deals predominantly with civilians. Indeed all witnesses he examined in this reporting period were civilians.

These concerns have been addressed with the announcement by Victoria Legal Aid that funding will be made available for witnesses attending before the DPI and Chief Examiner (as explained in paragraph 26 of this Report).

65 Who Was Represented And Who Was Not

The witnesses examined by the Chief Examiner in this period were all civilian witnesses. A total of 15 examinations have been reported to the SIM. Of the 15 witnesses examined, 9 were legally represented.

In all cases the Chief Examiner explained to the witness his/her right to receive legal advice or be legally represented.

In only 1 investigation did a conflict of interest arise in respect of a legal representative advising more than 1 witness in the same investigation. This issue was satisfactorily resolved following a detailed explanation being given by the Chief Examiner to the legal representative highlighting the conflict.

66 Privilege Against Self-Incrimination

The privilege against self-incrimination is specifically abrogated by s 39 of the Act. Witnesses attending the Chief Examiner to be examined must answer questions or produce documents or other things and cannot rely on the privilege even where an answer, document or thing may incriminate them or expose the person to penalty.

The abrogation of the privilege is akin to what occurs in a Royal Commission. The purpose of an examination is to elicit evidence that may assist an investigation into a serious organised crime. The seriousness of the crime is such that the public interest served by the investigation of the crime outweighs the person's right to exercise this privilege.

In order to protect a witness who has given incriminating evidence, sub-section (3) limits the use that can be made of such evidence. In particular, the answer, document or thing is inadmissible against a person in:

- A criminal proceeding; or
- A proceeding for the imposition of a penalty.

There are however exceptions where such evidence can be used. Evidence that would otherwise be inadmissible under sub-section (3) is admissible in proceedings for an offence against the Act, proceedings under the *Confiscations Act 1997* or a proceeding where a person has given a false answer or produced a document which contains a false statement.

The Act is very specific that every witness must have explained to him/her what the privilege is, that it does not apply to proceedings before the Chief Examiner and that there are exceptions and what these are.

The practice of the Chief Examiner is to confirm with every witness that he/she has understood the explanation of the privilege and its application. This step enables the Chief Examiner to satisfy himself that a witness understands his/her rights in such a hearing. Where a witness is still uncertain, the Chief Examiner provides a further explanation until such time as he is satisfied that the witness has a clear understanding. This practice is followed by the Chief Examiner in all cases regardless of whether a witness is represented or not.

Taking this step ensures, in the view of the SIM, that a witness understands that there are certain protections in place preventing the use of evidence against him /her that has been given at an examination. A witness can then be free, as far as is possible, to give complete and frank evidence to the Chief Examiner.

The SIM is satisfied that the procedure followed by the Chief Examiner in explaining the privilege and how it applies in examinations complies with the requirements of the Act and is thorough, detailed and clear.

67 Restriction On The Publication Of Evidence

Section 43 provides the Chief Examiner with a discretionary power to issue a direction prohibiting publication or communication. Such a direction can be given in respect of:

(a) any evidence given before the Chief Examiner; or
(b) the contents of any document, or a description of any thing, produced to the Chief Examiner; or
(c) any information that might enable a person who has given evidence to be identified; or
(d) the fact that any person has given or may be about to give evidence at an examination.

A direction does not necessarily have to be a blanket direction. The Chief Examiner may issue a direction but allow publication or communication in such manner or to such persons that he specifies.

Sub-section (2) imposes a clear requirement on the Chief Examiner to issue such a direction where the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been, or may be charged with an offence. Penalties apply to persons found in breach of a direction.[52]

Only a court can over-ride a direction given by the Chief Examiner under sub-section (4). This sub-section applies where a person has been charged with an offence before a court and the court is of the opinion that it is desirable in the interests of justice, that the evidence the subject of the direction be made available to the person or his/her legal practitioner. Where a court forms this view, a court may give the Chief Examiner or the Chief Commissioner a certificate requiring the evidence to be made available to the court.

Once a court has received and examined the evidence, the court may release the evidence to the person charged with the offence if the court is satisfied that the interests of justice require the release of the evidence.

The Chief Examiner cannot issue a direction that impedes in any way the functions of the SIM under the Act or affects the right of a person to complain to the SIM. Therefore, a person making a complaint to the SIM is not in breach of a direction.

The Chief Examiner issued non-publication and non-communication directions in all examinations conducted by him in this reporting period. The SIM is satisfied that in all cases, the requirement stipulated by sub-section (2) was met and the directions were justified in the circumstances of each examination.

68 The Use Of Derivative Information

The use of derivatively obtained information in the context of examinations conducted by the DPI was discussed in the Annual Report for 2004–2005 at paragraph 25.

A witness appearing before the DPI who is granted a certificate is protected against the direct use of the evidence given. The indemnity does not extend to the use of derived material by investigators. The Act does not have a use-derivative-use indemnity.

In the context of evidence obtained from an examination conducted by the Chief Examiner, a similar protection applies in that s 39 provides a use immunity preventing the use of evidence given by a witness against him or her in a criminal proceeding or proceeding for the imposition of a penalty. However, the immunity is not a use-derivative-use indemnity. Therefore, evidence given by a witness at an examination can be used to follow-up other lines of inquiry in an investigation by investigators and can be used against other persons. In the majority of examinations, a witness is summonsed for exactly this purpose. That is to give evidence about the involvement of other persons in organised crime offences and to open up new leads in an investigation.

69 Legal Professional Privilege

Legal professional privilege ("LPP") applies to answers and documents given at examinations conducted by the Chief Examiner. Under s 40, a person cannot be compelled to answer a question or produce a document if legal professional privilege attaches to the answer or document.

In the case where LPP is claimed in respect of an answer to a question, the Chief Examiner can determine whether the claim is made out at the time of the claim being made.

