Office of the **Special Investigations Monitor**

Annual Report 2007–2008

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Annual Report 2007–2008

01 Introduction

This is the annual report for the financial year ending 30 June 2008 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 Office of Special Investigations Monitor's (OSIM) 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 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. He has been re-appointed for a further period at the time of the writing of this report. Mr Jones is an Australian lawyer of 42 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 2005-2006 Annual Report. This report, as did the 2006-2007 Annual Report, covers the oversight of surveillance devices and telecommunications interceptions as that legislation took effect on 1 July 2006. The legislation relating to controlled operations, which the SIM will oversight, has not come into effect at the date of reporting.[1] The SIM has no oversight role in relation to the use of assumed identities.

1 This legislation will come into force on 2 November 2008.

The OPI Act required that the DPI also be the Ombudsman. Mr George Brouwer was appointed DPI. He also held the Office of Ombudsman. The legislation has been amended to remove this requirement. Mr Brouwer ceased to be DPI on 1 May 2008 when his Honour Michael Strong, a retired Judge of the County Court, took up the office of DPI. Mr Brouwer continues to hold the Office of Ombudsman.

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 two annual reports.

05 Director, Police Integrity – Coercive Questioning Powers

The *Ombudsman Legislation (Police Ombudsman) Act 2004* gave the Police Ombudsman and consequently the Director, Police Integrity 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.

During the period under review the SIM has reported to Parliament (1 November 2007) pursuant to s. 86ZM of the Act (the s. 86ZM Report). This report reviews the operation of Part IVA of the Act and the coercive powers conferred on the DPI. Further reference will be made to the s. 86ZM Report and legislation that has been passed by Parliament implementing recommendations made in the report.

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 2001* (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 no matters to the SIM under the Whistleblowers Protection Act in this reporting period.

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

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

The extent of these powers and the role of the Chief Examiner were reviewed in the 2005-2006 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.

During the period under review the SIM has reported to Parliament (26 June 2008) pursuant to s. 62 of the Act (s. 62 Report). This report reviews the need for the MCIP Act as it relates to the Chief Examiner and the police coercive powers in relation to organised crime and the adequacy of the performance of the Chief Examiner and members of the police force. Further reference is made to this report.

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

The SIM has oversight responsibilities for State law enforcement agencies which use telecommunications interceptions and/or surveillance devices (data surveillance devices, listening devices, optical surveillance devices and tracking devices).

The SIM's responsibilities include monitoring compliance with the legislation and reporting on compliance.

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. The SIM understands that this legislation will come into force on 2 November 2008.

14.1 Telecommunications Interceptions

Eligible authorities of the State of Victoria, declared by the Commonwealth Attorney General under s. 34 of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to be agencies for the purpose of that Act, are permitted to intercept telecommunications under the authority of a warrant and to make certain permitted uses of lawfully intercepted information. As a pre-condition of the Commonwealth Minister making a declaration at the request of a State Premier a State must have enacted legislative provisions that provide for accountability of State agencies through record keeping requirements and inspection oversight. Section 35 of the TIA Act provides that particular provisions must be included in the State legislation. Victoria has qualifying provisions in the *Telecommunications (Interception) (State Provisions) Act 1988* (State TI Act).

Inspection of intercepting agencies under the State TI Act provisions was, until 30 June 2006, the responsibility of the State Ombudsman. Prior to that date the only eligible authority in Victoria was Victoria Police. On 1 July 2006 inspection responsibility passed to the SIM. This opened the way for the Commonwealth Attorney General to make a s. 34 declaration in respect of the OPI and with effect from 19 December 2006 OPI[2] became the second Victorian State agency able to use the provisions of the TIA Act to conduct telecommunications interceptions.

