Office of the **Special Investigations Monitor**

Annual Report *2006–2007*

CONTENTS

01 Introduction

This is the annual report for the financial year ending 30 June 2007 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) ("MCIP 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 MCIP 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 MCIP 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.

02 The Special Investigations Monitor

The OSIM was created by s 4 of the *Major Crime (Special Investigations Monitor) Act* ("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 three 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.

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

The *Major Crime Legislation (Office of Police Integrity) Act 2004* ("OPI Act") established a new Office of Police Integrity ("OPI"), headed by a Director, Police Integrity ("DPI"). The provisions establishing the DPI and 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 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 interceptions. 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, nor had it commenced during the period of the previous annual report. This report does cover the oversight of surveillance devices and telecommunications interceptions as it took effect on 1 July 2006. The legislation relating to controlled operations, which the SIM will oversight, has not come into effect. The SIM has no oversight role in relation to the use of assumed identities.

04 *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. They were reviewed in the previous annual report.

05 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 MCIP 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.

06 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.

07 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.

08 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 summoned 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.

09 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 MCIP 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 section 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 section 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 section 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 section 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 reported one matter to the SIM under the Whistleblowers Protection Act in this reporting period. This is reviewed at section 18.2 of this report.

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 were reviewed in the previous annual report. Therefore that review will not be repeated in detail but briefly referred to.

Central to the powers 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 MCIP 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 MCIP 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 six 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 MCIP 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 summoned 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 investigation of an organised crime offence.

14 Oversight In Relation To The Use Of Surveillance Devices And Telecommunications Interceptions

The SIM has oversight responsibilities over State law enforcement agencies which use:

- telecommunications interceptions
- surveillance devices (data surveillance devices, listening devices, optical surveillance devices and tracking devices).

The SIM's responsibilities include inspection of records, reporting on those inspections and monitoring compliance with the legislation.

The use of controlled operations by State law enforcement agencies under the provisions of the *Crimes (Controlled Operations) Act 2004* will also fall within the SIM's oversight responsibilities once that Act is proclaimed. Proclamation has been delayed while the State and Commonwealth work out changes required by the Commonwealth to the monitoring and reporting aspects of the legislation with respect to the Australian Crime Commission.

14.1 Telecommunications Interceptions

Victorian State law enforcement agencies approved by the Commonwealth Government are able to intercept and make specified use of telecommunications interceptions pursuant to warrants and emergency authorisations issued under the Commonwealth *Telecommunications (Interception and Access) Act 1979* ("TI Commonwealth Act"). As a precondition for approval of State agencies by the Commonwealth Government, State legislators were required to establish a regime of State agency accountability through record and document keeping by the agencies, independent inspection of those records and reporting the results of inspections to the State Government. The *Telecommunications (Interception) (State Provisions) Act 1988* ("TI State Act"), as amended, provides that regime. Under the Act the SIM must inspect the records of Victoria Police and OPI to ascertain the extent of their compliance with Parts 2 and 2A of that Act respectively, and to report to the Minister about the results of those inspections.

The oversight function of the SIM under the TI State Act was previously performed by the Ombudsman Victoria who was also the DPI. From 1 July 2006 oversight responsibility passed to the SIM. Subsequently, and with the establishment of the SIM as the new oversight authority, the Commonwealth Attorney-General approved OPI as an intercepting agency under the TI Commonwealth Act, effective from 19 December 2006. Until that time Victoria Police had been the only Victorian State agency able to use the provisions of that Act.

A transitionary requirement in the TI State Act arising from the change of oversight authority is that at least one inspection of State agency records be conducted by the SIM during the year the subject of this report. In subsequent years at least two inspections are required. An annual report on the result of inspections by the SIM under the TI State Act must be made to the Minister as soon as practicable, and in any event, within three months of the end of the financial year. The SIM may also report at any time and must do so if requested by the Minister or the Attorney-General. Additionally, the SIM may report on any matter where, in the opinion of the SIM, a member of the staff of an agency has contravened a provision of the TI Commonwealth Act or the requirements under the TI State Act to provide certain documents to the Minister.

Chapter 3 of the TI Commonwealth Act as amended by the *Telecommunications (Interception) Amendment Act 2006* contains provisions for approved agencies, including State agencies, to obtain stored communications under warrant. The commencement date for this provision was 13 June 2006. At the present time the SIM has no oversight responsibility over the use by State agencies of the stored communications provisions of the TI Commonwealth Act.

14.2 Surveillance Devices

In 2006 legislative changes were made to the *Surveillance Devices Act 1999* ("Surveillance Devices Act") to move oversight responsibilities from the Ombudsman Victoria to the SIM. The change was effective from 1 July 2006.

There are four Victorian State agencies authorised to use surveillance devices under the provisions of the Surveillance Devices Act. The Act requires the SIM to inspect the records of a law enforcement agency to determine the extent of compliance with the Act by the agency and by law enforcement officers of the agency and to report the results of those inspections to Parliament. Reports must be made at six month intervals to each House of Parliament as soon as practicable after 1 January and 1 July of each year. A copy of each report must be provided to the Minister at the same time. The agencies inspected by the SIM during the year covered by this report are:

- Victoria Police
- Office of Police Integrity
- Department of Primary Industries
- Department of Sustainability and Environment.

14.3 Reports

Inspection reports under the Surveillance Devices Act are posted on the Department of Justice website after being tabled in Parliament.

Inspection Reports under the TI State Act are provided to the Minister of Police and are not publicly available.

There were no own-motion reports by the SIM to the Minister in the year the subject of this report. The SIM did not receive any requests from the Minister or the Attorney-General to provide any further reports.

Excellent cooperation was received from all agencies inspected.

15 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. Alterations to the premises referred to in the previous annual report have been carried out and an IT upgrade has also been carried out.

As indicated in the previous annual report additional staff positions have been established. 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. Consequently, in the year under review, the SIM has recruited 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 and the oversight of telecommunications intercepts and surveillance device powers exercised by the DPI and OPI. Those powers for DPI and OPI commenced on 1 July 2006 (surveillance devices) and 19 December 2006 (telecommunications interceptions). Thus, the OSIM now consists of four staff. The efforts of staff are much appreciated by the SIM. Temporary assistance has also been provided from time to time by other officers from the Department of Justice portfolio. This assistance is also much appreciated and gives OSIM flexibility in staff resources which is important.

16 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.

16.1 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 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.

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 355 per Ellicott J.
5 (1982) 41 ALR 337 at 351 per Fox, Toohey and Morling JJ.

16.2 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.

17 Section 86ZB Reports

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

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

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

- a total of 106 s 86ZB reports were received by the OSIM in the 2006-2007 reporting year (see Chart 1 below "Summonses Issued by OPI")
- the DPI issued 66 summonses (63 per cent) for the purpose of producing information, a document or thing and provided the SIM with the relevant reports within the required timeframe
- the DPI issued 28 summonses (26 per cent) for witnesses to attend for the purpose of giving evidence and provided the SIM with the relevant reports within the required timeframe
- the DPI issued 12 summonses (11 per cent) 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 required timeframe.

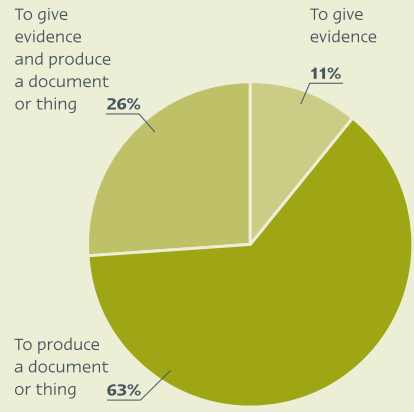


Chart 1: Summonses Issued by OPI

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

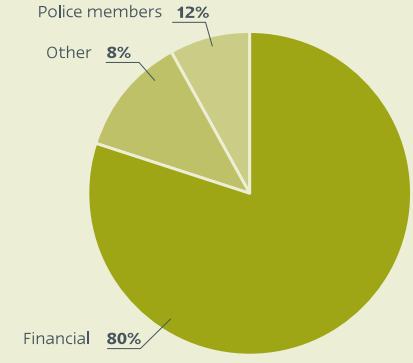


Chart 2: Types of Institutions Summoned to Produce Information, a Document or Thing

6 *Ross and Anor v Costigan* (1982) 41 ALR 319 at 355 per Ellicott J.

17.3 Financial institutions

Summonses to produce a document or thing served on financial institutions again outnumbered all other types of summonses issued. This category of summons comprised 80 per cent of the overall total of documents sought by OPI in the year the subject of this report.

Financial records that were sought and produced included names of bank account holders, 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, to identify any anomalous transactions.

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 OPI include alleged misconduct of police members involving drug related offences including supply, use, possession and trafficking of drugs of dependence; inappropriate associations with persons including drug traffickers and users, members of a motor cycle gang and convicted criminals; improper acceptance of gifts, gratuities or bribes including money and travel benefits; soliciting for and receiving bribes; theft of money and items including thefts during arrests and execution of search warrants; disclosure of confidential information relating to a police informer; involvement of a former Victoria Police member in the deaths of two police informers; money laundering and structuring; unauthorised secondary employment; illegal possession and trade of pirated DVDs; and involvement in the purchase of a licensed brothel.

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 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.

17.4 Other

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

- photographs that evidence the extent of a complainant's injuries from medical records
- hotel guest records, flight details, traveller details and payment methods were sought from a hotel and an airline company. The information obtained was used to identify the travel movements of police members and their companions, and the source of funds used to pay for travel costs.

The above category of summons comprised eight per cent of the overall total of documents sought by OPI in the year the subject of this report.

17.5 Police members

Seven 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 12 per cent of the overall total of documents sought by OPI in the year the subject of this report.

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

Section 86ZD reports were received for interviews conducted under s 86Q of the Police Regulation Act. A total of four s 86ZD reports were received relating to three investigations. In addition, one report under s 105 of the Whistleblowers Protection Act, relating to an investigation of a public interest disclosure was received. Five members were interviewed and all interviews were video recorded.

As referred to in section 17 of the previous annual report an interview of a police member conducted

under s 86Q of the Act is limited in its scope in that it can only relate to a complaint concerning a possible breach of discipline under s 69. A police member can be directed to furnish any relevant information, produce any document or answer any relevant question. The DPI reports to the SIM once a direction is given to a member at an interview as any answers then given or documents produced by the member cannot 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 in relation to s 86Q interviews 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 practice in the previous reporting period in some interviews whereby delegates gave a direction to the police member being interviewed without that member having requested such a direction has ceased. The current practice is that before members have answered any questions at an interview, the delegate has explained s 86Q directions and, if requested by the member, has made such directions in appropriate circumstances. The giving of such directions has been recorded or, if a member has requested a direction prior to the commencement of the recording, this has been confirmed on tape.

In the current reporting period the s 86ZD reports received in respect of each of the interviews conducted under the Act contained sufficient information about the circumstances in which the direction was given. In all cases, the members interviewed had requested the direction, either at the interview (before answering questions) or prior to the recorded interview.

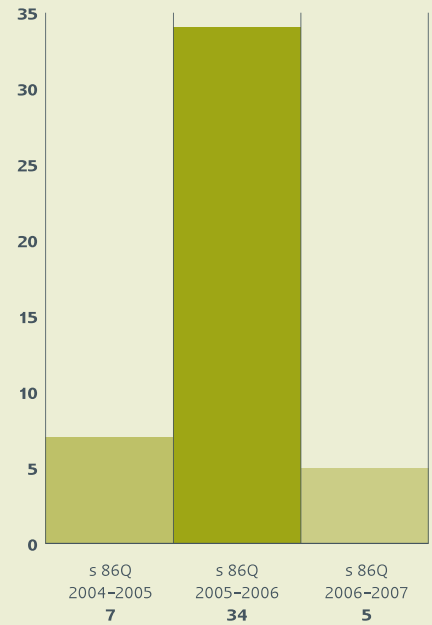
In relation to the s 105D Whistleblowers Protection Act report provided to the OSIM in respect of the interview conducted under that Act, there was an incorrect reference to s 86Q and to an investigation 'under Part IVA of the Act', which is clearly a reference to the relevant part of the Police Regulation Act. However, the authority to make a direction in this matter, being a referral of a disclosed matter to the DPI for investigation under s 43 (Part 5), arises under s 55 of the Whistleblowers Protection Act and the investigation is of a public interest disclosure under Part 5 of the Whistleblowers Protection Act. It is noted that the interviewer had adequately explained that the direction which was given under s 55 of the Whistleblowers Protection Act was equivalent to a s 86Q direction in other matters investigated under Part IVA of the Police Regulation Act and the interviewee appeared to understand this and the consequences of the direction having been given in this matter.

The s 105D Whistleblowers Protection Act report for this matter also incorrectly referred to s 86PB (of the Police Regulation Act) in the particulars relating to the requirement to produce a video recording with the s 105D report (the correct section being s 61BA of the Whistleblowers Protection Act).

In respect of all interviews conducted in this reporting period, including the one under the Whistleblowers Protection Act, 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 below, there was a significant decrease in the number of s 86Q reports received in 2006–2007 (five[7]) compared to the previous year being 2005–2006 (34 received). Nevertheless the SIM continues to be of the view that s 86Q is both appropriate and useful and should continue to be part of the legislative powers held by the DPI under the Police Regulation Act.

Chart 3: Comparison of s 86Q Reports Provided to the SIM by 2004–2005, 2005–2006, 2006–2007



7 One of these was a report in respect of s 55 of the *Whistleblowers Protection Act.*

SUMMARY OF INTERVIEWS UNDER SECTION 86Q OF THE POLICE REGULATION ACT 1958

18.1.1 Investigation of a complaint that a police member had failed to pay for food and drink consumed at a restaurant

This was an investigation into a complaint lodged with OPI that alleged that a Victoria Police member attended a particular restaurant on a specified date and knowingly failed to pay for food and drink consumed at that establishment, despite being asked to do so by staff. This investigation has been completed.

18.1.2 Investigation of a complaint that police failed to respond to a telephone call seeking a welfare check

This was an investigation of a complaint that police at a particular suburban police station failed to respond to a telephone call seeking a welfare check be conducted where the person whose welfare was of concern was subsequently found deceased. This investigation has been completed.

18.1.3 Investigation of a complaint against a police member using excessive force

This was an investigation of a complaint by a member of the public that on a particular date a Victoria Police member used excessive force when he pushed the complainant and levelled a capsicum spray container at the complainant outside a fast food restaurant. This investigation is near completion.

SUMMARY OF INTERVIEW UNDER SECTION 55 OF THE WHISTLEBLOWERS PROTECTION ACT 2001

18.2.1 Investigation of a public interest disclosure referred to the DPI under the Whistleblowers Protection Act 2001

This was an investigation by the DPI under Part 5 of the Whistleblowers Protection Act of allegations which had been determined by the Ombudsman to be a public interest disclosure under that Act. The allegations relate to possible conflicts of interest that may have arisen in relation to a particular police member given his role as a police member and his role as an elected Councillor of a local government municipality. This investigation is near completion.

19 Persons Attending The Director, Police Integrity To Produce Documents

Persons falling into this category are:

- persons who have been summoned to give evidence in addition to receiving a summons to produce
- persons who object to comply with the summons.

In such cases a video recording is made of the person attending 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.

20 Coercive Examinations Reported To The Special Investigations Monitor

Forty-four s 86ZD reports were provided to the SIM between 1 July 2006 and 30 June 2007. This does not include reports relating to s 86Q interviews which are reviewed at section 18 of this report.

Transcripts were provided for 35 of the 44 examinations. All hearings were accompanied by recordings.

The problems reported upon in the previous reporting period concerning faulty recordings have been resolved. Whilst the DPI has not provided recordings in a DVD format which can be viewed on the television facilities at the SIM's office, as requested originally, they have been viewable at the SIM's office. With the benefit of the IT upgrade this is satisfactory to the SIM.

21 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.[8]

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

8 *Police Regulation Act 1958 (Vic)* s 86PD(1).

22 The Need For The Use Of Coercive Powers

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

As stated in the previous annual report, the use of coercive powers for the production of documents or 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 SIM remains of the view that the use of coercive questioning needs to be considered on a case by case basis and that the use of a coercive power should be a last resort where voluntary or other non-intrusive options have been explored and even tested.

Whilst there has previously been some disagreement between the SIM and the DPI as to how the discretion to use coercive powers is to be exercised, as referred to in section 21 of the previous annual report, apart from the Armed Offenders Squad ("AOS") investigation which is referred to later, there were no issues relating to this in the current reporting period.