It is important to note that s 40 (2) imposes a separate requirement on legal practitioners claiming LPP. If a legal practitioner is required to answer a question or produce a document at an examination and the answer to the question or the document would disclose privileged communications, the legal practitioner can refuse to comply with the requirement. A legal practitioner can comply with the requirement if he/she has the consent of the person to whom or by whom the communication was made. If, however, the legal practitioner refuses to comply with the requirement of the Chief Examiner, he/she must give to the Chief Examiner the name and address of the person to whom or by whom the communication was made.

Where LPP is claimed in respect of a document or thing requiring production before the Chief Examiner, the Act provides for the determination of the claim to be made by the Magistrates' Court. In the first instance, the person claiming the privilege over a document or thing must attend the Chief Examiner in accordance with the summons. The Chief Examiner must then consider the claim of privilege. The Chief Examiner has the option of either withdrawing the requirement for production of the document or thing in question or applying to the Magistrates' Court for determination of the claim as provided by s 42 of the Act.

[52] A contravention of a direction is an indictable offence which carries a penalty of level 6 imprisonment (5 years maximum).

If the Chief Examiner refers the claim to the Magistrates' Court he must not inspect the document or thing and must not make an order authorising the inspection or retention of the document or thing under s 47. The person claiming the privilege is required to seal the document or thing and immediately give it to the Chief Examiner.

Sub-section (6) imposes a requirement on the Chief Examiner to give the sealed document or thing to the registrar of the Magistrates' Court as soon as practicable after receiving it or within 3 days after the document or thing has been sealed. The document or thing is then held in safe custody by the Court until the claim can be determined. The procedure set-out in s 42 then applies to determination of the claim by the Court. Any claim for a determination of whether LPP applies must be made by the Chief Examiner within 7 days of the document being delivered to the Court. If the application is not made within this time the document or other thing is returned to the witness.

The SIM has no oversight role in respect of LPP claimed over a document or thing. The SIM has requested the Chief Examiner to inform OSIM where such a claim is made by a witness. This is to allow the SIM to be fully appraised of the progress of an investigation. The SIM was notified that one claim for LPP was made in respect of a document in this reporting period. This claim has been determined by the Court.

The SIM does review determinations made by the Chief Examiner in respect of oral evidence given by a person where a claim for LPP is made. This is to ensure that procedural fairness applies to any such applications given that there is no other means of scrutinising such determinations. The SIM considers this to fall within his compliance monitoring function and determining the relevance of questions asked of a person during an examination. No issues arose in this reporting period in respect of determinations of LPP in respect of oral evidence.

70 Authorisation For The Retention Of Documents By A Police Member

Section 47 of the Act refers to documents or other things produced at an examination or to the Chief Examiner in accordance with a witness summons, which the Chief Examiner may inspect and may then authorise their retention by a police member. Retention will be authorised by the Chief Examiner to allow the following to occur:

- an inspection of the document or thing;
- to allow for extracts or copies to be made of documents if it is considered necessary to the investigation;
- to take photographs or audio or visual recordings of the document or thing if it is considered necessary for the purposes of the investigation;
- Retain the document or thing for as long as long as the police member considers its retention as reasonably necessary for the purposes of the investigation or to enable evidence of an organised crime offence to be obtained.

The Chief Examiner may authorise a police member to retain the document or thing for as long as necessary to do any of the above actions but this retention cannot be longer than 7 days.

Documents or things that the Chief Examiner authorised retention of during this reporting period include:

- Mobile telephones for the extraction of information about calls and messages sent and received.
- Documents, including statements, not subject to legal professional privilege.

Where the document or thing is retained for more than 7 days the police member must, as soon as practicable, bring the document or thing before the Magistrates' Court so that the matter can be dealt with according to law.

Where a document or thing is brought before the Magistrates' Court, the Court may direct that the document or thing be returned to the person who produced it. The Court may also impose any condition/s that the Court thinks fit, if in the opinion of the Court it can be returned consistently with the interests of justice.

A police member who retains a document or thing must take reasonable steps to return the item to the person producing it to the Chief Examiner if the document or thing is no longer necessary for the investigation. If the police member does not return the item, the person has the right to apply to the Magistrates' Court for its return. The procedure is identical to that which applies to applications to resolve claims of LPP.

71 Magistrates' Court Proceedings

Section 48 states that where an application is made for a claim of LPP under s 42 or the return of retained documents or things under s 47, the proceedings must not be conducted in open court. Furthermore, sub-section (2) prohibits the publication by any person of the whole or any part of a proceeding conducted under ss 42 or 47 or of any information derived from such a proceeding. A contravention of this sub-section is an indictable offence and attracts a penalty of level 6 imprisonment (5 years maximum).

72 Issues Arising Out Of Examinations (Compliance With The Act And Adequacy Of Reports)

72.1 Relevance

Relevance as it applies to investigative processes was discussed in the 2004-2005 Annual Report. The analysis of relevance and how it applies to inquisitorial/investigative proceedings is repeated at paragraphs 15.1 and 15.2 of this Report.

The assessment of relevance in every examination conducted by the Chief Examiner is undertaken by the same process that is applied to coercive examinations conducted by OPI.

The SIM, in oversighting the use of coercive powers by the Chief Examiner, aims to ensure that the powers are exercised for the purposes stated by the legislation. Scrutiny, be it of production or the giving of evidence at an examination, is rigorous and of utmost importance. In every examination, the nexus between the questions asked and/or the documents, information or things produced to the subject-matter of the investigation is assessed. This is one of the primary functions of the SIM.

The Chief Examiner provided the SIM with a section of the procedural guidelines prepared for the OCE entitled 'The Special Investigations Monitor and Reviewing the Role of the Chief Examiner.' The document states that the SIM, "is to sit in judgement on the relevance of various aspects of the proceedings which take place during an examination hearing." The SIM endorses this document and is of the view that the function of the SIM as described in the document is accurate.

The document further states that the relevance of questions asked by the Chief Examiner of a witness during an examination needs to be constantly monitored by the Chief Examiner during the process itself. The SIM agrees with this view as it ensures that the assessment occurs during the process itself in addition to being reviewed by the SIM after the examination is concluded.