The SIM is required under the State TI Act to inspect the records of Victoria Police and OPI at least twice each year and to report annually after 1 July of each year to the Minister (of Police and Emergency Services) on the result of inspections. The SIM may also report at any other time and must do so if asked by the Minister or Attorney General. In reporting under the State TI Act provisions the SIM may include a report on any matter where, as a result of the inspection of agency records, the SIM is of the opinion that a member of the staff of an agency has contravened a provision of the TIA Act or the requirement under the State TI Act to provide certain documents to the State Minister.

A report on the results of inspections for the 2006-2007 year was submitted within the required time frame. During the 2007-2008 year the SIM conducted two main inspections of agency telecommunications interception records as required by the State TI Act.

An additional inspection of records was conducted in relation to a joint Victoria Police - OPI investigation, now well known to the public as Operation Briars, and an OPI investigation into the alleged unauthorised disclosure of information about operation Briars to persons under investigation by the Briars operation. The latter of these two investigations included highly publicised public hearing examinations in which extensive use was made of lawfully intercepted information obtained under the authority of warrants issued pursuant to the TIA Act. The SIM reported on the results of these inspections in March 2008.

2 The Commonwealth required an inspection regime independent of the Ombudsman, who was originally also the DPI, before making a declaration under s. 34 in respect of the OPI.

14.2 Surveillance Devices

From 1 July 2006 the SIM assumed responsibility under the State *Surveillance Devices Act 1999* (SD Act) for inspection of Victoria State agencies authorised to use surveillance devices. The Act had been significantly amended to reflect national model surveillance device legislation cooperatively developed by States and the Commonwealth to provide, inter alia, for cross-border recognition of warrants authorising the use of surveillance devices and the controlled communication and use of protected information obtained under the authority of a surveillance device warrant.

There are four agencies of the State of Victoria authorised to use surveillance devices under the provisions of the SD Act. The Act requires the SIM to inspect the records of those agencies from time to time and to report the results of those inspections to each House of the Parliament as soon as practicable after 1 January and 1 July of each year. A copy of a report must also be provided to the Minister (Attorney General) at the same time as it is transmitted to the Parliament. The Act requires that a report submitted to the Parliament must be tabled in each House the next sitting day. The four agencies to be inspected and reported on by the SIM are:

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

During the 2007-2008 year the SIM conducted two inspections and submitted the required reports. Those reports, once tabled in Parliament, are publicly available.

14.3 Co-operation and Compliance

The SIM's reports under the SD Act are publicly available once tabled in Parliament, but reports under the State TI Act are provided to the Attorney General and Minister and are not available to the public. It is appropriate, therefore, to record in this annual report that the chief officer and the staff of each agency inspected under the State TI Act and the SD Act provided full co-operation with the SIM's inspections. It is also appropriate to note that in respect of both telecommunications interceptions and surveillance device use there is a high standard of compliance by the State agencies with the relevant legislative provisions.

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. The OSIM consists of four staff. The efforts of staff are much appreciated by the SIM particularly bearing in mind the heavy workload resulting from the s. 86ZM and s. 62 Reports which reviewed complex areas.

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."[3] 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.[4]

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[5] and includes information which can be directly or indirectly relevant to the investigation.[6] 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)*.[7] 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.

3 *Police Regulation Act 1958* (Vic) s. 86P(1)(d).
4 ibid., s. 86P(1)(a)-(c).
5 *Melbourne Home of Ford Pty Ltd v Trade Police Regulation Practices Commission* (No. 3) (1980) 47 FLR 163 at 173.
6 *Ross and Anor v Costigan (1982)* 41 ALR 319 at 355 per Ellicott J.
7 (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."[8] 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.