The SIM will continue to monitor the application of the DPI's policy on the use of coercive powers which is contained in his draft document 'Guidelines for Delegate'[9], under the heading 'Duty to be Fair and Reasonable'. Section 3 of this document confirms the need to only use coercive powers where the circumstances are warranted 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. The SIM will continue to monitor the application of the policy in the next reporting period and, where appropriate, will raise the exercise of this discretion by the DPI or his delegate as the monitoring of this discretion is important in the public interest.

9 This is the delegates' manual which was provided to the SIM in the previous reporting period as a draft. The SIM understands that the manual is still in the process of being developed and is awaiting a further draft.

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

A description of the investigations conducted by the DPI in this reporting period in which coercive powers were exercised is provided in broad terms in section 24 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(4) of the Act. That is, to ensure that persons or investigations are not identified. The AOS investigation has already been publicly identified through public hearings, other publicity and the laying of charges and consequently it is appropriate to identify it in this report.

The DPI reported a total of 11[10] own motion investigations and two complaint generated investigations to the SIM in this reporting period. Own motion investigations again dominated the overall number of investigations undertaken and increased significantly from the previous reporting period. The figures below do not include s 86Q investigations which are referred to separately in this report.

Investigation Type	2006–2007	2005–2006
Own motion investigation (s 86NA)	11	6
Complaint generated investigation (s 86N)	2	2
Further investigation conducted by the DPI (s 86R)	0	1

10 This number includes:
i. The AOS investigation (referred to later in this report) as one investigation because the same own motion determination applied to both of these. The investigation covered two specific incidents of alleged assault by police and originally commenced as an investigation of a complaint.
ii. One investigation in respect of which the own motion determination was made in the previous reporting period but which was not received by the SIM until January 2007.

24 Descriptions Of The Investigations Where Coercive Examinations Were Conducted

There was a slight decrease in the use by the DPI of compulsory questioning in this period as compared to the last reporting period. A total of 32 witnesses were examined,[11] of these, 10 were examined twice and one was examined three times. making a total of 44 examinations conducted in this reporting period.[12] Of the 32 witnesses examined, 26 are serving police members, one is a former police member and five are civilians.

A very general description of each of the investigations utilising coercive questioning is provided below.

24.1 Allegation of improper dealings by police members with drugs purchased for evidentiary purposes in the course of drug offence investigations

This own motion investigation, which commenced in the 2005-2006 reporting period, has been completed by the DPI. The focus of this investigation was the alleged failure of certain members of Victoria Police to properly deal with drugs purchased for evidentiary purposes in the course of drug offence investigations, including allegations of unlawful provision of such drugs to informers. The investigation also extended to allegations that senior members of Victoria Police hindered or obstructed the proper investigation into these matters.

The OPI has advised the SIM that it has approved the preparation of criminal briefs by Ethical Standards Department against two Victoria Police members for four counts of trafficking, one count of conspiracy and one count of misconduct in public office against each member.

24.2 Allegations of assault by members of the Armed offenders Squad and Allegations of police assault of suspects during arrest and interview

An own motion investigation was instigated into allegations of serious misconduct by members of the AOS in relation to two specific incidents where it was alleged that suspects had been assaulted during arrest and interview. The investigation also focused on whether the relevant Victoria Police policies, practices and procedures in relation to, amongst other things, suspect interviews were complied with by members of the AOS or were adequate to prevent or inhibit the alleged misconduct. As such it also investigated whether there was a systematic issue of assault by members of the AOS. Initially, members were examined in private hearings and subsequently in public hearings during which video surveillance evidence of some of the alleged assaults was put to the relevant members. This investigation has been completed and is further referred to later in this report.

24.3 Allegation of police member engaging in unlawful activity in relation to illegal copies of DVDs

This own motion investigation related to alleged misconduct by a Victoria Police member relating to the making, possession or distribution of infringing copies of DVD films in contravention of the *Copyright Act 1968*.

The member was alleged to have been the source of pirated DVDs found during the execution of a search warrant conducted at the home of the member's brother. Whilst no illegal DVDs were found at the Victoria Police member's house during the execution of a search warrant at his home, the member was examined in relation to allegations of his involvement in the making, possession or distribution of infringing copies of the DVDs. This investigation has been completed. As a result disciplinary action has been recommended.

24.4 Allegations of unlawful activity by certain members at a suburban Police station, including soliciting for and receiving bribes and theft during execution of search warrants

This own motion investigation was initially an investigation into allegations that a particular member at the subject police station had engaged in unlawful action including theft, soliciting for and receiving bribes and misconduct in public office, including whether there was adequate supervision of that member at that time and whether senior officers at that police station knew or ought to have known of incidents involving that member. The specific incidents alleged against the members included taking money or alcohol from motorists in return for not charging them with traffic offences.

11 One of these witnesses voluntarily attended an examination without having been issued a summons. This was a civilian witness who was publicly examined during the course of the AOS public hearings conducted by the OPI in this reporting period which are referred to later in this report.

12 The increase in the number of witnesses being examined twice, and in one case three times, resulted from the fact that the AOS investigation involved private and public hearings.

The scope of the investigation was subsequently extended to cover whether this police member and other named members at the particular police station had stolen money and other items whilst executing search warrants. This investigation is continuing.

24.5 Allegation of improper associations between police members and alleged criminals in relation to access by those persons to police equipment and training facilities

This own motion investigation was instigated in relation to allegations that police equipment, including clothing, accoutrement or appointments, had been given to civilians by police members and that those civilians had been given access to unauthorised areas at Victoria Police. The investigation sought to identify the police members responsible for providing the items and access to police training facilities and also extended to a review of policies, practices and procedures of Victoria Police in relation to the security of police equipment and training facilities. This investigation is continuing.

24.6 Allegation of improper disclosure of confidential information for the purpose of obstructing, hindering or resisting the DPI in the course of an investigation under Part IVA of the *Police Regulation Act 1958*

This own motion investigation was instigated in relation to an alleged improper disclosure of an OPI investigation. Specifically, it was alleged that a police member had made an improper disclosure of a report prepared in relation to searches conducted on a database of a unit within Victoria Police. The disclosure was allegedly made to another police member whose name appeared in the report. This investigation is continuing.

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

Chart 4 below provides an overall summary of the incoming material from OPI that relates to s 86ZB, 86ZD and 86Q reports under the Police Regulation Act.[13]

26 Issues Arising Out Of Examinations

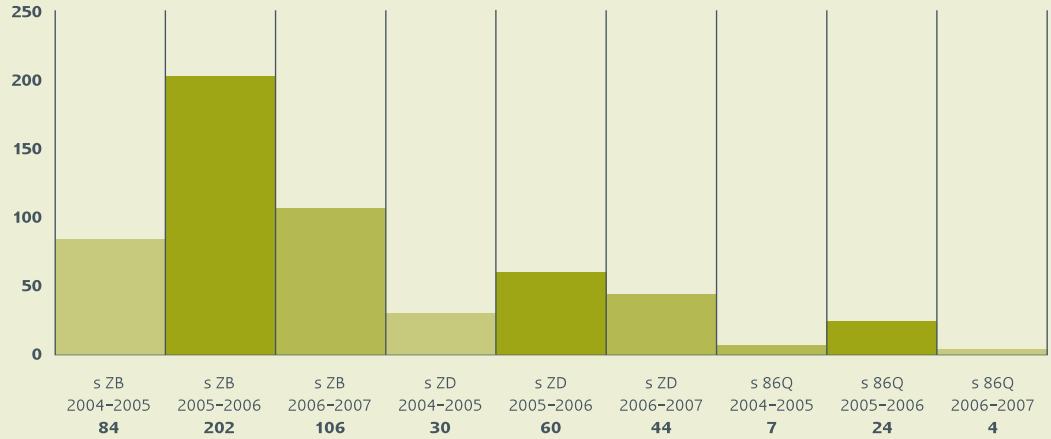
26.1 Summons issue procedures

The procedures employed by OPI when summonses are issued and served, including the relevant policies and guidelines were discussed in section 25.1 of the previous annual report. They continue to be followed by OPI and no issues arose in relation to them during this reporting period.

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

Reference was made in section 25.2 of the previous annual report to the DPI's procedure 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.

Chart 4: Comparison of Reports Provided to the SIM by OPI 2004/2005, 2005/2006, 2006/2007



13 The statistics for the 2004-2005 reporting period commence from November 2004 when OPI commenced operation.

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.

26.3 Viewing of examinations from a remote hearing room

This matter was discussed in section 25.3 of the previous annual report. No concerns relating to confidentiality arose in relation to persons watching an examination from a remote room in this reporting period. The SIM continues to be of the view that the OPI sign-in book for persons watching an examination from a remote room is adequate protection against potential breaches of confidentiality or other problems occurring outside of the hearing room. The sign-in book was inspected by SIM staff on 26 June 2007 and the SIM is satisfied that the book is being adequately completed.

26.4 Confidentiality notices

The power under s 86KA of the Police Regulation Act for the DPI to give a witness a confidentiality notice upon issuing a summons is discussed in section 25.4 of the previous annual report. The recommendation made with respect to this matter (recommendation 1 of 2006) is set out.

26.4.1 Explanation of confidentiality to witnesses

Whilst there has been adequate explanation of the requirements of a confidentiality notice and the penalties applicable for breach of confidentiality in the hearings conducted in this reporting period, there were some issues. These issues, which in essence related to ensuring that a witness understood the confidentiality requirements, were discussed with the DPI. The SIM's concern was that there was clear confirmation of the witness' understanding of these requirements. The DPI maintained that there had been sufficient explanation from the delegate about the confidentiality requirements.

Arising from these discussions about understanding of confidentiality, which is an important matter, a new procedure to be followed with respect to explanations to witnesses evolved. This procedure, which commenced in January 2007 and which is explained at section 26.9 of this report, should ensure that there are no further issues in regard to the explanation of confidentiality and other matters.

26.5 Exclusion and non-publication orders

The effect of the making of an exclusion order and a non-publication order on hearings conducted by the DPI was discussed at section 25.5 of the previous annual report. As stated, the ability to make such orders is a discretionary power given to the DPI under the Police Regulation Act which exists to protect both the integrity of an investigation and the safety and reputation of a witness required to attend compulsorily.

In this reporting period all examinations were conducted in private except for one investigation where some of the police witnesses who had been examined in private hearings were subsequently examined in public hearings. This investigation concerned alleged assaults by members of the AOS on suspects who had been taken into custody. Issues have arisen in relation to these examinations and a complaint lodged with the SIM on behalf of members of the AOS. This matter is further referred to later in this report.

26.6 Confidentiality, serving of summonses and protection of witnesses

There were no issues relating to confidentiality in the context of the service of summonses on witnesses in the period under review. As referred to in the previous annual report (section 25.6), the SIM asked the DPI to review the service procedures employed by investigators to ensure that it is clear to them that witnesses are served in a way which minimises the potential for confidentiality to be compromised.

The SIM will continue to monitor the situation relating to service procedures because a breach of confidentiality can have significant consequences for witnesses and the integrity of investigations.

26.7 Breaches of confidentiality

There were no instances involving breach of confidentiality in this reporting period. However, as potential breaches of confidentiality are a serious matter, the SIM will continue to monitor the situation, including the taking of preventative measures by the DPI.

In relation to witness security, there were no matters in the current reporting period relating to breaches or potential breaches of security. It appears that the DPI's witness security policy, referred to in the previous annual report (section 25.7), has adequately addressed the security issues that may face witnesses. The SIM will continue to monitor this situation.

26.8 Service of summonses on witnesses

The SIM's recommendations 2 and 3 of 2006, which require a reasonable time of service of summonses on witnesses before their required attendance and provision of the time and date of service of a summons in s 86ZD reports respectively, have continued to be applied by the DPI in the period of review. The background to these recommendations

is discussed in section 25.8 of the previous annual report. Whilst no issues have arisen in the period under review, the SIM will continue to monitor compliance with the recommendations and procedural fairness.

26.9 New process to inform witnesses of their rights and obligations – 'Information to Assist Summoned Witnesses'

As a result of earlier discussions relating to the process adopted in the OPI public hearings conducted in September 2006, whereby summoned witnesses were informed of their rights and obligations in a written document given to them at the time of service of the summons, the DPI wrote to the SIM on 14 December 2006 seeking his views on adopting such a procedure in all future cases. In the DPI's view, this procedure is the best way of ensuring that witnesses are fully informed of their rights and obligations. To that date, and in accordance with the SIM's recommendations (1, 4 and 5 of 2006), the practice was for the DPI or his delegate to give an oral explanation to witnesses of their rights and obligations, including those relating to confidentiality, the privileges that apply, and the right to complain.

The new procedure proposed by the DPI, as used in relation to witnesses summoned to attend the OPI public hearings, was for witnesses to be given detailed written advice contained in a document entitled 'Information to Assist Summoned Witnesses' at the time that they are served with a summons. That document contains the following information:

- confidentiality obligations relating to a hearing
- legal representation
- general obligations of witnesses at the hearing
- the privileges that are available to witnesses, including the privilege against self-incrimination and legal professional privilege
- the right of witnesses to make a complaint to the SIM.

In relation to summoned witnesses who are legally represented at hearings, the proposal required that they be asked by the delegate whether they had received a copy of the information document, whether they understood that document and whether they had any questions about its contents. The delegate would also ask the legal representative if he or she had discussed the contents of the document with the witness. If necessary, the delegate would grant a short adjournment to ensure that the witness was provided with the necessary information and advice by his or her legal representative. Once the delegate was satisfied that the witness understood the document and had no questions the examination would proceed. If the witness was not legally represented, the delegate would take the witness through the document and be satisfied that the witness understood its contents before the examination commenced.

At the conclusion of the examination all witnesses would be reminded, by reference to the contents of the information document, of their obligations of confidentiality and of their right to complain to the SIM where the witness considered that he or she was not afforded adequate opportunity to convey his or her appreciation of the relevant facts.

In the DPI's view the early provision of a detailed written explanation of rights and obligations in accordance with the information document, and confirmation by the delegate at the commencement of the hearings that its contents were understood by a witness, had potential to streamline the conduct of hearings while ensuring fairness to witnesses.

Having reviewed the document prepared by OPI entitled 'Information to Assist Summoned Witnesses' and its proposed application in the conduct of OPI hearings, the SIM agreed that the DPI's new procedure was appropriate. However, in the SIM's view the procedure should also deal with the situation of a witness who is to be examined but has not been summoned. In that situation the witness would be provided with the document before the examination commences and otherwise the same procedure followed at the examination hearing.

Accordingly, the SIM made recommendation 1 of 2007, which rescinded recommendations 1, 4 and 5 of 2006 (the information document replacing the need to recite the same detailed information at the commencement and or conclusion of every examination hearing in accordance with the rescinded recommendations).

Recommendation 1 of 2007

Recommendations 1, 4 and 5 of 2006 are rescinded as of 8 January 2007 and in lieu thereof the following procedure, as agreed by the DPI shall apply:

(1) When a witness is served with a summons the witness will also be provided with a copy of the document 'Information to Assist Summoned Witnesses' which document is attached to the letter of 14 December 2006 from DPI to the SIM.

(2) Where a witness is to be examined who has not been summoned a copy of the document will be provided to the witness before the examination commences.

(3) At the examination of any witness the procedure set out by the DPI in the letter of 14 December 2006 will be followed by the DPI or his delegate.

It is noted that the DPI will take the action recommended from 8 January 2007. Adherence to this recommendation will continue to be monitored by the SIM.

27 Legal Representation

The need to make free legal assistance available to witnesses summoned before the DPI was discussed in the previous annual report (section 26). Since then, funding has been provided to Victoria Legal Aid to assist witnesses summoned to appear before the DPI and 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.

27.1 Legal representation and witnesses appearing before the DPI
The role played by the DPI or his delegate in regulating the role played by legal representatives pursuant to his power under s 86P(1)(d) was discussed in the previous annual report (section 26.1). No issues have arisen in the period under review in relation to the role of legal representatives during examinations. The practice of inviting legal representatives to make submissions at the conclusion of questioning has continued.

27.2 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 29 applications were granted in this reporting period.

The proportion of police witnesses who were legally represented increased in the current reporting period, being 96 per cent compared to 81 per cent in the previous reporting period. The proportion of civilian witnesses who were legally represented also increased in this reporting period, being 60 per cent compared to 19 per cent in the previous reporting period. The figures below display a breakdown of legal representation for the current and previous reporting periods.