The task of reviewing relevance by the Chief Examiner is an important one that is encouraged by the SIM. The Chief Examiner is in a position of knowledge when conducting the questioning because he has had the advantage of having read the materials relating to the investigation and being across the issues of the investigation that need to be explored. In many respects he is in the best position to assess relevance when it is raised as an issue by a witness during an examination because of this knowledge. It also ensures that where such an issue arises and is followed up by the SIM, the Chief Examiner is able to provide the SIM with a comprehensive explanation of the reasons for determining whether a question or a line of questioning is relevant or not. This illustrates the importance of the independence of the Chief Examiner.

The SIM is satisfied that in all examinations reported and reviewed in this reporting period, there was sufficient connection between the questions asked and the documents, information or things produced to the subject-matter of the respective investigations.

In all cases, the Chief Examiner conducted the questioning of witnesses. The SIM was greatly assisted in determining relevance by the provision of transcript for every examination conducted by the Chief Examiner. The transcript was provided in addition to the recording.

An objection to the line of questioning was raised in 1 matter in this reporting period which is described in the following paragraph (72.2). The Chief Examiner determined that the subject-matter about which objection was made was relevant to the investigation.

72.2 Examination 1

The witness in this examination questioned the relevance of questions relating to his background, schooling, finances and his involvement in a particular organisation. The witness stated that he could not see the relevance of these questions to the organised crime offence being investigated. The witness in this example was unrepresented.

The Chief Examiner determined that the questions he was asking the witness were relevant and important to the investigation as a whole. In particular, the Chief Examiner explained to the witness that the witness' character, relationships with persons involved in the investigation and the particular organisation of interest were highly relevant to understanding the circumstances leading up to the crime being investigated. The Chief Examiner also informed the witness that it was important to tell the truth and that failure to do so may expose him to possible prosecution and penalty.

The SIM, upon reviewing this examination, made the assessment that there was sufficient nexus between the questions asked of the witness and the organised crime offence being investigated. The questions were important to the progress of the investigation. The SIM was also satisfied with the detailed and thorough explanation given to the witness by the Chief Examiner. This ensured that the witness could understand where the questioning was headed and its relevance. The warning about giving false or misleading evidence was appropriate and necessary given the serious nature of the crime being investigated.

72.3 Breach of confidentiality

The service of summonses in the presence of others was an issue raised by the SIM with the DPI in the previous Annual Report and was the subject of further discussions and monitoring in this reporting period.

In regard to a witness summons issued by either the Supreme Court or the Chief Examiner, a police member is responsible for service of the summons on a witness. The SIM noted in this reporting period that some witnesses were served in the presence of other people. This occurred because service was executed at their place of work.

The service of a summons on a witness at a public place, at home or at work has the potential to breach the requirement of confidentiality that is to be maintained by the person serving the summons and the confidentiality to which every witness is entitled.

The SIM understands that in some circumstances, service in such places is justified where a witness is avoiding service. However, unless such circumstances exist, a police member serving a summons must take the necessary steps to ensure service in a confidential environment. This matter will be monitored by the SIM to ensure that the potential for a breach of confidentiality is minimised or avoided.

73 Obligations Of The Chief Commissioner Of Police To The Special Investigations Monitor Under The *Major Crime (Investigative Powers) Act 2004*

The SIM has the responsibility of reviewing and inspecting records kept by the Chief Commissioner where a coercive power/s has been used to facilitate an investigation into an organised crime offence.

The Chief Commissioner's obligations are found in s 66 of the *Major Crime (Investigative Powers) Act*. This section imposes a number of reporting obligations on the Chief Commissioner to the SIM. In addition to these requirements, the *Major Crime (Investigative Powers) Regulations 2005* came into force on of 1 July 2005. The Regulations detail the prescribed matters that must be reported by the Chief Commissioner to the SIM in written reports and a computerised register.

74 Obligations Of The Chief Commissioner Under Section 66 Of The *Major Crime (Investigative Powers) Act 2004*

The legislation requires the Chief Commissioner to keep records and a register of all information relating to the use of coercive powers by Victoria Police. Section 66 lists the records and register that must be kept by the Chief Commissioner. The Chief Commissioner must also provide written reports to the SIM so that compliance with the section can be monitored.

The obligations of the Chief Commissioner under s 66 are as follows:

(a) ensure that records are kept as prescribed on any prescribed matter; and

(b) ensure that a register is kept as prescribed of the prescribed matters in relation to all documents or other things retained under section 47[53] of the Act and that the register is available for inspection by the Special Investigations Monitor; and

(c) report in writing to the Special Investigations Monitor every 6 months on such matters as are prescribed and on any other matter that the Special Investigations Monitor considers appropriate for inclusion in the report.

Regulations 11, 12 and 13 list the 'prescribed matters' referred to above.

[53] Section 47 is outlined under paragraph 76 of this Report .

75 Records to be kept by the Chief Commissioner: Section 66(a) and Regulation 11 (a – k)

The Chief Commissioner is required to keep a number of records relating to the granting, refusal, extension and variation of CPOs. Other records must also be kept as described below:

(a) **The number of applications made for a CPO under s 5 of the Act.**
This record must also include the types of organised crime offences in relation to which the applications were made; the number of CPO applications made before an affidavit is sworn; the number of remote applications made; the number of CPOs made by the Supreme Court and the number of CPOs refused by the Supreme Court and the reasons for the refusal, if given.

(b) **The number of applications for an extension of a CPO.**
This record must also include the types of organised crime offences in relation to which the extension applications were made; the number of extensions granted by the Supreme Court; the number of refusals and the reasons, if given, for each CPO extended, the total period for which the order has been effective.

(c) **The number of applications for a variation of a CPO.**
This record must also include the types of organised crime offences in relation to which the variation applications were made; the number of variations granted by the Supreme Court; the number of applications refused and the reasons for the refusal, if given.

(d) **The number of notices to the Supreme Court under s 11 of the Act notifying the Court that a CPO is no longer required.**
This record must also include the reasons for giving the notice and the number of CPOs revoked by the Court under s 12.