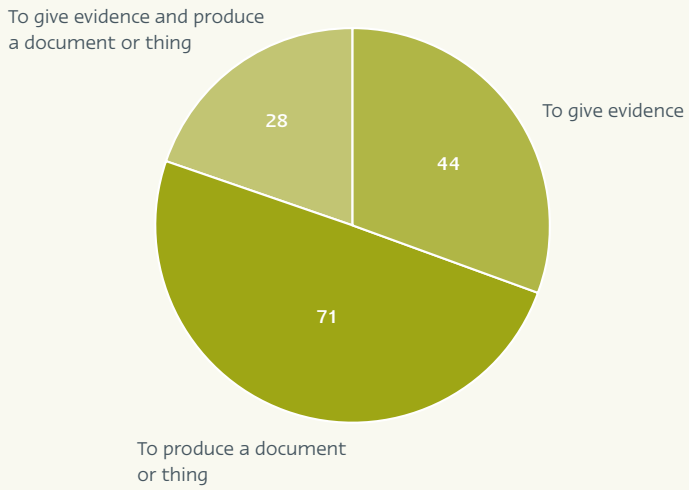
17 Section 86ZB Reports

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 143 s. 86ZB reports were received by the SIM in the 2007-2008 reporting period. All reports were received within the required time frame. The following chart displays the breakdown of types of summonses issued by the DPI.

Summonses issued by the DPI

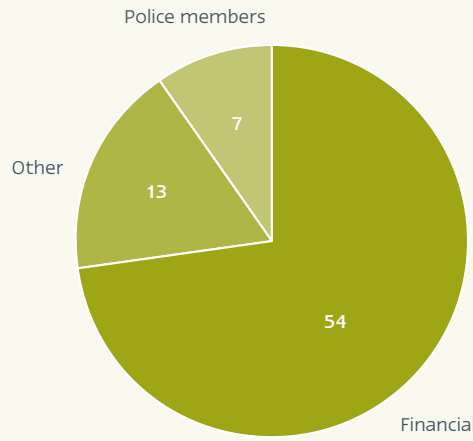


8 *Ross and Anor v Costigan* (1982) 41 ALR 319 at 355 per Ellicott J.

17.2 Summons to produce information, a document or thing

The following chart displays the types of institutions or persons summoned to produce information, a document or thing.

Types of Institutions Summoned to Produce Information a Document or Thing



17.3 Financial institutions

Summonses to produce a document or thing served on financial institutions again outnumbered all other types of summonses issued.

Financial records that were sought and produced included names of bank account holders, bank accounts evidencing transactions, bank statements, bank vouchers, share portfolios and loan documentation. Financial records belonging to investigation targets were sought to assist in establishing financial profiles and 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, allegations of improper associations, drug offences, theft, assault, attempts to pervert the course of justice, unauthorised secondary employment and unauthorised disclosure of confidential information.

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 summons a witness for the giving of evidence unless there is no other avenue by which to obtain the necessary information.

17.4 Other

Documents and other items were also sought to assist with investigations being conducted by OPI. Some examples include details of betting accounts held by gaming institutions, racing and betting records, security video footage and travel documentation.

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.

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

Interviews involving the use of s. 86Q were discussed in section 18 of the previous annual report. There were no interviews conducted under s. 86Q of the Police Regulation Act in this reporting period and accordingly there were no s. 86ZD reports received in respect of such interviews.

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

20 Coercive Examinations Reported To The Special Investigations Monitor

Sixty three s. 86ZD reports were provided to the SIM between 1 July 2007 and 30 June 2008.

Transcripts were provided for 59 of the 63 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 facilities at the SIM's office, as requested originally, they have been viewable at the SIM's office on a laptop provided by the OPI.

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.[9]

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

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 2005-2006 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 2005-2006 Annual Report, there were no issues relating to this in the current reporting period. Issues relating to this arising from the armed offenders squad (AOS) investigation are considered in detail in the previous annual report and the s. 86ZM Report.

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',[10] 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 *Police Regulation Act 1958* (Vic) s. 86PD(1).

10 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 given are intentionally general to give an understanding of the types of investigations conducted in this reporting period 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 where they have not already been publicly identified. A description of investigations conducted by the DPI is also contained in the s. 86ZM Report.

The DPI reported a total of 13 own motion investigations and one complaint generated investigation 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 table below displays this representation.