Legal Representation	2006–2007	2005–2006
Police witnesses legally represented during examination	25	38
Police witnesses not legally represented during examination	1	9
Former police members legally represented during examination	1	0
Former police members not legally represented during examination	0	2
Civilian witnesses represented during examination	3	2
Civilian witnesses not represented during examination	2	8

28 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 was explained in the previous annual report (section 27). Leaving aside the AOS examinations, which are referred to later, the SIM is satisfied that the questioning of all witnesses in this reporting period was relevant to the investigations the subject-matter of the hearings. However, in one examination a line of questioning was commenced, which, if pursued, would not in the SIM's view have been relevant. The terms of reference for the subject investigation, as set out in the DPI's determination, related to particular acts of corruption alleged against a particular Victoria Police member working at a particular suburban Police station. The proposed questioning of the witness sought to elicit evidence about the witness's knowledge of other acts of corruption by other members at that Police station relating to the execution of search warrants. At that point counsel for the witness sought an adjournment to confer with his client before this question was answered. After that adjournment the OPI examiner advised the delegate that he would not be proceeding with that line of questioning. In the SIM's view, the OPI examiner was correct in not proceeding with that line of questioning as it was not relevant to the purpose of the investigation.

It is noted that subsequently the DPI issued an expanded determination in relation to this investigation which covered the issues relating to alleged corruption by other members at the particular station when executing search warrants. The witness was then served with a further summons and a further examination was held for the purpose of questioning the witness on matters relating to his experience with warrant crew members at the subject police station and in particular whether he had ever been asked not to log certain items seized by the warrant crew in the log book.

The SIM will continue to monitor questioning as to relevance and raise with the DPI any concerns arising over a particular line of questioning as it is one of the central functions of the SIM to ensure the integrity of the use of coercive questioning power.

29 Length Of Hearings

The SIM's concern that examinations not take longer than is reasonably necessary was discussed in the previous annual report (section 28). In the period under review no issues arose concerning the length of time of the examination or the overall duration of a person's attendance at OPI in answer to a summons.

Where attendances may appear to have been unduly long, the s 86ZD report has provided additional information with respect to the circumstances of that witness' length of attendance.

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.

30 Mental Impairment

The measures to be taken by the DPI or his delegate under s 86PC(6) of the Police Regulation Act if they form a belief that a witness has a mental impairment were discussed in the previous annual report (section 29). 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.

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. Further, there were no concerns relating to mental impairment raised by the SIM in relation to any witnesses examined in the period under review.

31 Witnesses In Custody

The power of the DPI under s 86PE(2) of the Police Regulation Act 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 was discussed in the previous annual report (section 30).

In the period under review, two of the witnesses examined, both being civilians on remand, were brought before the DPI's delegate for examination pursuant to a direction under s 86PE(2) of the Police Regulation Act.

There were no cases in the period under review where the DPI used an alternative to s 86PE(2) of the Act to bring a prisoner before the DPI for examination, as was the case in the previous reporting period. As stated in the previous annual report, the SIM has continued to monitor the use of alternative means by the DPI to the use of the powers provided under the Police Regulation Act. The powers under the Police Regulation Act are 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.

32 Explanation Of The Complaints Procedure

As referred to in section 31 of the previous annual report, the SIM considers that persons who are being coercively examined should be informed of their right to complain even though the legislation does not explicitly require this.

For the period up to and including 8 January 2007,[14] there has generally been a consistent approach by the delegates in explaining the complaint procedure before the commencement of questioning in accordance with the SIM's recommendation 4 of 2006. Delegates have generally informed witnesses of their right to complain to the SIM before questioning at an examination commences or before a witness produces any document or thing in accordance with this recommendation. However, there were three cases in which the explanation was not given until after the examination.

14 Since 8 January 2007, the SIM's recommendation 1 of 2007, referred to above, has been implemented.

33 The Use Of Derivative Information

As referred to in section 32 of the previous annual report, the protection afforded to a witness who has been granted a certificate under the Police Regulation Act in respect of documents or other things or given evidence at a hearing does not extend to the use of derived information by investigators. The SIM's view was that it should still be explained to a 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.

Although there were no explanations given to witnesses as to the derivative use of their evidence, the issue did not arise during the course of the hearings reviewed in this period. Nevertheless, it was referred to in the context of one hearing in the course of submissions made by counsel representing the witness relating to the application of s 86P(3) and (4) of the Act in light of the High Court decision in *Hammond v The Commonwealth (1982) 152 CLR 188.*

In this hearing counsel for the witness submitted that because criminal charges were imminent against his client, it was an abuse of process for the examination of him to continue in the circumstances in accordance with the *Hammond* principle. In this case no charges had been laid against the witness at the time of the examination and there were therefore no proceedings were on foot at the time as referred to in s 86P(3) of the Police Regulation Act. In making submissions as to why the examination of the witness should not continue in these circumstances, counsel also raised concern about the derivative use of any evidence which would be given by the witness and which may assist in the prosecution of the witness for the alleged offences which were being investigated.

The position put by the OPI examiner was that s 86P(3) allows the DPI to proceed even if charges have been laid (which in this case had not been the case). Counsel for the witness maintained that this provision refers to an investigation, and that he was not suggesting that the investigation as such should not continue, only that the examination of the witness should not proceed. Counsel referred to the Hammond case, where the High Court found that it would be a contempt of court to continue with the examination in that situation but that the enquiry itself could properly continue. In his submission it was an abuse of process to continue the examination of the witness in circumstances where:

- the witness had been the subject of two formal records of interview pursuant to the provisions of the Crimes Act by members of the Ethical Standards department in relation to allegations which were the same as or arose out of the purpose and ambit of the DPI's current investigation. In both of these interviews, the witness had maintained his right to silence
- criminal proceedings were very likely or expected to be commenced against the witness
- to require a person to answer questions when criminal proceedings were very likely to be instituted in due course improperly interfered with the judicial process.

In response the delegate queried whether the judicial process had started and also noted that in the Hammond case there was no provision such as s 86P(3) of the Act which the court had to consider. In any event, it was agreed that in view of the indication about the questions to be asked in this examination, namely that the witness would not be asked questions about his own involvement in the alleged misconduct but of the involvement of others, it was not necessary to make a decision on the interpretation of this section at that time. That is, the witness would not be asked questions about his own culpability. In passing, the delegate commented that he had hesitations about counsel's interpretation because in his view that interpretation would mean that ss 86P(3) and (4) of the Act really do not have much operation – they are almost superfluous in the legislation. Counsel disagreed, saying this was an argument for another time, and that he wished to state it for the record that these may be arguments to be raised at another time and place. As the issue did not have to be resolved at that time for the reasons referred to above, the examination of the witness then continued.

Whilst the SIM has no difficulty with the way in which the delegate dealt with this issue on this occasion, he is of the view that it may raise difficult issues that may need to be resolved by the DPI on another occasion. The DPI agreed and considered that in the circumstances the matter had been dealt with by a common sense approach by the parties.

The SIM agrees with this view and will continue to monitor these important issues when they arise in OPI hearings.

34 Certificates

As discussed at section 33 of the previous annual report, the certification procedure provided under s 86PA of the Police Regulation Act provides a statutory immunity to a witness against the use of material or evidence given by the witness at a coercive hearing 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:[15]

- perjury or giving false information
- a breach of discipline under s 69
- failure to comply with a direction under s 86Q
- an offence against s 19 of the *Evidence Act 1958*[16]
- a contempt of the DPI under s 86KB.

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.

35 Issues Arising From Section 86PA and the common law privilege against self-incrimination

The application of the privilege against self-incrimination to OPI hearings and the exercise of the discretion to grant a certificate to a witness pursuant to s 86PA(4) of the Police Regulation Act was discussed in sections 34, 35 and 36.2 of the previous annual report. Reference was also made in these sections to the advice obtained by the SIM from Mr John Butler, Crown Counsel (Advisings). On the basis of this advice, it is clear that before a certificate can be granted pursuant to s 86PA(4) the issue of self-incrimination has to 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. Once a certificate is granted it extends only to the incriminating evidence.

15 Section 86PA(8) of the *Police Regulation Act 1958 (Vic)*

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

The practice observed in the previous reporting period amongst delegates of granting blanket certificates to witnesses prior to the commencement of questioning or production has ceased. In the SIM's view, s 86PA(4) has generally been administered in accordance with the advice received by Mr Butler and referred to in the previous annual report. When an issue of self-incrimination has arisen in hearings, the delegate has considered whether the privilege does in fact apply. Upon being so satisfied, the delegate has proceeded to consider whether it is in the public interest for the evidence to be given and if so, has granted a certificate to the witness in respect of the relevant evidence. Although this reasoning has not generally been stated in the hearings during the period under review (and is not required to be stated), the s 86ZD reports have articulated this line of reasoning having regard to the particular circumstances relating to the witness and the evidence to be given by that witness. It can be inferred from this information and what has been said during the hearing by both the OPI examiner and the legal representative for the witness that the delegate has considered each case based on his knowledge of the investigation and the type of allegations that can be put to a witness arising from the evidence.

Most certificates issued in the examinations reviewed in this reporting period have been confined. However, in relation to the examination of three witnesses during the course of the AOS public hearings conducted in September 2006, it appears that some of the certificates granted had a blanket application (whether or not this was intended). The certificates were granted in respect of the evidence on the particular matter which was said to incriminate the witness and 'any other matter', thereby appearing to give the certificate a blanket application. Although the DPI has stated to the SIM that he does not agree that these certificates had a blanket application, he is in general agreement that certificates require as much specificity as is practicable having regard to the circumstances. Regardless of whether the subject certificates had such application in the particular cases, the SIM considers that it is important to ensure that certificates are confined to answers which may incriminate the witness. On this point, the DPI agrees.

In all other examinations, it appears that, given the generally robust discussions that took place during the course of the public hearings in relation to the granting of certificates, the intention has been to issue confined certificates.

There was one application made for a certificate in the reporting period which was refused. No reasons were given in either the s 86ZD report or during the

course of the hearings for refusing the application for a certificate by this witness.[17] Whilst there were no other applications for certificates which were refused, robust debate took place in some hearings relating to applications for certificates by or on behalf of witnesses. In these hearings, the legal representative who had raised the issue of a certificate did not proceed with making an application in the circumstances, having regard to, *inter alia*, whether there were any allegations being made against the particular witness and the purpose of the proposed line of questioning.

35.1 The application of the privilege against self-incrimination in OPI hearings

There were two issues relating to an application by the witness of the privilege against self-incrimination which arose in the course of some hearings during the reporting period. These issues were:

- the position taken by the DPI's delegate that where a witness has denied all allegations made against him or her, there has been no incriminating evidence given which supported the application and granting of a certificate to that witness
- the approach taken by the DPI's delegate in asking witnesses about the truth or accuracy of their evidence after they have been granted a certificate in circumstances where a view has been formed that they have not given any incriminating evidence.

In the two subject cases, the witnesses had denied all the allegations made against them relating to the assault of a suspect taken into custody. The delegate raised his concern about having granted certificates in circumstances where no incriminating evidence had apparently been given by the witness. In both cases he raised this with the respective witnesses and gave them an opportunity to reconsider and change their evidence if it was incorrect or inaccurate, noting that they had the protection of a certificate.

At the end of one of those examinations, the delegate addressed counsel noting that he had indicated to him that there was going to be something which would incriminate the witness. Counsel said that 'may tend to incriminate him.' The delegate stated that nothing had come out of the witness' evidence and queried counsel as to what the witness had said to him and about the witness' instructions. The witness replied that he was unaware that he was going to be asked about any assaults on the date in question before he attended that day. He maintained his evidence that there was no assault on the suspect on the date in question. The delegate then requested counsel to be careful when requesting certificates because the tests are quite strict and they should not be granted unless they are required. Finally, the delegate queried the witness as to whether he was satisfied that his evidence was true and correct, to which he replied in the affirmative.

The DPI responded to these issues raised by the SIM as follows:

- whilst a false denial under oath may be a matter that might tend to incriminate a witness, s 86PA(8) of the Act operates to remove the protection of a certificate in respect of *(inter alia)* perjury, providing false information and a breach of discipline
- in each of the subject cases, the delegate was justified, having heard the evidence of the witnesses, to return to the reasons offered by the witness for the granting of the certificate. Probing by the delegate about the truth or the completeness of the evidence provided by the witness may be justified and relevant, depending on many factors which may or may not be present in any particular case. A witness who has simply denied matters put to him or her may have had second thoughts or may need some encouragement to provide the potentially incriminating evidence. Therefore a delegate may properly decide to raise this issue with some witnesses who have sought and obtained certificates, but not with others.

Whilst that response was helpful in understanding the approach taken by the delegate in these two cases, the SIM considered that it was important to discuss the issue of self-incrimination, particularly in cases where the witness denies all allegations made against him or her. In the SIM's view a false denial at an examination could later be sought to be used against a witness in criminal proceedings on the basis, for example, that it evidences a consciousness of guilt or affects the witness' credit. In these circumstances, s 86PA(8), would not, in the SIM's view remove the protection of a certificate as suggested by the DPI.

The SIM has met with the DPI to discuss difficulties with the application of self-incrimination and, in particular, these two issues. As discussed in that meeting, the SIM considers that self-incrimination is a difficult area because it cannot be predicted what will happen later that affects the position of a witness. In the SIM's view, once an area of examination is raised where some criminal conduct may be involved and in which a witness may be implicated, a conservative approach in favour of the witness should be taken. In respect of denials made by a witness, it can never be known for certain how a denial by a witness may be used forensically in a

17 This is discussed later in this report at section 42.2

subsequent prosecution of that witness – it may be shown to be a false denial indicating a consciousness of guilt, or to show inconsistency with other evidence or it may be used where the witness exercises his/her right of silence. An implied admission may be used to the prejudice of the witness.

This issue also arose during the course of the AOS public hearings. Submissions were made by Mr Holdenson QC on behalf of one of the witnesses as to when the privilege against self-incrimination can be claimed. The delegate asked Mr Holdenson how the witness can have a genuine belief that if he answers the questions it may tend to incriminate him by being an admission of an offence or some link in the chain of evidence, given that this witness had previously denied all allegations. In response, Mr Holdenson submitted that the witness' answer may in combination with other evidence which may be given in another place, constitute a part or a link in a chain which may tend to incriminate the witness in that other place, whether or not it does so now before this hearing. He also referred to the High Court decision in *Reid v Howard*[18] as support for the proposition that the privilege against self-incrimination is something which can indeed attach and be the subject of a claim by the innocent.

As stated, in the SIM's view a conservative approach in favour of the witness should be taken at examinations where it is clear that some criminal activity is being raised with the possibility of some involvement or complicity by the witness. In those circumstances a certificate may be granted to the witness as the public interest may prevail in favour of the grant of a certificate in those circumstances.

Since this issue was raised with the DPI, there have been no further difficulties and the approach suggested by the SIM appears to have been generally taken by the DPI's delegates in granting certificates in the reporting period.

Given that s 86PA is clearly a difficult provision to administer, it will be considered in the SIM's s 86ZM Report. For this purpose the SIM has specifically requested submissions from OPI as to the issues arising with the granting of s 86PA certificates. In particular, whether the OPI legislation should be the same as the Chief Examiner legislation where the privilege against self-incrimination is abrogated, with a restriction on the use of the evidence given.

The second issue discussed at the meeting with the DPI in relation to the granting of s 86PA(4) certificates was the approach taken in some cases of following up the truth and accuracy of a witness' evidence after they have been granted a certificate in circumstances where the delegate had formed a view that they had not given any incriminating evidence. Whilst it is appropriate, in the SIM's view, to ask the witness to confirm their evidence and the correctness of that evidence noting that a certificate has been granted, it is not appropriate, to challenge the *bona fides* of a witness' claim of self-incrimination in the light of their evidence as this is not a part of the examination function. Generally, no issues in this regard arose in the reporting period, although in one case the delegate appeared to suggest that a witness, who had been granted a certificate, had committed perjury. This is a matter that is the subject of other issues relating to the AOS public hearings. Whilst asking a witness to confirm their evidence may be an appropriate line of questioning, it is not, in the SIM's view, part of the examination function to assess the evidence given.

36 Procedural Issues

A number of procedural issues relating to certificates were discussed in the previous annual report (section 36). There were no issues in the period under review regarding the methods by which applications for the granting of certificates were made and the handing of certificates to witnesses.