(e) **The number of applications refused by the Supreme Court and the reasons for the refusal, if given.**
This record must also include the number of applications refused by the Supreme Court and reasons for refusal, if given; the number of summonses issued by the Supreme Court; the number of witness summonses issued by the Supreme Court requiring immediate attendance before the Chief Examiner.

(f) **The number of applications made to the Chief Examiner for the issue of a witness summons under s 15 of the Act.**
This record must also include the number of applications refused by the Chief Examiner; the number of summonses issued by the Chief Examiner on the application of a police member; the number of summonses issued by the Chief Examiner requiring the immediate attendance of a witness before him.

(g) **The number of applications made to the Supreme Court or the Chief Examiner for an order under s 18 of the Act to bring a witness already in custody before the Chief Examiner to give evidence.**
This record must also include the number of orders granted by the Supreme Court or Chief Examiner; the number of refusals and reasons for the refusals, if given.

(h) **The number of Applications made for the issue of a warrant for arrest under s 46.**
This record must also include the number of applications refused by the Supreme Court and the reasons for the refusal; the number of arrest warrants issued by the Supreme Court; the number of arrest warrants which were executed, how long the person was detained and whether the person is still in detention.

(i) **The number of prosecutions for offences against ss 20 (5), 35(4), 36(4), 37(3), 38(3), 42(8), 43(3), 44 and 48(3) of the Act.**

(j) **The number of arrests made by police members on the basis (wholly or partly) of information obtained by the use of a CPO.**

(k) **The number of prosecutions that were commenced in which information obtained by the use of a CPO was given in evidence and the number of those prosecutions in which the accused was found guilty.**

76 Register For Retained Documents And Other Things

Section 66(b) relates specifically to documents or things retained by an authorised member of the police force under s 47(1)(d). Such documents or things are retained after having been produced at an examination or to the Chief Examiner after having been inspected by the Chief Examiner. As explained above at paragraph 70, authorisation for the retention of the document or thing is given to a member following a successful application to the Chief Examiner.

Regulation 12 states that a computerised register must be kept of the following matters for the purpose of s 66(b):

(a) A description of all documents or other things that were produced at an examination or to the Chief Examiner and which were retained by a police member under section 47(1)(d) of the Act.
(b) The reasons for the retention of the documents or other things.
(c) The current location of all documents or other things.
(d) Whether any of the documents or other things were brought before the Magistrates' Court under section 47(3) of the Act and if so, the date on which this occurred and the details of any direction given by the Magistrates' Court in relation to the return of the document or thing to the person who produced it.

77 Inspection Of The Computerised Register For Retained Documents And Other Things: Section 66(b) And Regulation 12

The computerised register must be available for inspection by the SIM at any time.[54] The SIM was advised by the Chief Commissioner that a SQL database for the recording of this information is being developed. The Office of Chief Examiner is responsible for the development and design of the SQL database. The SIM has been advised by the Chief Commissioner that the computerised database will not be completed before November 2006.

In the interim, the OCE has developed a computerised database in a Microsoft XL spreadsheet format to store the register. The Chief Commissioner has made this register available to the SIM for inspection. The register is maintained by the OCE.

The SIM is satisfied that the software programs that have been established and will be developed are satisfactory to meet the legislative requirements of s 66(b) and Regulation 12. The SIM will make a further assessment of the adequacy of the SQL database once it is completed and inspected by the SIM.

The interim computerised database has been inspected by staff members of the OSIM. The inspected register included details of the following:

(a) a detailed description of each exhibit or thing produced and retained;
(b) the reason for the retention;
(c) the current location of the exhibit; and
(d) full details of exhibits taken before the Magistrates' Court and the directions given by the Court.

[54] Section 66(b) *Major Crime (Investigative Powers) Act 2004.*

The SIM is satisfied that the data recorded in the interim register complies with the legislative requirements.

78 Chief Commissioner's Report To The Special Investigations Monitor: Section 66(c) And Regulation 13

Section 66(c) requires the Chief Commissioner to provide the SIM with a written report every 6 months on such matters as prescribed. The written report may include any matters considered appropriate for inclusion by the SIM.

Regulation 13 states that for the purposes of s 66(c) of the Act, the prescribed matters on which the Chief Commissioner must report in writing to the SIM are the matters prescribed by regulation 11 paragraphs (a) to (k).

The Chief Commissioner provided the SIM with the written reports for the 2005-2006 reporting period on 21 December 2005 and 5 July 2006.

The SIM is satisfied that both reports meet the requirements of s 66(c) and Regulation 13.

79 Secrecy Provision

Section 68 imposes a strict requirement for secrecy on the Chief Examiner, an Examiner, the SIM and his staff and a member of the police force.

Permitted disclosures for the Chief Examiner, an Examiner and the SIM and his staff are those that are done for the purposes of this Act or in connection with the performance of the functions of these persons under the Act.

In the case of police members, disclosures are permitted if they are for the purposes of investigating or prosecuting an offence. Secrecy, in relation to all the above persons, applies whilst they are subject to this section and continues to apply after they cease to be persons to whom this section applies.

The provision forbids disclosure where the conditions described in the above paragraph do not exist. Therefore, the Chief Examiner, an Examiner, the SIM and his staff and a member of the police force are prohibited from making a record or divulging or communicating to any person, either directly or indirectly, any information acquired in the course of the performance of his/her functions under the Act. A person in breach of this section can be charged with an indictable offence. The penalty for a breach of secrecy is level 6 imprisonment (5 years maximum).

Under sub-section (3), any of the persons to whom the secrecy provision applies cannot be compelled by a court to produce documents that have come into their control for the purpose of carrying out their functions under the Act or to divulge or communicate to a court a matter or a thing that has come to their notice in the performance of those functions.

Sub-section (3) does, however, contain an exception to the above rule in respect of the Chief Examiner, the SIM and the member of the police force in their official capacity to be required to provide a document or divulge or communicate information in certain circumstances. The exception applies where the Chief Examiner, the SIM or the member of the police force in his/her official capacity, is a party to the relevant proceeding or it is necessary to divulge this information:

(a) for the purpose of carrying into effect the provisions of this Act; or
(b) for the purposes of a prosecution instituted as a result of an investigation carried out by the police force into an organised crime offence.