Investigation Type	2007–2008	2006–2007	2005–2006	2004–2005	Total
Own motion investigation (s. 86NA)	13	11	6	4	**34**
Complaint generated investigation (s. 86N)	1	2	2	1	**6**
Further investigation conducted by the DPI (s. 86R)	0	1	1	0	**2**

24 Descriptions Of The Investigations Where Coercive Examinations Were Conducted

There was an increase in the use by the DPI of compulsory questioning in this period as compared to the last reporting period. A total of 53 witnesses were examined, of these, 6 were examined twice and one was examined three times making a total of 61 examinations conducted in this reporting period. Of the 53 witnesses examined, 34 are serving police members, four are former police members[11] and 16 are civilians.

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

24.1 Alleged disclosure by former and current Victoria Police members of a police file relating to an informer and the subsequent death of that informer

This own motion investigation was instigated in relation to the circumstances surrounding the disclosure of a police file relating to a Victoria Police informer, now deceased, and the involvement of former and current Victoria Police members in the file's disclosure and the deaths of the informer and his wife, including the connection if any between the disclosure and the deaths. It extends to the links between the deaths and:

11 One of these four ex-police members was a police member during his first two examinations but, on his third examination, ceased to be a member.

- any direct or indirect associations/relations between any current or former Victoria Police members; and
- any direct or indirect relationships between any current or former members of Victoria Police and certain underworld figures.

The investigation is also seeking to establish whether Victoria Police are properly investigating the deaths of the informer and his wife and, by a subsequent own motion determination, was extended to include whether the investigation by Victoria Police of the deaths of the informer and his wife have been impeded, obstructed or influenced by any improper conduct by any serving or former member of Victoria Police. This latter issue was the subject of public hearings which were held by the OPI in June 2008 and consequently the investigation was made public.

This investigation is continuing.

24.2 Alleged involvement of members of the Victoria Police in the operation of licensed premises contrary to the Victoria Police Outside Employment Policy

This own motion investigation was instigated to determine whether subject members were in fact, directly or indirectly, involved in the operation of licensed premises, contrary to Victoria Police policies and procedures, in particular the Victoria Police Outside Employment Policy. The investigation also sought to determine whether there was an inappropriate association between subject police members and a person convicted of criminal offences relating to drugs of dependence and who was involved in the operation of the subject licensed premises.

This investigation is continuing.

24.3 Alleged involvement of Victoria Police members in criminal activities associated with drugs of dependence and developing inappropriate relationships with informers/human sources

This own motion investigation was instigated in relation to the alleged involvement of members of Victoria Police in criminal activities associated with drugs of dependence. The investigation extends to allegations of inappropriate involvement by members of Victoria Police with human sources (including registered and unregistered informers), including being involved in the commission of criminal offences relating to drugs of dependence with human sources and providing assistance, or giving tacit approval, to human sources in the commission of criminal activities. The investigation is also looking at the failure of line supervisors to take action if and when made aware of misconduct or criminality of Victoria Police members under their command. It also extends generally to issues relating to the Victoria Police informer/human source management policies, practices and procedures, including whether these are adequate to prevent misconduct or criminality associated with the handling and use of informers by Victoria Police.

This investigation is continuing.

24.4 Alleged serious misconduct of Victoria Police members who are or have been attached to a metropolitan police station, including attempts to pervert the course of justice, thefts of goods and controlled drugs from known 'sex workers', assaults of 'sex workers' and criminal or improper associations with drug dealers, drug users and sex workers

This own motion investigation was instigated into a number of alleged actions by the subject police members being wilful misuse of their positions as police officers amounting to the common law offence of misconduct in public office. Those actions were alleged to be any or all of the following:

- attempts to pervert the course of justice
- thefts of goods and controlled drugs from know 'sex workers'
- assaults of known 'sex workers'
- supply and possession of drugs of dependence
- improper access to, and use of, information held by police on known 'sex workers'
- criminal or improper associations with drug dealers, drug users and sex workers
- ownership and management of an unlicensed brothel and the commission of offences contrary to the *Prostitution Control Act 1994* (Vic).