36.1 Handing of certificates to witnesses

Section 86PA(7) states that if the DPI 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 all cases where a certificate was granted in this review period, it was done prior to the witness giving the incriminating evidence. A copy of the written certificate was given to the witness or his/her counsel before requiring the person to give evidence or produce a document. This is in accordance with the advice given by Mr Butler as summarised in section 36.1 of the previous annual report.

In one case, an objection to answering questions on a particular matter which was considered to be incriminating was not taken until after initial questions on that matter had been asked and answered by the witness. A certificate was then applied for and granted. Counsel for the witness, having stated that it was an inadvertent oversight

18 (1995) 131 ALR 609.

on the witness' part that he did not object to giving evidence as soon as the questions relating to the particular matter were asked, submitted that in his understanding the certificate covers the answers given thus far in relation to the subject matter identified in the certificate. However, the delegate was of the view that the Act may constrain that effect as the certificate has to be given before the answers are given. Counsel submitted that his reading of sub-section (8) of s 86PA is that it is not necessary that the certificate has to happen chronologically before the answers are given – the certificate relates to the subject matters of the answers whether it is before or after. Further debate on that issue was left for another day as it was not necessary to resolve it for the purpose of continuing the hearing, the delegate having granted a certificate to the witness in the terms agreed. As subsequently discussed with the DPI, it is the SIM's view that a court would take the view that the certificate should protect the witness in these circumstances. The failure to object earlier was clearly due to oversight. The DPI agrees with the SIM's view that in the event of a minor irregularity or oversight in the process of granting a certificate such as occurred in the subject case, a court would most probably give the witness the benefit of the protection of the certificate.

The SIM will continue to monitor the application of s 86PA as it is an integral part of the coercive powers that are granted.

36.2 Certificates issued

A total of 32 witnesses were compulsorily examined in the 2006-2007 reporting period.[19] Of these witnesses, 26 are serving Victoria Police members at the time of questioning. One of the witnesses is a former member and the remaining five are civilian witnesses.

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 one case as delegate.

There was only one examination in which the delegate refused to give the witness a certificate. However, no reasons were given by the delegate. This is discussed further later in this report.

19 This total is exclusive of s 86Q examinations.

Certificates	Numbers
Blanket certificates granted on the application of witness	3*
Blanket certificates granted on the initiative of delegate	0
Confined certificates granted on the application of witness	21**
Confined certificates granted on the initiative of delegate	1***
Certificates refused by delegate	1
Application not made for certificate	20****

Notes to table

*As discussed at section 35 of this report, the DPI does not agree that these were blanket certificates. In the SIM's view, the wording of the certificates appeared to give them a blanket application, whether or not this was intended.

**Some witnesses were examined more than once and some were granted more than one certificate as their examinations ran over the course of more than one day. Each certificate granted is included in this number.

***This certificate was granted to a civilian witness who was not legally represented at the time of the examination. The delegate raised the issue of self-incrimination noting that the witness was not legally represented as he considered that the questions to be asked of him may incriminate him. The OPI examiner agreed that the witness may incriminate himself in answering questions asked of him in relation to certain items that were found in his possession and also in relation to issues relating to the Firearms Act 1996. The delegate noted that if the witness was represented he would be advised to claim the privilege in his case and it would be appropriate to say in the circumstances that the privilege does apply. He explained to the witness that the privilege against self-incrimination has been claimed for him and that a certificate would be issued to override the privilege against self-incrimination so that he would be required to answer questions put to him. After the delegate explained to the witness the consequences of a certificate being issued, a copy of the issued certificate was shown to the witness. The SIM agrees with the approach taken by the delegate in issuing a certificate to the witness on his own initiative in the circumstances of this case.

****As noted above, some witnesses were examined on more than one occasion and this number includes each examination at which an application for a certificate was not made by a witness.

37 Complaints

The SIM's jurisdiction under s 86ZE of the Police Regulation Act in relation to complaints was discussed in the previous annual report (section 37). As stated, 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 three days after he or 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.

The SIM received a total of seven complaints in this reporting period. However, six of the complaints were either not made pursuant to s 86ZE or did not fall within the SIM's 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). One complaint received by the SIM concerned media publications involving OPI in the context of pending or current criminal proceedings against police members, which is discussed at section 38 below as it raises important issues relating to the consequences on the fair trial of accused persons.

The SIM therefore could not review these matters or assist the complainants in relation to the matters raised, most of which related to the adequacy of an OPI investigation or the failure of OPI to conduct an investigation into a complaint. These are matters that could be raised with the Ombudsman under his general jurisdiction with respect to OPI. As the DPI and the Ombudsman are the same person it is the SIM's understanding that OPI matters are handled by the Deputy Ombudsman. Whether this is a satisfactory situation is being addressed in the SIM's review of OPI pursuant to s 86ZM of the Police Regulation Act.

37.1 Complaint regarding the decision to conduct and the subsequent conduct of public hearings relating to the Armed Offenders Squad investigation

The only complaint received that the SIM has acted upon is that relating to the AOS public hearings. This complaint was made in writing to the SIM by the solicitor representing nine members of the former AOS who had been publicly examined following their initial private examinations. The solicitor raised issues about the power of the DPI to conduct the public hearings, the purpose of the hearings, the fairness of the examinations and procedures followed and the relevance and appropriateness of questioning at the public examinations.

The correspondence from the solicitor and details of the basis of the complaint were forwarded to the DPI for comment. He queried the basis upon which the matter was being raised with him. The SIM pointed that basis out to the DPI referring to the fact that coercive examinations were involved, the SIM's function pursuant to s 86ZA of the Act, to monitor compliance with the Act by the DPI and his staff and assess the questioning of persons attending before the DPI, the matters to be covered in the annual report in the light of s 86ZL of the Act and that s 86ZM of the Act requires the SIM to report, *inter alia*, as to the adequacy of the performance of the DPI and his staff in exercising the coercive powers.

Subsequently, the DPI has provided to the SIM detailed information and views concerning the matters and issues that have been raised. In response to an offer from the DPI, the SIM and members of his staff have inspected the OPI files relating to the AOS investigation.

The DPI in his responses has strongly defended the procedure followed in the AOS investigation and strongly maintained that the public hearings were a proper exercise of his powers and were fair and appropriate.

Section 86ZM of the Act requires the SIM to report to Parliament before 16 November 2007 on the operation of Part IVA of the Police Regulation Act. The report must include the opinion of the SIM as to the need for the DPI to have the various coercive powers conferred on him including the power to coercively examine persons and to do so in public. The report must also include the opinion of the SIM as to the adequacy of the performance of the DPI and the OPI in exercising those powers.

The SIM is in the course of preparing the s 86ZM Report.

The AOS investigation issues relate to the annual report and the s 86ZM Report. Initially, the SIM had intended to review the matter fully in the annual report and set out his views in that report and then consider it further in the s 86ZM Report.

On reflection, the SIM considers that it is not desirable to have the consideration of the matter covered in two reports. It should be done comprehensively in the one report. The SIM considers the appropriate report to do this is the s 86ZM Report.

Consequently, no further comment about the matter will be made in this annual report and it will be fully reviewed and the SIM's views set out in the s 86ZM Report. In that report the matter will be considered, inter alia, as part of the assessment of the adequacy of the DPI's and OPI's performance, the need for the DPI to have the power to coercively examine persons and to do so in public and, if so, the form that power should take.

38 OPI and the Media – issues relating to potential prejudice to fair trials

In the period under review the SIM received a complaint from the solicitor representing a police member whose criminal trial was adjourned for two months as a result of an alleged OPI media publication on the day that his trial was due to commence. His Honour Hart J ruled that there was a risk of the member not receiving a fair trial as a consequence of the publication and it was better to grant an adjournment instead of running the risk and trying to repair the damage through judicial direction.

As referred to in section 37 above, this was not a complaint that fell within the SIM's monitoring jurisdiction under the Police Regulation Act, however it has raised issues which the SIM considers relevant for the purpose of his review of OPI under section 86ZM of the Act.

In making this complaint, the solicitor raised other previous instances where it was alleged the DPI has made comments in the media during the course of criminal hearings involving police members which had the potential to prejudice the fair trial of the subject police members. Two cases were referred to where it was said the comments apparently made by the DPI were subject to critical judicial comment.

Further, it was brought to the SIM's attention that the OPI report tabled in Parliament on 15 November 2005 had appended to it an advice by the Director of Public Prosecutions ("DPP") cautioning against the publication of material which might prejudice pending trials involving allegations of police corruption.

The SIM also received a complaint from The Police Association about the use of media by OPI, and in particular, to the most current matter relating to the police member whose trial had been adjourned for two months as a result of the OPI media publication. The Police Association also referred to two other instances of OPI media releases during the course of criminal trials involving police members. In respect of one of these cases, The Police Association expressed the view that the trial was initially aborted due to the impossibility of the accused receiving a fair trial because of the media coverage that was either generated, or contributed to, by OPI. In respect of the other trial, The Police Association referred to a two page article in a metropolitan newspaper that became the subject of an address by counsel to the trial judge.

The SIM's response to the issues raised by the above correspondence was that whilst they did not fall within the SIM's jurisdiction to investigate complaints under the Police Regulation Act, they did fall within the scope of the review that the SIM is conducting under s 86ZM of the Police Regulation Act. In advising the DPI of his position, the SIM also referred to s 86P of the Police Regulation Act, as he considered it to have some relevance to this issue in so far as it recognises the importance of not prejudicing proceedings which are on foot or which have been instituted.

For the purpose of the s 86ZM review the SIM therefore requested from the DPI his response to the issues raised, being in essence, the potential prejudicial effect on the fair trial of police members as a result of OPI media releases. In particular, the DPI was asked to respond to the following questions:

- whether OPI had knowledge of the pending or current criminal proceedings at the time of the relevant media publications
- if so, whether consideration was given to any possible prejudice to the fair trial of the subject police officers as a result of the anticipated media publications, and
- what safeguards (including any relevant policies, practices and procedures) does OPI have in place to minimise the risk of prejudice to criminal trials of police members that are proceeding or pending which may be caused by OPI media releases.

The DPI provided a detailed response to the issues raised by the two complaints and addressed each of the specific trials referred to. In summary, the DPI noted that in most of the trials referred to, the releases were made in the context of the DPI's statutory duty to report to Parliament annually, and that in those cases where extracts from his report

were published, or comments were made by him to the media about these reports, every effort was made to ensure that they would not prejudicially affect any current or pending criminal proceedings. This and other relevant responses are summarised below.

(1) In relation to one of the trials, the comments attributed to the DPI and to his Assistant Director in the subject newspaper article were made in response to intense press curiosity about the contents of his impending first annual report to Parliament. The comments were, as noted by the trial judge, kept general in an effort to avoid any danger to matters then current. In that trial His Honour ruled against the application by the defence for the discharge of the jury as he did not consider that the publication of the general findings by Mr Brouwer had caused any prejudice to the fair trial of the accused.

(2) In relation to the particular media publication concerned, the DPI noted that his annual report had been examined by the OPP prior to its release in an attempt to avoid the danger of compromise to the matters then on foot. Further, that the cautionary note to the media by the OPP was negotiated prior to the release of the DPI's annual report.

(3) In relation to one of the trials, the DPI pointed out that he had made no statements to the media concerning the matter the subject of this trial, and that the subject article did not assert or indicate that he had. He wrote to the Chief Justice pointing this out as soon as the comments of the trial judge about venturing into the public arena came to his attention. The DPI maintained that the information contained in the relevant media article was not provided to the reporter by OPI nor could the article reasonably be read to have implied this. Further, none of the material in the article drew any attention to the two accused police members.

(4) In the trial where the jury was discharged by the trial judge, the DPI advised that this was following the press coverage of his review of the Police Witness Protection Program tabled in Parliament on 19 July 2005. The DPI pointed out that the trial judge was not able to say from reading the subject newspaper article whether the subject quotations were from the DPI's annual report or from a press conference held with the DPI after the tabling of the report. In fact, the DPI clarified that the article was based entirely on the content of his report and that he did not hold any press conference. Further, that his report to Parliament did not mention the name of the accused police member the subject of this trial.

(5) In respect of the DPI's review of the adequacy of the Witness Protection Program and the safety of witnesses, the DPI pointed out that was a matter which, given the murders of two protected witnesses at the time, was a matter which he had a duty to inquire into and to report publicly at the earliest possible time. It was impossible to conduct this review and to report to Parliament without making reference to the murdered witnesses and that in doing so, the reference to them was made strictly in the context of the safety of witnesses and the adequacy of the Witness Protection Program.

(6) In relation to the timing of the release of his annual report, the DPI stated that, to his recollection, he was aware of the proximity of the commencement of the subject trial to the time he had planned to release his report. Prior to the tabling of his report it was the DPI's view that nothing in his report could reasonably been seen as likely to impinge on the trial of the subject police member. He felt that that view was, and remains, a reasonable view. Nevertheless, the trial judge chose to discharge the jury.

(7) In relation to the newspaper article referred to in one of the trials in respect of which the trial judge made critical comments, the DPI was not able to comment as details of the subject article were not provided. In respect of the trial of the subject accused police member, the DPI explained that he had withheld his annual report from publication in order to avoid interference with the proceedings.

(8) In relation to the most recent trial, the DPI was not aware of the pending criminal proceedings against the subject member at the time that he and his Assistant Director, Mr Ashton, were interviewed by the Herald Sun (about a week before the commencement of the trial). They were interviewed about the achievements of OPI since its establishment and were advised by the Herald Sun that it would be a feature article at some time in the future. Although OPI maintains close contact with the Corruption Prosecution section of the Office of Public Prosecutions, OPI was not made aware of the subject trial until after this press conference was held. The information about the commencement of the subject trial on the Monday came to OPI from the CEJA taskforce on the Friday before the Monday commencement. Although the DPI was made aware on the Friday that the Herald Sun would publish an article on the Monday, he made no comments at that time which could conceivably have affected the subject trial. In respect of the subject article, the headline

"Dozens of Police Bent"[20] and other such language in the story could not be attributed to anything Mr Ashton or the DPI had said to the Herald Sun then, or at any other time. The DPI further pointed out that the comments he made at the press conference, were measured and moderate and could not reasonably be anticipated to cause interference with the subject trial. It was noted by counsel making the adjournment application on behalf of the accused that the allegations of corruption referred to in the article were not of wholesale corruption but of more limited scope. The remainder of the comments attributed to the DPI in the article were directed at addressing comments made in a public statement by former NSW Royal Commissioner Donald Stewart that there is widespread corruption in Victoria Police and that a Royal Commission is required. The DPI considered these as being inaccurate and based on an imperfect understanding of certain facts concerning the prevalence of corruption and of the system in place to deal with it. He also made certain comments about the police discipline system. The DPI considered that as the statutory officer with actual responsibility for these issues, it was appropriate for him to respond at that time to Mr Stewart's comments and to give the Victorian community the facts as he believed them to be.

As for the issues raised by the SIM in relation to potential prejudice to pending or current criminal proceedings and safeguards in place to ensure that this does not occur as a result of OPI media releases the DPI said:
My office maintains a good liaison with the relevant section of the OPP's office, and with ESD and Victoria Police generally. I make all reasonable efforts to be aware of the progress of prosecutions against police – most of which ... originate from special Victoria Police taskforces or ESD and are dealt with by the OPP without any direct input from my office.

All public comments originating form this office are carefully considered in terms of the accuracy of their content, their impact on OPI investigations, Victoria Police investigations and any current or future legal proceedings.

Bearing in mind the importance of the matter it was felt appropriate to set out the DPI's position in some detail.

The SIM accepts the DPI's explanation in relation to the complaints made about the subject media releases and that OPI has safeguards in place to minimise the risk of prejudice to criminal trials of police members that are proceeding or pending which may be caused by OPI media releases or other publications or public comments. It is a difficult and sensitive area where there can be competing public interest considerations involved and careful judgements required. It is important that the DPI be able to publicly report on police corruption and it is also important that the fair trial of accused persons not be prejudiced. The SIM accepts that the DPI is conscious of these matters. Clearly, there have been some difficulties arising in relation to the DPI's statutory obligation to report to Parliament annually. This area and these matters will be the subject of further comment in the SIM's s 86ZM Report.

39 Search Warrants

Division 3 of Part IVA of the Police Regulation Act gives the DPI powers of entry, search and seizure. This matter was reviewed in the previous annual report at section 38.

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. The SIM has been informed by the DPI that in the reporting period the subject of this report there were four occasions on which the OPI exercised its power under s 86VB to enter, seize and inspect premises of public authorities.

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.