In all examinations reviewed by the SIM in this reporting period, the Chief Examiner informed all police members watching the examination from a remote location of the requirement for secrecy and the penalties that apply if the requirement is breached. All OCE staff are also reminded of this requirement in the presence of the witness.

80 Compliance With The Act

80.1 Section 52 reports
Section 52 provides that the Chief Examiner must give a written report to the SIM within 3 days after the issue of a summons or the making of an order under s 18.

All s 52 reports received during the period under review complied with the section.

The Chief Examiner made one order under s 18 that was subsequently revoked. This order is therefore not the subject of review.

80.2 Section 53 reports
All s 53 reports were prepared and signed by the Chief Examiner as soon as practicable after the person had been excused from attendance and complied with the section.

80.3 Section 66 reports and register
The SIM received 2 s 66 reports from the Chief Commissioner for this reporting period in compliance with the Act. The reports contained all the matters prescribed by s 66.

The SIM was also satisfied with the register of prescribed matters kept by the Chief Commissioner in relation to documents or other things retained under s 47 of the Act. The register was inspected once for this reporting period and will be inspected on a 6 monthly basis for future reporting periods.

Section 58 requires the Chief Examiner and the Chief Commissioner to provide assistance to the SIM. The Chief Examiner, the Chief Commissioner and their respective staff have responded promptly to all requests for assistance and have given the SIM all the assistance that the SIM has requested and required.

The SIM has not exercised any powers of entry or access pursuant to s 59.

The SIM has not made any written requirement to answer questions or produce documents pursuant to s 60.

In sum, the SIM is satisfied with the Chief Examiner and the Chief Commissioner's compliance with the *Major Crime (Investigative Powers) Act* in the period the subject of this report.

81 Relevance

Relevance has already been referred to in this report at paragraph 15.1 and 15.2.

The SIM is satisfied that the questions asked of persons summonsed during the year the subject of this Report were relevant and appropriate to the purpose of the investigation of the organised crime.

Further, the SIM is satisfied that any requirements to produce documents or other things under a summons during the year the subject of this Report were relevant and appropriate to the purpose of the investigation of the organised crime.

82 Comprehensiveness And Adequacy Of Reports

82.1 Section 52 reports
The reports provided by the Chief Examiner were adequate. As discussed in this Report, the SIM requested further information to be included in the s 52 reports. The Chief Examiner has complied with this request and the SIM is satisfied that the reports in their current form are sufficiently comprehensive and adequate to enable a proper assessment to be made of requests made by the Chief Examiner for the production of documents or other things concerning the relevance of the requests and their appropriateness in relation to the investigation of the organised crime offence.

82.2 Section 53 reports

Section 53 reports were sufficiently adequate and comprehensive when considered in conjunction with the video-recording and in all cases transcript, to assess the questioning of persons concerning its relevance and appropriateness in relation to the investigation of the organised crime offence.

82.3 Section 66 reports

Section 66 reports contained all the matters as prescribed under the Act and Regulations. The reports were sufficiently comprehensive and adequate to ensure the SIM was able to be satisfied that all prescribed matters were contained in the reports.

83 Recommendations

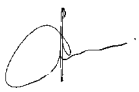
No formal recommendations were made during the year the subject of this report to the Chief Examiner or the Chief Commissioner pursuant to s 57.

However, as already stated, all requests made to the Chief Examiner and the Chief Commissioner and their respective staff have been agreed to and acted upon accordingly.

84 Generally

There has been full co-operation from the Chief Examiner and the Chief Commissioner and their staff members which has been appreciated by the SIM and the staff of the OSIM.

This is new and quite complex legislation. Difficult public interest considerations are involved. The SIM has been impressed by the thorough, comprehensive and responsible approach taken by the Chief Examiner to the performance of his functions and role and his willingness to assist the SIM when asked. The approach taken by the Chief Examiner and the Chief Commissioner has assisted the SIM and his staff to carry out their function and ensure that the public interest objectives of the legislation are achieved.



David Jones
SPECIAL INVESTIGATIONS MONITOR

23 August 2006

APPENDIX A – Substance of Letter from SIM to the DPI

This matter has not been raised as a complaint that falls under s. 86ZE of the Act. It has been raised on the basis of the role of the SIM under s. 86ZA and s. 86ZM(3)(b) of the Act.

The detailed explanation that has been provided has been considered. Section 17 of the *Evidence Act* does not specify a time to be allowed for the service of a summons. However, in my view by necessary implication a summons must be served a reasonable time before the date on which the person is required to attend. This is the requirement imposed upon the Chief Examiner under s. 15(8) of the *Major Crimes (Investigative Powers) Act* 2004 and the requirement contained in s. 43(5) of the *Magistrates' Court Act* 1989. In determining what is a reasonable time all the circumstances have to be taken into account including whether the witness is required to produce documents, which is the case here.

In my view, the time allowed for attendance and production of documents after service by the witness was not reasonable in all the circumstances. More time should have been allowed to enable the witness to be adequately prepared in relation to what was an important attendance for the witness. It is no answer, in my view, to say that the witness could have applied for an adjournment and didn't or that the scheduling of witnesses meant that more time for attendance could not be allowed. These matters do not make the time that was allowed reasonable. A substantial coercive power is being exercised and the witness is entitled to the protection that a requirement of reasonable time provides.

The place of service in this case was obviously connected to the time allowed for attendance. In my view, the request of the witness to not be served at home was reasonable in the circumstances and if reasonable time for attendance had been allowed that would have enabled service to be effected at the witness' place of work. In my view, where practicable and reasonable, requests by police witnesses not to be served at home should be followed.

Appendix A – Substance of Response by DPI to the SIM

I note your advice that the matter is raised not as a complaint under section 86ZE, but on the basis of the role of the SIM under section 86ZA and section 86ZM(3)(b).