The SIM has been informed by the DPI that in the reporting period the subject of this report there were no warrants executed by the 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 was the subject of some preliminary discussions between the SIM and OPI in the previous reporting period.

The search warrant provisions will be analysed for the purposes of the s 86ZM Report and the SIM's opinion on the operation of these provisions will be set out in that report.

20 Moor, K., 12 February 2007, Herald Sun Newspaper.

40 Meetings With The Director, Police Integrity And Cooperation Of The Director, Police Integrity

The SIM and his staff continued to have meetings with the DPI and his staff in this period. The OSIM has continued the practice whereby reports and recordings relating to attendances by persons on the DPI are reviewed by the OSIM and a letter outlining any issues or other matters arising from the review is provided to the DPI every three months.

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 period under review.Some of the issues that arose from these reviews have been discussed in this report and do not require further discussion.

Other procedures implemented in the last reporting period include the provision by OPI to the SIM of 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 OPI has provided final and interim reports on investigations on a six-monthly basis, and in some cases earlier depending on the progress of investigations.

In addition to the above, the OSIM continues to provide 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 OSIM 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.

41 Compliance With The Act

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

All s 86ZB reports received during this reporting period were prepared and signed by the DPI within three 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.

41.2 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 continues as in the last reporting period, namely OPI notifies SIM of an impending delivery and the documents are then provided by safe hand to the OSIM. This same procedure applies to the delivery of all s 86ZB reports.

41.3 Other matters
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 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.

As already stated, the AOS investigation matter is being reviewed in the s 86ZM Report.

41.4 Relevance
This matter has already been reviewed in some detail. Leaving aside the AOS matter which is being dealt with in the s 86ZM Report, the SIM is satisfied that overall the questioning or interview of persons was relevant and appropriate to the purpose of the investigation to which the questions were asked.

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.

42 Comprehensiveness And Adequacy Of Reports

Generally, the comprehensiveness and adequacy of reports has improved from those in the previous reporting period. There has been an ongoing consultation process between the SIM and the DPI and his staff on this matter which has assisted in achieving this result.

42.1 Section 86ZB reports

As requested by the SIM in the last reporting period, the DPI has continued to provide additional information in s 86ZB reports. The additional information requested is set out in section 41.1 of the previous annual report. The provision of this additional information 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.

42.2 Section 86ZD reports

Most of the informal recommendations made in the previous annual report (section 41.2) to deal with the adequacy of information contained in s 86ZD reports have been implemented as evidenced in the reports received in this period of review. However, in relation to one examination an issue arose relating to provision of reasons for the refusal of a certificate. In that examination the witness' application for a certificate was refused by the delegate and no reasons were given in either the s 86ZD report or during the course of the hearing for refusing the application. In response to this issue, the DPI informed the SIM that the only logical explanation for not granting a certificate is that the party applying for the certificate failed to satisfy the delegate of the requirements of s 86PA(4). Further, that as far as he is aware, there is no requirement to provide reasons for the refusal of a certificate. Although the SIM agrees that there is no legislative requirement to provide reasons for the refusal to issue a certificate,[21] it is considered appropriate for these reasons to be included as the refusal of a claim of self-incrimination is an important matter in a coercive examination, the witness being required to answer as a result.

Generally, s 86ZD reports have been sufficiently adequate and comprehensive in respect of the hearings and examinations conducted in the above period 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. They have complied with sub-section 86ZD(2) of the Police Regulation Act, which sets out a number of matters that must be included in these reports, including 'the reasons the person attended.' However, in two matters the report gave a very general reason for the witness' attendance – namely 'to give evidence in relation to the investigation.' The investigation was not described under this heading. In the former case the general nature of the investigation could be ascertained from other information in the report – namely relevance of attendance to the purpose of the investigation. Nevertheless, it is considered appropriate to provide a more comprehensive reason for the attendance in this part of the s 86ZD report as it will assist in assessing the relevance and appropriateness of questioning of persons in relation to the purpose of the investigation.

In response to this issue, the DPI agreed that that the words 'to give evidence in relation to the investigation' convey little specific information. Whilst he was agreeable to direct that wherever possible additional detail regarding the relevance of the attendance of the particular witness in the context of the particular investigation should be provided, in his opinion the totality of the material provided with the s 86ZD report, including the video recording of the examination, make this plain. Further the DPI was of the view that by cross-referencing other material provided by his office, including where applicable the DPI's 'own motion determination' and s 86 ZB reports, the SIM will have a full and clear understanding of the context and scope of the relevant investigation. However, as stated to the DPI, the SIM is of the view that it would be of assistance if additional information is included in the s 86ZD report where possible.

In addition, the SIM considers that the investigation should be clearly stated in s 86ZD reports. In a case involving a witness, the information provided in relation to the relevance to the purpose of the investigation, was also very general being in relation to acts of corruption engaged in by the named subject of the investigation whilst the witness was working with him.

However, the investigation was not clearly described in the s 86ZD report and the only reason stated as to why the summons was issued to the witness was 'to give evidence in relation to the investigation.' Other than relating to alleged acts of corruption by the subject of the investigation, the scope of the investigation was not sufficiently set out in the s 86ZD report. In response to this issue, the DPI disagreed that the description of the investigation in this case was not sufficiently detailed. In the SIM's view, providing a more comprehensive explanation of the investigation in the s 86 ZD report will assist in assessing the relevance and appropriateness of questioning of persons in relation to the purpose of the investigation.

All other s 86ZD reports have included more comprehensive reasons for the witness' attendance and the nature of the investigation. In the SIM's view, this should occur in all s 86ZD reports.

21 Section 86ZD(2)(d)(i) only requires that reasons as to why a certificate was issued to be set out in the report.

In relation to subsequent examinations, the SIM has noted that where s 86ZD reports have included general descriptions for the reasons for a person's attendance, namely 'to give evidence in relation to the investigation' they were generally supplemented with detailed reasons as to why the summons was issued.[22] This has assisted in assessing the relevance and appropriateness of questioning of persons in relation to the purpose of the investigations. The SIM has emphasised to the DPI the importance of providing sufficient details in s 86ZD reports in order to allow full and proper consideration of the relevance and appropriateness of questioning during the course of examinations.

Section 86ZD reports have generally included reasons why a certificate was issued in appropriate cases. However, in relation to one examination, the reasons appear to have omitted one of those which resulted in the successful application for the certificate.

42.3 Other issues

(1) In respect of three examinations, each s 86ZD report omitted reference to the presence of two persons who had been authorised to be present during the examination by the delegate. The DPI has explained that in respect of two of these examinations, the names of these persons were omitted from the s 86ZD report in error as both persons authorised were in fact present during the course of the examination. However, in relation to the third examination, the DPI explained that although the delegate had authorised two persons to be present, they did not in fact enter the hearing room during the examination.

(2) The s 86ZD reports for two examinations incorrectly detailed who the examiner was, which the DPI has explained was a transcription error which was not identified by their checking processes.

(3) The s 86ZD report provided in respect of the examination of a civilian witness during the course of the public hearings relating to the AOS incorrectly referred to the fact that a summons was issued to this witness. However, there was no summons issued to this witness who had attended voluntarily under s 86ZD(1)(b) of the Act. The DPI agreed that this witness attended voluntarily and explained that the incorrect reference in the report occurred because an inappropriate template was used, and was an oversight on the part of the investigator who prepared the report.

(4) The s 86ZD report in relation to the examination of one witness did not specify that the summons was also issued to the witness for production of documents (in addition to give evidence) and failed to mention the nature of the documents required to be produced by the witness. However, the DPI was of the view that references in other parts of the report to the production of documents and the witness' diaries, together with the prefix to the summons number indicated that the summons called upon the witness to produce documents. In response, the SIM advised the DPI that the exact nature of the documents required to be produced was not set out in the s 86ZD report and that this information was only ascertained as a result of viewing the video recording. Whilst it could be ascertained that the summons was also one for production having regard to the contents of the s 86ZD report overall, the matter was drawn to the DPI's attention to ensure that there is a consistency of practice in reporting upon the nature of summonses issued.

(5) The s 86ZD report in relation to one examination incorrectly stated the time of the interview as 10.00am when in fact it was approximately 12.15pm. The DPI has explained that this was an oversight on the part of the investigator who prepared the report.

(6) In relation to the s 86ZD reports for three examinations, the required video recordings were not received with the reports, but about a week later. The DPI explained that this was an oversight due to the fact that the usual staff member responsible for the delivery of s 86ZD reports was away on annual leave and the OPI staff member taking care of the deliveries in her absence omitted to send the DVDs with the reports. The SIM accepts that this oversight was attended to as soon as his office alerted staff at OPI.

42.4 Remaining issues

In relation to one investigation it was noted that transcripts were not provided for the seven witnesses examined. Whilst the legislation does not require transcripts to be provided, the SIM requested the DPI to provide them where possible as transcripts are of great assistance. In response, the DPI advised the SIM that the very high cost of having recordings transcribed means that transcripts are not prepared unless essential to the investigative process. He confirmed that where transcripts are prepared they are provided to the SIM's office, either at the time of despatch of the s 86ZD reports or shortly thereafter.

22 In previous cases where there have been such general descriptions, there has been little if no further information provided in section 86 ZD reports which assist in identifying the context and scope of the investigation.

It is noted that in relation to the AOS public hearings, there was a practice of issuing a new summons for some of the witnesses who had been previously examined in private, whereas in other cases the summons relied on in the private hearings was used to compel the attendance of those witnesses to the subsequent public hearings. The DPI explained that this was because:

(1) After the private examinations of some witnesses it was decided that some of those witnesses should re-attend hearings which the DPI had decided should, subject to the ultimate decision of his delegate on the day, be held publicly. Although the private examinations were adjourned sine die and these witnesses were subsequently informed by letter from the DPI that they would be required to attend public hearings on the scheduled date, it was considered preferable to issue fresh summonses to avoid any argument as to whether the letter from the DPI to the witnesses was sufficient to create an enforceable obligation under s 20A, which provides that a person who has attended under a summons "is required to attend at the time and place to which the inquiry is adjourned or postponed without the issue of any further summons."

(2) Witnesses who were privately examined after the time and date of the proposed public hearings had been decided, and who would be required to attend the proposed public hearings, were advised at the conclusion of their private examination of the adjourned time and place for their next attendance.

42.5 Delegates' Manual

As referred to in the previous annual report (section 41.2), the introduction of the delegates' manual is an important initiative fully supported by the SIM as it facilitates consistency of approach and adherence to the legislation and the recommendations of the SIM. The manual is still in draft form and is currently being developed by the OPI.

The SIM considers this a positive step which will greatly assist in carrying out his functions under the Police Regulation Act.

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

The SIM made only one formal recommendation in this reporting period to OPI pursuant to the SIM's power under s 86ZH. This recommendation has been reproduced and explained above (section 25.9). The context in which the recommendation was made has been set out. Since 8 January 2007, when it came into effect, the DPI has applied the recommendation in all hearings.

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

44 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 previous two annual reports 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.

Overall, apart from the AOS matter, there have been less issues arise in this reporting period than arose and were reviewed in the previous reporting periods.

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.

As stated in the previous annual report, 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. For example, the DPI has expressed his views very strongly in relation to the AOS matter. 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 respects the role that the DPI and OPI perform. 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.

45 Chief Examiner - *Major Crime (Investigative Powers) Act 2004*

The background relating to the legislation and its operation are set out in the previous annual report (sections 44-46). The provisions in the MCIP 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".[23] 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.

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 five 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 position of Chief Examiner.

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.

23 Section 1(a) *Major Crime (Investigative Powers) Act 2004*.

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[24] and academics about the undermining of traditional rights of citizens and the use of coercive powers.[25] A review of these concerns and the government's response is contained at section 44 of the previous annual report. There is no need to repeat that review.

46 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 five imprisonment (10 years maximum) or more. In addition to these requirements, an organised crime offence must –

(1) involve two or more offenders, and
(2) involve substantial planning and organisation, and
(3) forms part of systemic and continuing criminal activity, and
(4) has a purpose of obtaining profit, gain, power or influence.

47 Applications for Coercive Powers Orders

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

24 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.

25 Corns, C., "Combating Organised Crime in Victoria: Old Problems and New Solutions', *Criminal Law Journal*, Vol. 29, 2005, pp. 154-168.

The Supreme Court is the only body that can grant a CPO. All applications for a CPO must be heard in closed court.[26] Section 7 prohibits the publication or reporting of an application for a CPO unless the court otherwise orders if it considers publication appropriate.[27] In respect of one application for a CPO made in this reporting period the court published the application and the ruling made by it in respect of that application.[28] The court had therefore ordered otherwise in accordance with section 7 of the MCIP Act. The CPO made by the court as a result of this application was in relation to the organised crime offence involving the assault and non-fatal shooting of a man in the context of trafficking illegal drugs (referred to later in this report). In respect of this application, the judge was satisfied that because the affidavit in support of the application for the CPO provided a reasonably detailed coverage of what appeared to be quite extensive drug-related activities, he was satisfied that the offence particularised in the application satisfied the requirements of 'organised crime offence' as specified in the Act.

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.[29] 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."[30]

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

(1) the name and rank of the applicant, and
(2) the name and rank of the person who approved the application; and
(3) particulars of the organised crime offence, and
(4) the name of each alleged offender or a statement that these names are unknown, and
(5) 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.[31]

47.1 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:

(1) that there are reasonable grounds for the suspicion founding the application
(2) 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.

26 Section 5(8) *Major Crime (Investigative Powers) Act 2004*.
27 The unauthorised publication of a report of a proceeding is an indictable offence under s 7 of the Act with a penalty of level six imprisonment (five years maximum).
28 All other applications made for a CPO in this reporting period were heard in closed court as required by s 5(8).
29 Section 5(2) *Major Crime (Investigative Powers) Act 2004*.
30 *ibid*., s 5(1).
31 *ibid*., s 6 .

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:

(1) The organised crime offence for which it was made.
(2) The name of each alleged offender or a statement that the names are unknown.
(3) The name and rank of the applicant.
(4) The name and rank of the person who approved the application.
(5) The date on which the order is made.
(6) The period for which the order remains in force.
(7) 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.[32] In the period under review there was one application made to the Supreme Court on behalf of a summoned witness seeking to have the subject CPO revoked under s 12 of the MCIP Act on the basis that the CPO is defective and invalid and because the facts relied on by the Applicant for the CPO do not support the existence of an organised crime offence. These proceedings have been taken against the Chief Commissioner Police and the Chief Examiner who are contesting the grounds relied upon in the revocation application and the witness' capacity to make any application under s 12 of the Act. At the time of the scheduled examination the representatives for the witness applied to the Supreme Court for an injunction restraining the Chief Examiner from continuing the examination hearing after the Chief Examiner refused their application for an adjournment (the Chief Examiner already having adjourned the matter previously). As a result of this application to the Supreme Court an order was made restraining the Chief Examiner from continuing with the examination hearing and argument on the application seeking revocation of the order was set down for hearing. The Chief Examiner adjourned the examination hearing of the witness pending the decision of the court. As at the date of this report, the application seeking revocation is waiting to be heard by the court.

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.

In one operation conducted in this period, two applications were made by Victoria Police to the Supreme Court for the relevant CPO to be extended. On each occasion the Supreme Court made an order extending the relevant CPO. The first extension granted by the Supreme Court was for a period of 14 days, the application for that extension having been made by Victoria Police. Whilst the extension order did not state that the extension of 14 days was from the expiry of the original CPO, the SIM considers that the effect of an order extending a CPO is to extend the operation of that CPO from its expiry date for the specified duration (in this case being 14 days). Therefore, in the circumstances of this case, the original CPO had been extended for a further 14 days from the date it would have otherwise expired. It was during this extended period that the adjourned examination of the subject witness took place. In this regard, the SIM also notes that the second extension of the original CPO in this case was granted for a period of six months just before the expiry of the 14 day extension previously granted. To avoid any uncertainties in the future with regard to extensions of CPOs, the SIM considers that it is preferable for an extension order to specify the date to which the extension order is granted rather than the duration of the extension period.

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	Number of Orders with Conditions Attached
6	6 months[33]	6

32 *ibid*., ss 10 and 11.

33 In three cases an extension being granted for six months, one of which was initially extended for 14 days and then for six months.

A summary of organised crime offences in respect of which CPO were made or extended in this reporting period is as follows:

(1) The original CPO was issued by the Supreme Court on 15 February 2006 and extended by further order of the court on 14 August 2006 for a further six month period. The organised crime offence was the murder of an alleged underworld figure.

(2) The Supreme Court issued a CPO on 14 September 2006 in respect of the organised crime offence of conspiracy to commit burglary, burglary and obtain property by deception.

(3) The Supreme Court issued a CPO on 2 November 2006 in respect of an organised crime offence of arson, criminal damage to property and extortion against the owners of the properties subject to the arson/criminal damage. This CPO was extended initially for a period of 14 days and then again for a further six month period.

(4) The Supreme Court issued a CPO on 16 November 2006 and extended by further order of the court on 15 May 2007 for a further six month period. The CPO was issued in respect of the organised crime offence of conspiracy to murder.

(5) The Supreme Court issued a CPO on 13 February 2007 in respect of an organised crime offence involving a number of gangland murders.

(6) The Supreme Court issued a CPO on 4 April 2007 in respect of an organised crime offence involving the non-fatal shooting of a person and the manufacturing and trafficking of drugs of dependence.

48 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 DPI. These functions are stated in s 51 of the Act and are set out at section 11.

49 Reporting Requirements of the Chief Examiner

49.1 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 three 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 applications made in the period under review.

As referred to at section 48.1 of the previous annual report 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. Details of the additional information and documents are set out in section 48.1 of the previous annual report and there is no need to repeat them.

The Chief Examiner agreed to provide this further information and has continued to do so since the request was made. 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 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.

In the period under review there was one issue which the SIM raised in relation to the information provided by the Chief Examiner in seven s 52 reports received. The subject s 52 reports did not provide any information advising of the fact that the relevant CPO had been extended by further order of the Supreme Court. The original CPO in relation to this operation had expired before the seven witness summonses were issued by the Chief Examiner. The witness summonses issued also did not refer to the fact that the CPO was extended by further court order. It only became apparent that there was an extension order in place when the DVD of the application for the summonses was viewed.

The fact that the s 52 report did not state that the CPO had been extended by further order of the Supreme Court on 14 August 2006 and that the summonses issued referred only to the original CPO order without any reference to the fact that an extension order had been made was raised with the Chief Examiner. Whilst it was made clear on the DVD recording of the application for these summonses that the CPO had been extended by further order, in the SIM's view it is preferable for the s 52 reports and also the summonses issued to refer to the fact that the CPO has been extended by further order. The Chief Examiner agreed with this view.

Since raising this issue with the Chief Examiner, all further summonses issued by him in cases where the CPO has been extended have referred to the fact that there is an extension order and the relevant s 52 reports have also included this information. As requested by the SIM, the Chief Examiner has also provided copies of any extension orders as soon as they are available.

49.2 Section 52 reports received

A total of 10 s 52 reports were received for the 2006-2007 reporting period. Every s 52 report received by the SIM during the period under review was prepared and signed by the Chief Examiner within three 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 section 55.4 of this report.

49.3 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
- place and time of the examination
- the name of the witness and any other person present during the examination. This includes persons watching the examination from a remote location
- the relevance of the examination to the organised crime offence
- matters prescribed under clause 10 (1) (a) – (l) of the Regulations.[34]

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.

In the previous reporting period 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 Office of the Chief Examiner
- 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 has continued to include 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.

34 Major Crime (Investigative Powers) Regulations 2005 (Vic).

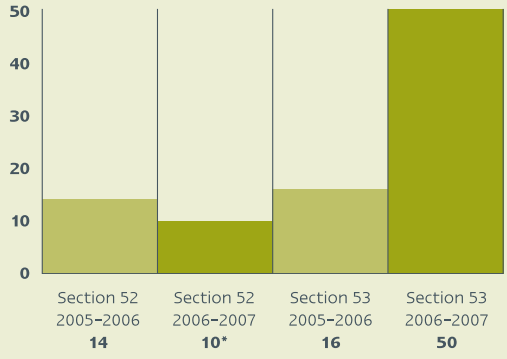
49.4 Section 53 reports received
The SIM received 50 s 53 reports relating to six CPOs for the 2006-2007 reporting period.

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. In one case there initially appeared to be an issue in relation to the prompt delivery of the required s 53 report. However, it was subsequently ascertained that whilst the matter had been scheduled for examination on a particular date, it was only part heard on that date due to an argument on legal professional privilege, and therefore was adjourned to a later date. As a result, it was agreed with the Chief Examiner that when such delays occur the SIM will be notified of same.

All s 53 reports in this reporting period continued to be delivered by the Chief Examiner or staff of the Office of the Chief Examiner 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 six examinations the DVD recordings provided to the SIM were incomplete, having frozen after the first hour. This was due to a difficulty in playing the DVDs in the format in which they were provided. A complete copy of the recordings of the examinations in question were promptly provided to the SIM by the Office of the Chief Examiner upon being requested, the issue being resolved by provision of the DVD recordings in another format which was compatible with the systems used at the OSIM.

Chart 6: Comparison of Reports Provided to the SIM by the Chief Examiner 2005/2006 and 2006/2007



Note to chart 6
*Some reports included information for two or more witnesses.

50 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 three 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:

- the relevance of any questions asked of the witness to the investigation of the organised crime offence
- 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.

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 received one complaint in the period under review. This complaint arose as a result of the release of the evidence given by a witness at an examination hearing to the defendant in the course of committal proceedings relating to the subject organised crime offence in accordance with the directions given by the magistrate in the course of those committal proceedings. As a result of this release, the Chief Examiner wrote to the witness advising him that

he proposed to rescind the non-publication directions which he had given during the course of the examination hearing relating to the witness. This is discussed further at section 69.1 of this report. For present purposes, the subject complaint encompassed three issues being:

(1) That the examination of the witness by the Chief Examiner was an abuse of process because the matter was no longer in the investigative stage as the hand up brief had been served and the matter was in the jurisdiction of the DPP.
(2) That the proposed rescission of the Chief Examiner's non-publication directions and the release of his evidence to the defendant in the committal proceedings was unfair.
(3) That the witness was asked to speculate and to provide answers based on speculation and/or hearsay at the examination hearing (which had occurred over 12 months ago).

The SIM's views in relation to these issues were conveyed to the witness and are as follows:

(1) The fact that charges have been laid by the DPP against a person or persons in respect of the organised crime offence being investigated by the Chief Examiner does not mean that the investigation by the Chief Examiner has been completed. Investigations may in fact continue after charges have been laid because new evidence may be obtained which will further support the charges. The MCIP Act in fact recognises that an examination may be conducted whilst criminal proceedings have been instituted against a person. Section 43(2) of the MCIP Act requires the Chief Examiner to give a direction prohibiting publication if the failure to do so might prejudice the fair trial of a person who has been, or may be, charged with an offence, as was done in the course of the subject examination (the other ground being that a failure to have done so might have prejudiced the witness' safety or reputation).
(2) It was because the witness' evidence had already been published pursuant to the court order directing its release to the defendant that the Chief Examiner was proposing to rescind the non publication directions.
(3) Whilst the complaint about being asked to speculate and to provide answers based on speculation and/or hearsay may fall within the SIM's jurisdiction under s 54 of the MCIP Act, being a complaint about the relevance of questions asked by the Chief Examiner, the MCIP Act requires that such a complaint must be made within three days after the witness was asked the question. The subject complaint was made over 12 months since the witness was examined and it would not be appropriate for the SIM to investigate it at this stage. The witness' examination was reviewed at the time and it was not considered that the questions asked of him were inappropriate or irrelevant. In this regard it is noted that s 30 of the MCIP Act provides that the Chief Examiner is not bound by the rules of evidence in conducting an examination and may regulate the conduct of proceedings as he thinks fit. Section 36 of the MCIP Act provides that the Chief Examiner may examine any witness on any matter that he considers relevant to the investigation of the organised crime offence to which the examination relates.

51 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:

- whether or not the Chief Examiner or Chief Commissioner has taken, or proposes to take, any action recommended by the SIM
- 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.

52 Assistance To Be Provided To The Special Investigations Monitor

The MCIP 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.[35]

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.[36] 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.[37]

Both the Chief Examiner and the Chief Commissioner have been fully cooperative 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.

53 Annual Report

Under s 61, the SIM is required to provide an 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 section 13 of this report.

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.

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.

54 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 MCIP Act
- 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.

55 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:

(1) A summons to attend an examination before the Chief Examiner to give evidence.

(2) A summons to attend at a specified time and place to produce specified documents or other things to the Chief Examiner.

(3) A summons to attend an examination before the Chief Examiner to give evidence and produce specified documents or other things.

(4) 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.[38]

35 Section 58 *Major Crime (Investigative Powers) Act 2004*.

36 *ibid*., s 60.

37 The penalty for breach of these requirements is level six imprisonment (five years maximum).

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

55.1 Types of summons issued

In the reporting period 1 July 2006 to 30 June 2007 a total of 51 summonses were issued. Of these, 46 summonses were to give evidence, and four were to give evidence and to produce documents or other things. There was only one summons to produce specified documents or other things. There were no summonses for immediate attendance during this period. Chart 7 below reflects this representation.

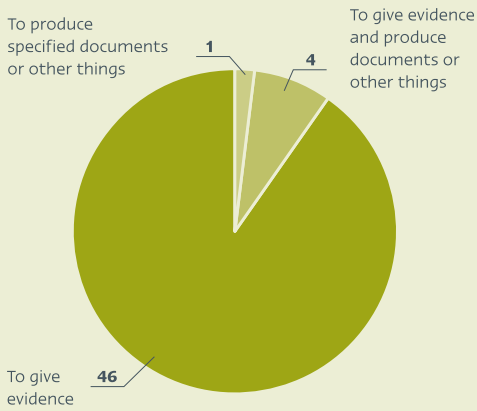


Chart 2: Types of Institutions Summoned to Produce Information, a Document or Thing

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.[39]

55.2 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.[40]

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.[41] The Chief Examiner has implemented a procedure for such applications which are contained in a 'Procedural Guidelines' handbook.

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
- the age of the person, and any mental impairment to which the person is known to be subject.

55.3 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.[42] 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

39 ibid., s 16.
40 ibid., s 14(3).
41 ibid., s 15(3)
42 A video recording has been provided for all applications made to the Chief Examiner in the period under review.

- 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 2006 to 30 June 2007 a total of 45 summonses were issued.[43] Of these, 10 were issued by the Chief Examiner on application by a member of the police force. The Supreme Court issued the remaining 35 summonses. The Chief Examiner did not issue any summonses on his own motion during this period.
In regard to the fact that most summonses in this reporting period were issued by the Supreme Court, the Chief Examiner has advised the SIM that the Supreme Court has placed restrictions on his power to issue summonses and to make custody orders. These restrictions have come about as the result of conditions placed on a number of CPOs made by the Supreme Court in this reporting period to the effect that any summonses are to be issued by the court. The Chief Examiner commenced proceedings in the Supreme Court relating to this matter. Judgement has been delivered in the proceedings, details of which are restricted from publication by the Act.

55.4 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 was discussed by the OSIM and Office of the Chief Examiner in the last reporting period and an appropriate practice has been developed to avoid discrepancies that can arise in the statistics when the OSIM is unaware that the Supreme Court has issued a summons.

The course suggested by the Officer of the Chief Examiner, namely 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 has been adopted. This will ensure that the statistics and information kept by the OSIM are complete and accord with those held by the Office of the Chief Examiner. This outcome has greatly assisted the SIM's staff in carrying out their functions to ensure that reports are accurate.

43 This number includes one summons for production of documents only, which was issued by the Supreme Court. However, it does not include three summonses issued by the Supreme Court in respect of which the examinations of the subject witnesses has been adjourned and therefore no section 53 reports have been received by the SIM in respect of these summonses.

56 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 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.[44] In one case, the witness had been served on the day of the scheduled examination and the Chief Examiner, having considered this to be short service, adjourned the matter on his own initiative. The SIM agrees that the course adopted by the Chief Examiner in this case was appropriate.

57 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.[45]

44 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.

45 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.

The Chief Examiner is only required to give a general description of the proposed subject-matter of the investigation. In the last period when an issue was taken in relation to the generality of the description in the summons by counsel assisting a witness during one examination, the Chief Examiner explained that the description was intentionally general so that the witness can have a general idea about the likely subject/s for examination. He referred to s 15(10) of the Act which does not require him to provide any further details for the purpose of a summons. In the case in question, the general description provided in the summons was sufficient for the witness to identify the alleged crime and surround matters that will be the subject of examination.

In the period under review there were no issues taken during examination hearings with respect to the generality of information provided in summonses issued by the Chief Examiner.

58 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 seven s 18 orders[46] being made for the 2006-2007 reporting period in respect of which s 53 reports were received. All seven orders were made by the Supreme Court. In one case the s 53 report relating to the examination of one witness failed to mention that a s 18 order had been made in respect of his attendance before the Chief Examiner.

46 Four of these section 18 orders were issued in respect of one witness, as there had been 3 adjournments of the examination hearing.

However, it was clear from other material provided with the s 53 report that a custody order had been made to compel the witness to attend before the Chief Examiner as the witness was in custody at that time. As the Chief Examiner could not complete the examination of the witness on the date of his first attendance it was necessary to adjourn the examination to a later date and for this purpose a summons was issued to the witness as he was released from custody before the date of the adjourned examination hearing. The Chief Examiner agreed that the failure to mention the fact that a custody order had been made in the s 53 report was an oversight. The SIM also notes that the s 53 report provided full details relating to the summons that was issued to the witness after his release from custody.

59 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 summoned 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
- 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.

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 MCIP 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 Office of the Chief Examiner.

60 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
- the fair trial of a person/s who has or may be charged with an offence
- 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).

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).

61 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:

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

(2) 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
- the Chief Examiner has issued a summons
- the Chief Examiner has received a s 18 order
- 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 seven 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 six imprisonment (five 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 notified of two instances where a witness was in breach of s 37(1) of the Act, having failed to attend at an examination as required by summons. In regard to these two witnesses applications were made by Victoria Police pursuant to s 46 of the MCIP Act for the issuing of arrest warrants for the arrest of the two witnesses. The two witnesses, who were arrested and brought before the Supreme Court, were granted bail and required to attend for examination on specified future dates. In the course of the subsequent examination hearing of one of these witnesses, the witness had asked the Chief Examiner about the repercussions of his non-attendance on the initial date of his required attendance as specified in the summons served on him. The Chief Examiner advised the witness that it was a high probability that he would be charged with failing to attend previously because it is a serious matter and cannot be let go. However, he also advised the witness that the fact that he had given evidence and answered questions at the adjourned examination hearing is something that should be put in his favour in relation to the penalty for the offence in his case. In this regard, he explained to the witness that if he is charged and if he wishes to rely on what had taken place at the examination hearing to assist him in what penalty might be imposed in relation to that charge, the Chief Examiner would, upon request by or on behalf of the witness, make the necessary directions to ensure that he is able to put that material forward at the time that the charge against him is heard. The Chief Examiner asked the witness' counsel to explain this further to the witness. The SIM agrees with the approach taken by the Chief Examiner in this case.

There were no instances notified to the SIM where a witness was in breach of ss 38 or 44.

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

49 The penalty for breach of this section is level six imprisonment (five years maximum).

62 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
- 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
- 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 notified of contempt proceedings which the Chief Examiner had instigated against one witness who had refused or failed to answer questions relevant to the subject matter of the coercive examination. In the Supreme Court proceedings, the witness pleaded guilty to the contempt of the Chief Examiner. The witness was sentenced to six months imprisonment by the Supreme Court. In handing down his decision, the judge stated that he had watched the video recording of what had passed between the witness and the Chief Examiner. In the course of his decision, His Honour said, *inter alia*:

> *[the Statute's] primary purpose is to provide for a regime for the authorisation and oversight of the use of coercive powers to investigate organised crime offences. ....You had information. Before the statute, you could choose not to provide it. The statute reduces the capacity of people like you who have information about serious crime to remain silent. The statute means that when the criteria for asking questions aimed at obtaining information are satisfied, people in your position must either provide the information or be punished. ....Your choice to refuse to answer questions was a considered choice. It was a serious contempt. You were well aware of the consequences of not answering the questions. You were well aware that you could have to serve a term in prison. .... You have not given a reason for not answering the questions put to you. .... Your choice to refuse to answer questions must be strongly denounced. Others must be deterred from making the same choice. I am satisfied that an immediate term of imprisonment is the only appropriate option..... The term that I will impose would have been longer but for the existence of several mitigating factors. You have no prior convictions, You come from a law-abiding background. You gave indications very early of your intention to plead guilty to the contempt. You did answer some questions of the Chief Examiner. I also accept that there are potentially some types of examinations, such as with respect to murder or police corruption investigations, where the non-answering of questions could be even more serious than in your case.*

63 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.