I have, however, some difficulty in accepting that the matter falls within the contemplation of section 86ZA. I presume that you consider it falls within section 86ZA(a), as the terminology of the remaining paragraphs of that subsection seems clearly to have no application to the circumstances concerning the witness and complaint.

However, that paragraph concerns "compliance with this Act" and it seems to me that in the absence of any statutory period required under the *Police Regulation Act 1958* for service of a summons, it cannot be said that there has been a question of 'compliance with the Act by the Director, members of staff of the Office of Police Integrity and the witness engaged by the Director under s102E(1)(b)'. I would also have thought that references to other statutes which impose such requirement on different officials, such as your references to the *Magistrates' Court Act 1989* and the *Major Crimes (Investigative Powers) Act 2004*, cannot overcome this difficulty. Indeed, reference to the latter Act indicates very much the contrary in that the Parliament was considering the "reasonable time" issue when it imposed this requirement on the Chief Examiner. However, it did not consider it necessary to impose it on the Director, despite significantly boosting his powers by the same Act.

As a result, in my view it is difficult to conclude that there has been a question of compliance with the Act raised by this incident or that 86ZA has any application in this instance.

Be that as it may, as to the substance of your letter, I also cannot agree that the witness was not provided with "reasonable time in all of the circumstances". You have expressed the view that the witness should have been given more time to be adequately prepared but your letter does not make clear why the admittedly short time period is not considered reasonable in the circumstances concerning the witness. You seem to have taken the view that because the time was short, it was therefore, unreasonable. With respect, this does not necessarily follow.

I think that it needs to be recalled that one of my statutory objectives is to detect, investigate and prevent police corruption and serious misconduct and the powers available to me under the *Police Regulation Act* need to be interpreted in that light, rather than for the convenience of witnesses. In view of my statutory objectives I believe that the primary question to be asked in this case is whether the time period allowed the witness to be adequately prepared and instruct counsel and, if so, whether in doing so, it placed the witness at some disadvantage. I believe it is clear, once the recording of the witness' appearance is examined, that the witness was well prepared for the examination and had been able to instruct counsel to act for him, who was also adequately prepared for that purpose. Furthermore, so far as I am aware, the witness suffered no disadvantage in achieving that preparedness in the time period allowed.

As your letter noted, the witness' counsel did not seek an adjournment on the basis of short service, or object to the Delegate regarding that issue, something which I would have expected any competent counsel to do if he or his client considered the period unreasonable or unfair. This does not, as you have observed, convert something which is unreasonable into being reasonable. But it does indicate fairly clearly that both counsel and client considered that the time provided, although short, was not insufficient for them to be adequately prepared or was unreasonable.

I therefore remain of the view that the witness was given reasonable notice of the hearing and that there was no lack of compliance with the Act, even on the broader interpretation of the words "the Act" that you prefer.

I also note that you also seem to consider that I am bound by reasonable requirements of witnesses regarding the location of service. To put the matter shortly, I can see no basis for that conclusion. Even if the request by a witness regarding the location for service is reasonable, the priorities for service of summons are the needs of the investigation rather than the desires of the witness. In this instance, the witness was served at the witness' home so as to give the witness reasonable notice of the hearing time. In my view, because of the complexities of the investigation and the hearing schedule, service at home, despite the witness' request, was not inappropriate.

I should also add that the concerns I expressed earlier regarding the "reasonable time" issue not falling within the scope of "compliance with the Act" are equally applicable to this issue. Indeed, I think that this issue is even clearer, as I am unable to discern any obligation flowing from the Act or the common law which compels me to serve a witness at a place which the witness finds most convenient.

APPENDIX B – Proposed Reference in Report Provided by the SIM to the DPI

Office of Police Integrity – Review of Fatal Shootings by Victoria Police

A Report of this Review by the Director, Police Integrity was tabled in the Victorian Parliament in November 2005. (P.P. No. 177).

The Review follows a determination by DPI in April 2005 to investigate:-

- The circumstances surrounding the fatal shooting of Mr Mohammed Chaouk by an officer or officers of the Victoria Police Force on 5 April 2005;
- The fatal shooting of persons by officers of the Victoria Police which have occurred between 1 January 2003 and 6 April 2005, being a review of the practices, policies, procedures and conduct of officers of Victoria Police; and
- The adequacy of policies, procedures or practices of Victoria Police and resources available to it.

The determination was made pursuant to s. 86NA of the *Police Regulation Act* 1958 as amended ("the Act").

The Report sets out the approach taken to the review. A variety of sources were drawn upon by investigators. Hearings were not held. Nor were witnesses examined.

The Report states (p. 5):-

> "An invitation to meet with investigators was extended to many officers involved in the shootings through their senior officers. The officers declined these invitations and because the Coroner had not yet had the opportunity to investigate five of the six deaths officers were not required to provide additional information for this review. Consequently, this review has not explored the state of mind of the officers involved in the incidents or the considerations which guided them. For the same reasons, investigators and I have been careful in the conduct of the Review not to comment on the appropriateness of the level of force used, during the incidents. However, depending on the outcomes of the coronial investigations, I may seek further information about the specific incidents at a later time and make further comment in due course".

The Report states that submissions were invited from organisations that may have had an interest in providing information to the review. The Police Association was one of those organisations.

Chapters 2 and 3 of the Report review the circumstances of each of the six shootings, one of which had been the subject of a coronial inquest. With respect to the others, inquests are pending. The review of each fatal shooting contains a section headed 'Observations'. In that section statements are made about the conduct of police officers involved but they are not named. Examples are as follows:-

Case of Peter Hubbard
"My investigators found that while the four attending Constables in two divisional vans had an initial meeting in a nearby street, they did not sufficiently assess the risk or plan their approach in accordance with the Operational Safety Principles".

Case of Gregory Biggs
"Several Operational Safety Principles were not applied to the police response to this incident. From the Coronial Brief of Evidence it appears that the actions of the Sergeant in exiting the vehicle were ill-considered and the risks were not appropriately assessed".

Case of Jason Chapman
"In my view the Senior Constable and Constable who were first despatched to the incident were not appropriately supported by their supervising officers, whose duty it was to attempt to turn an unplanned operation into a planned one".