In the period under review the Chief Examiner had adjourned the examination hearings of some witnesses where appropriate. There were six applications made by or on behalf of summoned witnesses seeking adjournments of their examinations on the basis that they were not medically, physically or mentally fit. Five of these adjournment applications were granted by the Chief Examiner. One application, based on the witness' claimed physical state as a result of drug addiction, was refused by the Chief Examiner because he was not satisfied that the witness was unable to deal with the examination process. In particular, the Chief Examiner noted that the witness, who had previous opportunities to rehabilitate himself, failed to do so and that there were no definite plans presented as to the proposed rehabilitation treatment which the witness was now seeking. Further, in the Chief Examiner's view, his observation of the witness in dealing with the adjournment application (including arranging for his treating doctor and a rehabilitation counsellor to attend to give evidence on his behalf, and making submissions on his own behalf) indicated that he was well capable of dealing with the examination process.

Other grounds for adjournments granted by the Chief Examiner included short service of the witness summons, requests by witnesses to obtain legal advice and representation, claimed mental impairment of the witness (this matter is discussed at section 66 of this report) and pending Supreme Court proceedings by a summoned witness seeking to revoke the CPO relating to their examination (this matter was discussed at section 46.1 of this report).

Section 35 of the MCIP Act 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 six imprisonment (five 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, it has generally only been police members who were allowed to watch an investigation from a remote location (in two cases, an Office of the Chief Examiner staff member was permitted to view the examination from a remote location). Once the Chief Examiner made a direction to allow persons to watch remotely, he read out the name and rank of each member for the purposes of the video recording.[51]

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.

51 There has recently been a change of procedure in relation to applications made by a police representative under s 35 of the MCIP Act at examination hearings, namely the police representative details the name, rank and station of any police members the subject of the application and if the Chief Examiner grants the application he makes reference only to the name and rank of the police member.

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 Office of the Chief Examiner or part of the team conducting the investigation into the organised crime offence. In some examination hearings the Chief Examiner questioned the necessity for three investigators to be present in the remote location because in his view it would not normally be necessary to have more than two investigators present to provide assistance during the course of the examination. In response, the member representing police interests at those hearings made submissions to the effect that, in one case all three investigators made up part of the investigation team, some had specific knowledge in regard to the witness' property and financial interests which the other investigators did not have, and in another case that some investigators had an overall knowledge of the defendants whereas other investigators may, being informants for the alleged defendants, only have knowledge of certain aspects relating to the subject defendants. The Chief Examiner accepted these submissions and, in each case, acceded to the application to allow all three investigators to view the examination from a remote location. In his view, each of the investigators would be assisting with the examination by providing information and suggested lines of enquiry. The SIM agrees with the approach and conclusion made by the Chief Examiner in these hearings. The SIM also notes that in respect of two examinations in which the Chief Examiner granted leave for five investigators to view the examination from a remote location, this was subject to a condition that not more than two of those investigators could be present at the one time, the intention being that some investigators would leave during part of the examination and then be replaced by others.

In one examination hearing, counsel for the witness queried whether there was authority within the legislation for others to view the examination from a remote facility. He raised this question before it was obvious that the Chief Examiner's assistant was handing him questions that were being prepared by other people. The Chief Examiner said that there is no specific section of the Act that gives him authority to allow others to view the examination from a remote facility but that it is intrinsic, in his opinion, to the operation of the Act and the proper functioning of his role that he has the power to do so. He further assured counsel and his client that if anybody was viewing the proceedings from a remote location they were authorised to do so by him and

the provisions of the Act in relation to secrecy applied equally to them. In response to the question as to whether the Chief Examiner had given that authorisation to persons in relation to this examination hearing, the Chief Examiner responded that he was not prepared to say one way or the other. In his view, because of the circumstances of the case, it was not necessary for this to be verified one way or the other.

As for those present in the examination room, the names, ranks and stations of police members or Office of the Chief Examiner staff permitted to be present were also read out on the video recording. Further, 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.

64 Preliminary Requirements Monitored By The Special Investigations Monitor

Unlike the position under the Police Regulation Act, s 31 of the MCIP 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 MCIP 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.

As in the last reporting period (at section 63), 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. 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.

65 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.

In the last reporting period, the Chief Examiner provided the SIM with a copy of the procedural guidelines he has adopted applicable to legal representation.[52] 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 (section 64 of the previous annual report).

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 did not think legal advice was necessary in the circumstances
- the witness could not afford to take time to obtain legal advice
- the witness could not afford the legal costs associated with representation and advice.

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 summoned to attend an examination must answer questions asked of them under penalty of imprisonment.

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.

Unlike the DPI, the Chief Examiner deals predominantly with civilians. Indeed all witnesses he examined in this reporting period were civilians. The concerns expressed in the 2004-2005 Annual Report about unrepresented civilian witnesses and a lack of access to free legal advice 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 section 27 of this report).

66 Who Was Represented And Who Was Not

The witnesses examined by the Chief Examiner in this period were all civilian witnesses. A total of 50 examinations have been reported to the SIM being an increase of 35 from the previous reporting period. Of the 50 witnesses examined, 30 were legally represented.

52 These procedural guidelines form part of a detailed document prepared by the Chief Examiner.

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

There were no cases where a conflict of interest arose as a result of a legal representative advising more than one witness in the investigation. However, in one examination hearing counsel representing a witness asked the Chief Examiner whether there was any issue with his instructing solicitor and himself acting for another witness who had also been summoned to attend at a later date in respect of the same investigation. The Chief Examiner advised counsel that there would be no problem with that provided that both he and his instructor understood the restrictions which apply in relation to communication and publication of what takes place as between the two hearings. Provided they understood these restrictions, it was a matter for them in advising one client and then the subsequent client. It was up to the legal representatives to decide whether he/she could adequately represent a second witness arising out of the same circumstances. The SIM agrees with the position taken and view expressed by the Chief Examiner in this examination hearing.

67 Mental impairment

Section 34(3) deals with the examination of a person who is believed to have a mental impairment. In the case of such person, the Chief Examiner must direct that an independent person is to be present during the examination if the witness so wishes and the witness may communicate with that person before giving any evidence at the examination.

There were two examinations in the period under review in which mental impairment of the witness was raised. In one examination counsel for the witness raised the issue of possible mental impairment of the witness as one basis for an adjournment of the examination (the other one being that the witness' usual barrister, who knows the whole history and who is currently representing him in respect of this and other offences, was not available on the day and the preference was for him to represent the witness at examination). Counsel referred to a psychiatric report on the witness which he was of the view suggested that further tests should be conducted to ascertain whether the witness had a probable brain injury arising from an incident he had some years ago. He therefore applied for an adjournment in order to consult with the doctor as to appropriate further examination of the witness to ascertain whether he had a brain injury.

The Chief Examiner said that he had read the transcript of the witness' record of interview with police a few months earlier (which occurred over a considerable period of time) and that there was no indication, based upon his reading of the transcript that the witness had any inability to understand the questions that were being put to him or understand the procedures which were being employed, which are of a similar nature to those being employed here.

However, before giving his ruling on this issue and having heard submissions also from the member representing police interests at the hearing, the Chief Examiner listened to part of the police tape-recorded interview of the witness, to assist him in deciding this issue. Having listened to that recording, he asked the witness questions about the answers he had given during that record of interview.

The Chief Examiner decided not to accede to counsel's application for an adjournment having regard to the following matters:

(1) Mental impairment is not a bar to the examination of a person pursuant to the Act because the legislation envisages that persons in that category will be the subject or can be the subject of examination.

(2) According to the psychiatric report on the witness, he suffered depression and there was some indication that the witness had sustained possible brain damage in the past but this was not a matter of certainty, and the examining doctor suggested further testing to see whether or not this was correct.

(3) The purpose for which the psychiatric report was prepared appears to be in relation to the witness' forthcoming bail application, supporting his release in order to recover from his current state of depression.

(4) The Chief Examiner's impression, having listened to part of the record of interview and having read the full transcript of that record of interview, is that the witness appeared to be perfectly responsive; he appeared to understand the questions that were being asked and to answer responsively. He answered without delay and he expressed himself perfectly adequately.

(5) What took place in the course of the record of interview is very relevant to whether or not the witness' depression (as diagnosed) would affect his ability to take part in this examination process. It is noted that the section 3 definition of mental impairment in the Act includes impairment because of mental illness, intellectually disability, dementia or brain injury.

(6) Section 34 of the Act requires that if a person is believed to have a mental impairment, the Chief Examiner must direct an independent person to be present during the examination if the witness so wishes.

(7) In the Chief Examiner's opinion, even if the witness had some mental impairment, which seems not to be perfectly clear (in fact it is a matter that requires further investigation), if appropriate procedures are put in place, bearing in mind his ability to answer the questions put by police a few months earlier, then he could adequately appear as a witness for the purposes of examination.

Nevertheless, because of the assessment made of the witness by the doctor (that there are indications that he has sustained brain injury), the Chief Examiner took the view that the witness was a person with a mental impairment because of the definition in the Act. He therefore made a direction that an independent person may be present during the examination under s 34. That independent person was a representative from the public advocate's office (who had been organised by the police in anticipation of such an issue arising). However, the witness said that he did not see any point given that he was legally represented and therefore he did not wish to have the representative present. He did however ask whether it was possible for his parents to be present during the examination. The Chief Examiner explained to the witness that whilst the Act allows a parent or guardian of the witness to be present during the examination (as set out in s 34(4) of the Act) this is only applied to the examination of a person who is under the age of 18 years, which did not apply to this witness because he was over this age.

The SIM agrees with the approach taken by the Chief Examiner in this case in dealing with the issue of mental impairment.

In the other examination in respect of which mental impairment of the witness was raised, the Chief Examiner had adjourned the examination as a result of evidence from a psychiatrist that the witness was not in a fit mental state to be examined at that time. The examination of this witness was rescheduled when the psychiatrist advised the Chief Examiner that the witness was able to be examined but subject to some conditions (including having an independent person present). Based on the advice of the psychiatrist the Chief Examiner formed the view that the witness had a mental impairment as defined in the MCIP Act. Accordingly, the services of an independent person were obtained to assist the witness during the examination. The Chief Examiner gave the witness the opportunity of communicating with the independent person before the witness was required to give evidence and the witness exercised this right of communication in the court room as observed on the video recording of the examination hearing. Again the SIM agrees with the approach taken by the Chief Examiner in this case in dealing with the issue of mental impairment.

68 Privilege Against Self-Incrimination

This matter is reviewed in the previous annual report (at section 66). 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.

As explained in section 66 of the previous annual report, 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.

69 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:

- any evidence given before the Chief Examiner
- the contents of any document, or a description of any thing, produced to the Chief Examiner
- any information that might enable a person who has given evidence to be identified
- 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.[53]

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. However, in one examination hearing, the SIM was not convinced that one of the grounds stated by the Chief Examiner in support of making the non-publication direction was in fact supported on the facts of that case. The Chief Examiner made the direction under s 43(2) on the basis that failure to do so may prejudice the safety or reputation of a person (being the witness) and, further may also prejudice the fair trial of a person or persons who may be charged with an offence. In respect of this latter ground, it is not clear how the Chief Examiner came to the view that the failure to make the non-publication order may prejudice the fair trial of a person or persons who may be charged with an offence. There were no proceedings on foot against such a person or persons at the time of the examination hearing, and although such proceedings may have been anticipated, there was no evidence presented or arguments made in this regard. In fact, the police representative at that hearing had made submissions in support of the non-publication direction on the basis that failure to do so might prejudice the safety or reputation of a person and the effectiveness of the investigation of the organised crime offence in relation to which the summons was issued. No mention was made of any prejudice to the fair trial of a person who may be charged with an offence.

The Chief Examiner explained that as the witness was the victim of a shooting and was called as a witness in part to identify the person(s) who had shot him, he considered that he was required to give a direction under section 43(2) to avoid any prejudice to the person(s) who might be identified by the witness. The SIM considers this to be a reasonable basis for making the non-publication direction together with the fact that that there was a concern about the safety or reputation as a result of appearing at the examination hearing.

53 A contravention of a direction is an indictable offence which carries a penalty of level six imprisonment (five years maximum).

69.1 Rescission of non-publication directions

On 4 October 2006 the Chief Examiner issued two notices rescinding the s 43 confidentiality directions previously made during the examinations of two witnesses. This was done as a result of a request by the DPP so that the evidence of the two witnesses could be used against another co-offender in committal proceedings and after the Chief Examiner had considered submissions made by the legal representatives of the subject witnesses as to why the directions should not be rescinded. The SIM agrees with the view that the Chief Examiner took in making the decision to rescind the s 43 directions, namely that given the purpose of the Act and the legislative intent, evidence obtained from a witness at an examination is able to be used in prosecuting an organised crime offence so that the witness may be called to give evidence and the evidence given at the examination may be used as a proof of the evidence of the witness (subject of course to the restriction in s 39(3) of the MCIP Act). Specifically, the Chief Examiner took the view that the purpose of the MCIP Act is to provide a means to assist police in the investigation and prosecution of organised crime offence. In forming this view, the chief Examiner made reference to the following sections of the MCIP Act:

(1) Section 45 which makes it plain that evidence obtained on examination is admissible in any proceedings against any person if it is video recorded and in the additional circumstances referred to in sub-section (3) even if the examination is not video recorded. Sub-section (4) provides that police will have access to the video recording which is consistent with the assertion that the purpose of the examination is to assist in the investigation and the prosecution of the organised crime offence.

(2) Section 39(3) which is the only limit on the use of evidence obtained on examination – namely it is inadmissible against the person who gave the evidence when that person has been charged in a criminal proceeding or a proceeding for the imposition of a penalty.

(3) Section 68(2) which permits a member of the police force to use information obtained in the course of his or her functions under the MCIP Act for the purposes of investigating or prosecuting an offence. Information would, in the Chief Examiner's view, include evidence obtained on examination. In addition, it is implicit from s 68(3)(b) that police can use information and evidence obtained on examination in the prosecution of an organised crime offence and that in these circumstance they will be required to produce a document or divulge or communicate to a court a matter or thing that has been obtained during an examination hearing.

(4) Section 43(4) and (5) which contain restrictions on publication of evidence given at an examination. However, the evidence given on examination is available to police and prosecuting authorities without these restrictions.

(5) Section 43 which provides for the power to make a non-publication direction. This power implicitly carries with it the power to rescind the direction in appropriate circumstance.

The Chief Examiner also wrote to the witnesses concerned advising that the confidentiality notices served on them prior to the examination hearing also ceased to have effect. This was because he was satisfied that the provisions of s 20(7)(d)(i) of the Act applied, namely that evidence of one or more offences committed by two or more persons has been obtained and criminal proceedings have been commenced against those persons.

The SIM agrees with the view taken by the Chief Examiner in making his decision to rescind the subject directions. It is a view which the SIM considers to be consistent with a view expressed by the Chief Examiner to the SIM, and with which the SIM agreed, that there is no need for the Chief Examiner to extend the direction which he is required to give to witnesses in relation to the abrogation of self-incrimination to advise them as to the use that can be made of derivative evidence.

Subsequently, the Chief Examiner rescinded three further s 43 directions which he had given in previous examination hearings relating to the same CPO. The circumstances in which two of these directions were made were such that committal proceedings were taking place in relation to the subject organised crime offence against one of the four defendants. The other three defendants were no longer involved as they had pleaded guilty to charges relating to the organised crime offence and had given, or were to give evidence against the remaining defendant in the course of the committal proceedings. Before doing so, the Chief Examiner had given notice to the two witnesses concerned of his proposed intention to rescind the directions and inviting submissions from those witnesses. No submissions were received from either witness opposing the proposal to rescind the directions previously given (although one witness had expressed concern about publication of personal matter which was raised during the course of the examination hearing). The Chief Examiner decided to rescind the directions for the following reasons:

(1) The directions were originally made to protect the fair trial of the then four defendants. All but one defendant has now pleaded guilty and the two witnesses in relation to whom the directions were made are witnesses in the committal proceedings against the remaining

defendant and the evidence that is proposed to be lead from these two witnesses involves matters on which they gave evidence at the examination hearings. In these circumstances, the publication of the evidence given by the two witnesses on the examination hearings will not create any prejudice to any ongoing criminal proceedings.