Case of Lee Kennedy
"More significantly, when urgent assistance was requested by the divisional van crew, the Sergeant and Senior Sergeant on afternoon shift initially failed to react or assume command of the operation".

Case of Wayne Joannou
"What occurred was a direct confrontation which placed the safety of the SOG operatives and members of the public at risk. The decision to confront Mr. Joannou in a parked vehicle containing two members of the public was, at best, questionable."

Case of Mohamed Chaouk
"My review has revealed that the actual planning and implementation of the forced entry... was less than satisfactory and that the SOG Tactical Operations Order was not as detailed as it might have been."

As will be apparent, these 'observations' and others contained in the Report are critical of the conduct of police officers involved in the incidents.

Correspondence was received by the SIM regarding this Report from the Police Association Victoria. The Association raised a number of issues regarding the contents and release of the Report prior to coronial inquests being conducted and finalised.

A meeting was held with representatives of the Association to further clarify the issues they were raising.

It appeared that the essence of their concern related to procedural fairness in the conduct and reporting of the investigation. In particular, the Association believed that procedural fairness had not been accorded to members of the police force the subject of adverse comment in the observations contained in the Report relating to the specific shootings. The Association contended that these members were not given the opportunity to be heard in relation to these observations before they were published and as a consequence of the publication of the observations, their standing and reputation had been adversely affected.

The matter could not be dealt with by the SIM as a complaint embraced by sections 86ZE, 86ZF and 86ZG of the Act as the use of the coercive powers was not involved. A letter was also received from a senior police officer at one of the police stations involved expressing concern about the contents of the Report.

After due consideration the SIM raised the matter with DPI as it was felt that there was a basis for concern by the Association in relation to procedural fairness. Although not a complaint embraced by the specific complaint provision, it was considered appropriate to raise the matter having regard to the SIM's role of monitoring compliance with the Act by the Director and members of his staff (s. 86ZA(a)) and making recommendations (s. 86ZH).

A meeting was held with DPI and OPI staff. The background to the review was explained and details provided as to how it was carried out. It was pointed out that there was consultation with Victoria Police at a high level during the investigation and drafting the Report. The Chief Commissioner was briefed on the investigation and provided with a draft of the Report to which she responded.

It was pointed out that there had been a meeting with the Police Association and in June 2005 the Association had been invited to make a written submission or to address matters pertaining to the investigation the subject of the terms of reference. In a written reply in July 2005, the Association stated that the investigation should await the findings of the Coroner following inquests. The Association also expressed the view that to further interview involved members may adversely impact on them psychologically. Rather than re-interviewing members, the Association encouraged OPI to refer to the already obtained interviews and statements of members.

Details of contact by OPI investigators with Senior Police at the stations or regions concerned were provided. This took place in June, July and August 2005. The response was that they did not want the members involved to be contacted about the matter.

Victoria Police command provided a written submission in November 2005 which mainly related to the SOG. No mention was made of natural justice concerns.

OPI maintains that there was no failure to accord procedural fairness to the police members the subject of the observations in the Report. It points out that they are not named, the observations are non-judgemental and there is no comment on the amount of force used or the state of mind. The focus is on operational safety principles and lack of adequate training.

OPI and the position of DPI are established under s. 102A of the Act. The objects of the DPI are set out in s. 102BA of the Act.

Section 86NA gives the Director power to conduct an investigation. This investigation was conducted pursuant to that section. Section 86P sets out the powers of DPI in conducting an investigation. They are wide powers. Sub-section (2) provides that if at any time during the course of an investigation, it appears to the Director that there may be grounds for making a report adverse to the force, the Director may, before making the report give, the Chief Commissioner the opportunity to comment on the subject matter of the investigation.

That was done in this case. However, the response did not address the 'observations' section of the Report. It is clear that the officers the subject of the observations were not privy to the draft Report.

The discretion as to how an investigation is conducted by the Director is a wide one. It can not be exercised arbitrarily but must be exercised in accordance with principle.

Authority establishes that the principles of procedural fairness apply to commissions of inquiry: Mahon v Air New Zealand Ltd (1984) AC808 (Privy Council); Annetts v McCann (1990) 170 CLR 596 (High Court).

In Mahon the Privy Council held that a person exercising an investigative jurisdiction having power to enquire and make a report which, may include adverse findings must listen fairly to such relevant evidence and rational argument against a finding that a person whose interests (including in that term career or reputation) may be adversely affected by it may wish to place before him or would have so wished if he had been aware of the risk of the finding being made. Reputation therefore is an interest attracting the protection of the rules of natural justice.

In conducting this investigation and reporting on it DPI is exercising an investigative jurisdiction. He is exercising an authority to investigate and publicly report on the conduct of individuals. In the SIM's view, the principles of procedural fairness as stated in Mahon and Annetts apply.

Although described as 'observations' the statements made in relation to the conduct of particular police officers are findings. They are findings that may adversely affect their careers or reputation. The fact that they are not named does not lead to a different conclusion as they could be readily identified, particularly by colleagues and people familiar with the incidents.

Consequently, in the SIM's view, procedural fairness required that they be given an opportunity to be heard, in relation to the findings adverse to them contained in the observations sections of the Report.

Were they given that opportunity? OPI points to the contact with the Police Association, the contact with their superiors and the provision of the draft to the Chief Commissioner. However, a copy of the draft and particularly the observations sections were not sent to the police officers concerned. Nor was it sent to the Police Association on their behalf.

The earlier contact with superiors did not meet the requirements of procedural fairness. At that stage the investigation was in progress and no findings had been formulated. Nor, in the SIM's view did the provisions of the draft Report to the Chief Commissioner. The response essentially dealt with the operation of the SOG and did not refer at all to the observations sections.

In the SIM's view, procedural fairness in the circumstances required DPI and OPI to give the police officers, the subject of the observations sections of the Report, notice of what was proposed to be said about their conduct, directly or through their association, the Police Association, so that they could have the opportunity to be heard before the Report was finalised and published. That was not done and consequently it is the SIM's view that procedural fairness was not accorded to those officers.