(2) As to prejudice to their safety or reputation, neither of the two witnesses had made submissions opposing the proposed rescissions. Further the witnesses were on the record as witnesses to be called by the prosecution as witnesses in the committal proceedings against the remaining defendant. Therefore they were known to be persons who would give evidence against that defendant and the publication of what took place at their respective examination hearings under compulsion would not adversely affect their current position in relation to prejudice to reputation or safety.

(3) The publication of the evidence given by the two witnesses will ensure that relevant evidence of what was said on their respective examination hearings is known so that if such evidence is relevant it may be used by the prosecution and the defence, if appropriate, to ensure that there is a fair trial of the proceedings relating to the remaining defendant.

In relation to the third case, the Chief Examiner had proposed to rescind the subject non-publication direction because in the course of the subject committal proceedings, the magistrate had directed that the defendant be supplied with the evidence given by the subject witness at the examination hearing. In the course of hearing submissions in relation to the release of the examination material concerning the subject witness to the defendant, counsel for the Office of the Chief Examiner, on instructions from the Chief Examiner, argued that the material should not be released without giving the witness the opportunity of making submissions given that the subject non-publication directions had been given by the Chief Examiner because in part there was concern about the safety and reputation of the witness. The magistrate disagreed with this submission and indicated that the examination material concerning the witness, being the DVD recording of the examination and an electronic copy of the transcript, should be released to the defendant. In those circumstances, when the Chief Examiner was advised of what had taken place he wrote to the subject witness advising that he was proposing to consider rescinding the non-publication direction made during the examination hearing on the basis that the continuing operation of the direction was pointless (that is, there had already been publication pursuant to the directions of the magistrate to the defendant and others). In the course of this correspondence, the Chief Examiner gave the witness the opportunity to making submissions as to his proposed rescission of the non-publication direction. Whilst no submissions were received from the witness opposing the proposal to rescind the directions, he did complain to the Office of the Chief Examiner about the actions of the magistrate.[54] In those circumstances, the Chief Examiner rescinded the subject non-publication directions and advised both the witness and the SIM as to what had taken place leading to his decision to rescind the subject directions. In advising the SIM of what had taken place in this matter, the Chief Examiner expressed concern in relation to the action taken by the learned magistrate particularly because the direction prohibiting publication and communication was made in part because of concerns as to the safety and reputation of the witness.

The SIM has no issue regarding the rescission of these further s 43 directions by the Chief Examiner in view of the circumstances.

70 The Use Of Derivative Information

The use of derivatively obtained information in the context of examinations conducted by the DPI was discussed in the in the previous annual report at section 68 and the 2004-2005 Annual Report at section 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 summoned 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.

54 The witness did however made a complaint to the SIM about the proposed rescission and the circumstances relating to his examination by the Chief Examiner earlier last year. This is discussed at section 50 of this report.

In one examination hearing in the period under review, counsel for the witness queried the extent of the restrictions in the use of evidence given by a witness. In explaining the restrictions on the use of evidence before the commencement of the examination, the Chief Examiner gave an example of a witness who made admissions that "I was the person who committed the murder. I used such and such a firearm. The firearm is in the cupboard at home and this is the reason that I murdered the other person." Counsel for the witness asked whether in that example it would be open for investigators who are entitled to share that information to go to the premises and look in the cupboard for the firearm. The Chief Examiner said that they could because the restriction against the use of evidence in criminal proceedings against the witness does not apply to derivative evidence.

The SIM agrees with the Chief Examiner that the restrictions on the use of evidence given by a witness at a coercive examination hearing do not apply to the use of derivative evidence obtained by investigators. In this regard, the SIM also agrees with the view of the Chief Examiner expressed to the SIM that there is no requirement in the MCIP Act for him to advise a witness that the restrictions on the use of evidence do not apply to the use of derivative evidence obtained by investigators. That is, the MCIP Act does not require the Chief Examiner to extend the direction which he is required by that Act to give to witnesses in relation to the abrogation of the privilege against self-incrimination to advise them as to the use that can be made of derivative evidence.

71 Legal Professional Privilege

This privilege was reviewed at section 69 of the previous annual report.

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 LPP 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 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.

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 three 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 seven 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 the SIM 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. In this reporting period the SIM was notified that one claim for LPP was made in respect of documents comprising a solicitor's files for a deceased client. This claim was determined by the court, it being decided that LPP pertaining to the files had been waived by the deceased's estate.

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.

72 Authorisation For The Retention Of Documents By A Police Member

This matter is reviewed at section 70 of the previous annual report.

Section 47 of the MCIP 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 seven 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 the files of a witness, being a solicitor, relating to his client, in respect of which it was determined by the Magistrates' Court that legal professional privilege had been waived.

Where the document or thing is retained for more than seven 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 of 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.

73 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 section is an indictable offence and attracts a penalty of level six imprisonment (five years maximum).

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

74.1 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 sections 16.1 and 16.2 of this report given its application to the exercise of coercive powers by the Chief Examiner.

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.

In the previous reporting period (section 72.1), the Chief Examiner provided the SIM with a section of the procedural guidelines prepared for the Office of the Chief Examiner entitled 'The SIM 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.' As stated in the previous annual report, 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 some hearings in this reporting period. In all cases, the Chief Examiner determined that the subject-matter about which objection was made was relevant to the investigation. No complaints were made to the SIM by any of the witnesses who had raised objections as to the relevance or appropriateness of questioning.

74.1.1 Examination 1

In this case the Chief Examiner had asked the witness about his use of his mother's mobile phone, which the witness had on him at the time of the examination hearing rather than his usual mobile phone (which the witness said he had lent to a friend before attending the hearing). One question asked of the witness was about his mother's views about his use of her mobile phone. Counsel for the witness questioned the relevance of this. The Chief Examiner said that he was of the view that the witness' use of mobile phones and his involvement with other persons is a matter which is intrinsic to the issues that he is going to raise because of the ongoing associations which might be involved. Whilst he did not press the witness in answering the question, he did ask the witness to provide him with the phone number of the friend with whom he had left his regular mobile phone. In response the witness said that he did not have his friend's phone number in his mother's mobile so he was unable to contact him.

The SIM agrees that the witness' use of mobile phones, including the use of his mother's mobile phone instead of his regular mobile phone at the time of the examination hearing, was a matter relevant to the investigation of the subject organised crime offence. The witness had not taken his regular phone with him and it was relevant for the Chief Examiner to question the witness as to the use of the mobile phone which he had taken to the examination hearing instead of his usual mobile phone, which would presumably have the numbers of his friends and associates.

74.1.2 Examination 2

In another examination the witness questioned the relevance of the police application seeking access to the witness' mobile phone, which application the Chief Examiner had acceded to. The Chief Examiner explained to the witness that it was relevant to the police investigating the witness' contact with

persons who were associated with the subject organised crime offence. The witness accepted this. The SIM agrees with the Chief Examiner's explanation in relation to this matter.

74.1.4 Examination 3

In this examination hearing the witness, who was represented, stated that he did not think that questions about his own personal life, and in particular about the money he owed and what he owed the money for, were matters that he should have been asked about. He raised this concern after having answered the Chief Examiner's questions relating to his personal financial circumstances. The Chief Examiner had explained to the witness that in his opinion these matters were intrinsic to his understanding of the witness as a person and was intrinsically linked with other evidence which he might give in relation to the organised crime offence.

The SIM agrees that in this case, as in many of the examinations conducted by the Chief Examiner, the witness' personal and financial circumstances are relevant to the organised crime offence being investigated. Questions about a witness' personal and financial circumstances will in many cases assist the Chief Examiner in understanding the type of person the witness is and understand the evidence given by the witness. In many hearings conducted during the period under review, the Chief Examiner has explained to witnesses before questioning that he is proposing to ask them questions about their personal and financial circumstances and the reasons why he considers these matters to be relevant to the organised crime offence being investigated. In most of these cases, neither the witness nor their counsel has raised an objection to answering these questions. The witnesses examined in these cases appeared to understand why they were being asked questions about their personal background and financial circumstances. In all cases, the SIM, having reviewed the examinations, made the assessment that there was sufficient nexus between the questions asked of the witness and the organised crime offence being investigated.

74.1.4 Examination 4

In this examination hearing the witness, a solicitor by occupation who was legally represented, raised objection in relation to the appropriateness of questions by the Chief Examiner relating to his knowledge of the contents of a disc on one of his legal files. The witness said that he thought that it was unfair for the Chief Examiner to have asked him about the contents of the disc and the origins of it without having advised him that the Office of the Chief Examiner had arranged for transcripts of what was contained on the disc to be printed off, so that the Chief Examiner was well aware of what was on the disc when he was asking the witness questions about it and its origins. The Chief Examiner explained to the witness that he can test his evidence at any stage, and that he did not think it was unfair because this was an inquisitorial hearing and he is entitled to proceed with questioning on any basis that he considers appropriate. This may involve him deciding not to advise the witness of certain material when questioning the witness about the matter.

The SIM takes no issue with the explanation given to the witness by the Chief Examiner in this case, and does not consider that it was inappropriate for the Chief Examiner to have asked the witness the questions objected to in the circumstances of that particular case. No complaint was made by the witness to the SIM in regard to this matter.

74.1.5 Examination 5

In this examination hearing, counsel for the witness objected to a line of questioning by the Chief Examiner which sought to ascertain how the relationship between the witness and the principal suspect in respect of the organised crime offence had developed over the course of years pre-dating the time of the organised crime offence. Counsel submitted that this line of questioning had no direct relevance to the organised crime offence and that it was hard to see how this was of even any peripheral relevance to the matters under investigation.
The Chief Examiner rejected that objection as the organised crime offence under investigation involved primarily, as the most important person, the principal suspect, and in those circumstances it seemed to be intrinsic to understand the relationship between him and the witness. The circumstances under which they met and the development of their relationship were therefore clearly relevant. The SIM agrees with the decision of the Chief Examiner in overruling the objection made as the issue was clearly relevant to the investigation of the organised crime offence.

In this examination hearing, counsel also objected to the relevance of another line of questioning by the Chief Examiner concerning two murders which were not the subject of the organised crime offence[55] in respect of which the CPO had been obtained. His objection was that the witness was being asked about organised crime activities other than those identified in this investigation. The Chief Examiner again rejected this objection because he considered that:

- The witness' knowledge, if any, of the circumstances of the murders and the witness' relationship with those allegedly involved in those murders was part of a pattern of behaviour which is linked; and

55 The organised crime offence being investigated was the conspiracy to murder another person.

- The use of the witness' house as a safe house for the purpose of carrying out the two murders is intrinsically linked with the subject of the CPO.

The Chief Examiner therefore considered the facts and circumstances involving the two murders and the relationship generally between the witness and those allegedly involved in those murders as a relevant factor. Again, the SIM agrees with the position taken by the Chief Examiner on this matter and also agrees with the explanation given by him in this (and other hearings) as to meaning of 'relevance' in these type of inquisitorial proceedings.

The Chief Examiner also did not accept a third objection raised by counsel in relation to a question relating to the number of mobile phones the witness had. He explained that this was possibly relevant to the investigation of the organised crime offence. Again, the SIM agrees with the position taken by the Chief Examiner in relation to this issue.

74.2 Breach of confidentiality

The service of summonses in the presence of others was the subject of continuing discussions and monitoring in the previous reporting period (section 72.3). There were no issues in this reporting period in relation to witnesses being served in the presence of other people. Whilst 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, no issues arose in this reporting period.

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.

74.3 Matters raised with the Chief Examiner in relation to the conduct of examinations and section 53 reports

In relation to the examination of one witness access to the video recording of the examination under s 45 of the MCIP Act was granted to a member of the police who had not applied for the CPO in this matter. Under s 45(4) of the MCIP Act the Chief Examiner must ensure that a copy of the video recording of an examination of a witness is provided, on request, to the member of the police force who applied for the CPO with respect to which the examination was conducted. It is noted that the Chief Examiner has, in relation to all applications for access, including the present, sought to confirm that the member who is granted access is in fact the member who applied for the CPO as required by s 45(4) of the Act. However, it appears that there was a mistake in the application made to the Chief Examiner by the police representative at the examination hearing in wrongly identifying the Victoria Police applicant for the CPO which led to the video being released to a police officer who was not the applicant for the order. The SIM accepts that this was due to an oversight.

75 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 MCIP 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 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.

76 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:

(1) ensure that records are kept as prescribed on any prescribed matter
(2) ensure that a register is kept as prescribed of the prescribed matters in relation to all documents or other things retained under section 47[56] of the Act and that the register is available for inspection by the SIM
(3) report in writing to the SIM every six months on such matters as are prescribed and on any other matter that the SIM considers appropriate for inclusion in the report.

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

77 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.

56 Section 47 is outlined under section 72 of this report.

78 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 section 72, 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 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
- the reasons for the retention of the documents or other things
- the current location of all documents or other things
- 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.

79 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.[57] The SIM was advised by the Chief Commissioner in the previous reporting period that a SQL database for the recording of this information was being developed (section 77). The Office of Chief Examiner is responsible for the development and design of the SQL database. That database has not, at the time of reporting, been established.

In the interim, the Office of the Chief Examiner has developed a computerised database in a Microsoft Excel 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 Office of the Chief Examiner.

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:

- detailed description of each exhibit or thing produced and retained
- the reason for the retention
- the current location of the exhibit
- full details of exhibits taken before the Magistrate's Court and the directions given by the court.

The register was inspected twice in this reporting period. The SIM is satisfied that the data recorded in the interim register complies with the legislative requirements.

80 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 six 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 a written report covering the period 1 July 2006 to 31 December 2006. At the time of the finalisation of this report the SIM was awaiting the second report which will be referred to in the 2007-2008 annual report.

57 Section 66(b) *Major Crime (Investigative Powers) Act 2004*.

81 Secrecy Provision

This provision is reviewed at section 79 of the previous annual report.

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, 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 six imprisonment (five 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 a 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 a 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:

(1) For the purpose of carrying into effect the provisions of this Act, or
(2) 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 Office of the Chief Examiner staff are also reminded of this requirement in the presence of the witness.

82 Compliance With The Act

82.1 Section 52 reports

Section 52 provides that the Chief Examiner must give a written report to the SIM within three 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. One issue which did arise in relation to s 52 reports was, as referred to earlier in this report, the omission to include the fact that the relevant CPO had been extended. However, as stated, this information was included in the DVD recording of the application to the Chief Examiner for the issue of the relevant summons. The main point in raising this with the Chief Examiner was because the summons issued by him as a result of this application also did not mention that the relevant CPO was extended for a further six months. When this matter was brought to the Chief Examiner's attention, he agreed that information about the extension of a CPO should be included in both the summons and s 52 reports. Subsequent summons and s 52 reports from the Chief Examiner have included this information and there have been no further issues.

82.2 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.

There were some issues raised with the Chief Examiner by the SIM in relation to the information provided in s 53 reports as follows:

(1) One s 53 report stated that the witness was called both to give evidence and produce documents, however the summons was only to produce documents. The SIM noted that the witness summoned to produce documents was examined in any event (which is permitted by s 29(1)(b)(i) of the Act). Nevertheless, in the SIM's view, the s 53 report should have included this further information rather than advising that the witness was summoned for both purposes. The Chief Examiner noted this matter.

(2) One s 53 report stated that no order was made on application under s 18(2) of the Act in respect of a witness in custody, when in fact such an order was in fact made by the Supreme Court and the subject witness attended before the Chief Examiner in accordance with that order. The Chief Examiner agreed that this s 53 report had incorrectly stated that no order was made on application under s 18.

(3) A small number of s 53 reports omitted to include the names of one of the police members who had been given leave to be present in the examination room and who in fact attended part or all of the relevant examination hearings. The Chief Examiner agreed that these reports had not included this information. In one examination one of the police members who was given leave to view the examination from a remote location was not mentioned in the s 53 report.

82.3 Section 66 reports and register

The SIM received one s 66 report from the Chief Commissioner for this reporting period in compliance with the Act. The report 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.

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 MCIP Act in the period the subject of this report.

83 Relevance

Relevance has already been referred to in this report at section 74.1.

The SIM is satisfied that the questions asked of persons summoned 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.

84 Comprehensiveness And Adequacy Of Reports

84.1 Section 52 reports

The reports provided by the Chief Examiner were adequate. As discussed in this report, the Chief Examiner has complied with the SIM's request for further information to be included in s 52 reports. 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.

84.2 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.

84.3 Section 66 reports

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

85 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.

86 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.

As stated in the previous annual report and appropriate to repeat, 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

31 July 2007