This matter has been reviewed in some detail as it is considered to involve an important principle relating to investigations such as this and because it is apparent that it is also important to the police officers concerned.

Appendix B – Response by the DPI to the Proposed Reference

I note that you have expressed the view that the OPI failed to grant procedural fairness in relation to the Report on the Review of Fatal Shootings in that I did not forward relevant part of that report to those who may have been adversely reflected on by that report prior to the finalisation of the report.

I do not agree with that conclusion.

While I accept that the Director's powers must be exercised in accordance with principle, by which I take it that you are referring to the common law regarding procedural fairness, I consider that it would be remiss of me to exercise my powers in a manner which is inconsistent with legislative intent and the various limitations which are placed on me in exercising my powers.

Relevant to this issue is the statutory framework in which the OPI investigations are conducted. As you will be aware, there is no provision in the *Police Regulation Act* which equates with section 23(7) of the *Ombudsman Act*. That section prevents the Ombudsman making a report adverse to a person unless that person is provided with an opportunity to be heard. The *Police Regulation Act*, however, takes a very different approach. You will be aware that the closest that Act comes to section 23(7) is section 86P(2) which requires the Director to give the Chief Commissioner the opportunity to comment if a report is adverse to the Force. The omission of a provision equivalent to section 23(7) in the *Police Regulation Act* is not a matter which I can regard as an accident, but as a matter reflecting legislative intent.

Also relevant is the purpose of many of the reports produced by the OPI. That is, they are reports for the Parliament. As such, I need to be satisfied that the use and distribution of a draft Parliamentary report, or extracts from such a report, is not one which will be in contempt of Parliament. Furthermore, it must not be one which is in contravention of the stringent confidentiality requirements located in section 102G of the Police Regulation Act.

In my view, in the absence of statutory authority, extracts of a draft Parliamentary report can only be distributed to another body or person if there is no other means of obtaining necessary information to finalise the report or if there is no other means of providing procedural fairness to those who will be adversely affected by the report.

In my view that test was not satisfied in relation to the Review of Fatal Shootings Report.

I have formed the view that there was sufficient material, without seeking additional views from the officers concerned, to form the observations made in the report and that the accounts of the affected officers were obtained by reference to the statements from each of the officers concerned which were made for the purposes of the Coroner's investigation.

As to procedural fairness, this doctrine does not require that persons who may be adversely affected by findings have the opportunity to view draft comments as you suggest. *Mahon's* case, to which you refer, does not require that. That decision concerned a Royal Commission and there was no suggestion in that matter, or in any Royal Commission of which I am aware, that draft Royal Commission reports can or should be made available to those affected by the report.

The essential requirement of that doctrine is fairness. As *Mahon's* case makes clear, those affected must be aware of the issues that are of concern and that they have the opportunity to place material before the decision maker which he or she must consider. The doctrine ensures that "any person... who will be adversely affected by the decision is not left in the dark as to the risk of the finding being made and thus deprived of an opportunity to adduce additional material". It is not to ensure that persons who may be adversely affected have the opportunity to view draft reports.

There are a number of decisions to that effect and in particular I refer to Lord Diplock's observations in *Hoffmann La Roche v. Secretary of State* [1974] 2 All ER 1156-57, Fox J's views in *Sinnathamby v Minister for Immigration* (1986) 66 ALR 502, 506 and those of Lockhart J in *Ansett v Minister for Aviation* (1987) 72 ALR 469. In the last matter, Lockhart J said:

> "In my opinion there is no general rule that, where an airline has been afforded an opportunity to put relevant information or comment to the Minister... it is entitled to be given an opportunity to comment upon the view the Minister may take of the observation or comment. Nor is there a general rule that the Minister is obliged to inform an airline of his draft or preliminary views for the purposes of making an estimate or capacity determination."

In my view, the officers were aware of the issues of concern. Each of the matters had been or was to be the subject of the Coroner's inquiries and statements had been taken from relevant officers for that purpose. Furthermore, the terms of the own motion investigation were widely circulated, including to the Police Association, and officers were invited to take part in the inquiry through their senior officers. I find it difficult to accept that any of them could seriously suggest that they were not aware of the inquiry and the potential for adverse findings from that inquiry.

Each of those officers had the opportunity to be involved in the inquiry and place any material that they considered relevant before me. As mentioned, they were invited through their senior officers to take part in the inquiry. I had, and have, no reason to believe that those invitations were not transferred to the officers concerned or that they were unaware of the invitation. However, they chose not to take part. Furthermore, you will be aware that the Police Association encouraged me not to press those officers to take part in the inquiry. Its view, which I accepted, was that instead of reinterviewing the relevant members, I should refer to "already obtained interviews and statement of members". That was the course that I adopted. I therefore find it very odd that the Police Association now objects to the course which it advocated or that this objection could seriously be considered.

I should add that if I considered that my report was in any way inaccurate or defective without the further input from police officers, or that those officers were deprived of the opportunity to contest matters before me, I would have again invited them to take part, or, despite the concerns of the Police Association, compelled them to take part or written to them to seek their views on matters which would negatively impact on them. This I did not consider necessary for the reasons discussed above, and in particular, the encouragement of the Police Association that the statements taken for other reasons should be used for my purposes. To provide the officers with extracts from draft Parliamentary reports was considered, as it will be in most cases, to be unnecessary as well as being potentially a contempt of Parliament and therefore not a matter which I consider that I was entitled to do. It is also a course which is often not wise as it is potentially dangerous to the security of the report. In addition, I find your suggestion that I could have provided such extracts to an industrial body to be very puzzling. This is not an option which I believe will ever be available to me under the current statutory arrangements.

I am, as I have explained, firmly of the view that there was no breach of procedural fairness in this instance. This does not mean, however, that I consider that this Office cannot learn from it. For that reason, I would welcome the opportunity to work with you, as we have on other issues, to develop mutually acceptable guidelines, within the given statutory framework, relating to procedural fairness for use in future investigations.