The investigation is also considering whether the policies, procedures or practices of Victoria Police in the area of 'sex workers' were adequate to prevent or inhibit such activity by officers.

This investigation is continuing.

24.5 Alleged involvement of current Victoria Police members in conjunction with former Victoria Police members in aiding and abetting a murder (of Shane Chartres-Abbott on 4 June 2003)

This own motion investigation was instigated in relation to the alleged involvement of Victoria Police members in the unauthorised disclosure from Victoria Police of the address details of a person to a convicted murderer who used that information to subsequently murder that person, and the provision of an alibi to the murderer for the day of the murder. In addition to the aiding and abetting of the subject murder, this own motion investigation extends to the subject member/s being involved as an accessory after the fact of murder and in the unauthorised disclosure of information contrary to s. 127A of the Police Regulation Act in relation to the subject murder. This investigation was referred to in public hearings held by the OPI in November 2007 and consequently has been made public. The hearings were the subject of a report by the DPI tabled in Parliament in February 2008.

24.6 Alleged unauthorised usage of the Victoria Police internal email system by a Victoria Police member using the pseudonym 'Kit Walker'

This own motion investigation was instigated in relation to the use by a Victoria Police member of the Victoria Police internal email system to send anonymous emails directed against the then president of the Police Association, Janet Mitchell, under the pseudonym 'Kit Walker'. At the time, this matter had also been under investigation by the Ethical Standards Department (ESD) of Victoria Police. The own motion investigation also extended to the policies, practices and procedures of Victoria Police in relation to the conduct of an investigation by ESD into this unauthorised usage of the Victoria Police internal system, and in this context it also considered the intervention by the Police Association into the ESD investigation, which resulted in a suspension of that investigation pending a review on issues raised by the Police Association. The investigation was the subject of public hearings conducted in November 2007.

This investigation has been completed and made public, the DPI having presented a report to Parliament on this investigation pursuant to s.102(2) of the Police Regulation Act. The report recommended the development and implementation of protocols for appropriate communication processes between the Police Association, Government and the Chief Commissioner. Further, it recommended the implementation of legislative amendment to ensure that police cease to be sworn members of Victoria Police for any period of employment with the Police Association.

24.7 Alleged unauthorised communication of confidential information by Victoria Police members and improper associations

This own motion investigation, known as operation Diana, was instigated in relation to improper disclosure of confidential information and improper associations concerning two Victoria police members (Assistant Commissioner Noel Ashby and Senior Sergeant Paul Mullet) and one unsworn member (Victoria Police Media Director Stephen Linnell). The confidential information concerned Operation Briars, OPI Investigations, including the 'Kit Walker' matter, the use of telephone intercepts and other confidential Victoria Police operating and corporate information. Initially witnesses were examined in private hearings and subsequently some of those were examined in public hearings during which intercepted telephone calls between those allegedly involved in unauthorised communications of confidential information were played and put to the relevant witnesses. Some of the witnesses were then examined in private and additional witnesses were called to give evidence in private after the public hearings.

This investigation has concluded with a report by the DPI including the Delegate's recommendations being tabled in Parliament in February 2008.

24.8 Alleged involvement of Victoria Police members with Interstate Police officers in relation to improper relationships with prisoners

This own motion investigation was instigated in relation to the alleged involvement of Victoria Police members with interstate police officers in relation to improper relationships with prisoners, the giving of improper favours to prisoners and improper movement of prisoners. It also extends to whether there was a failure of supervisors and colleagues of the subject police members to do their duty to take action and whether the policies, practices or procedures of Victoria Police are adequate to identify, prevent or inhibit improper relationships with prisoners.

This investigation is continuing.

24.9 Investigation of access by the public to, and security of, the Victoria Police OSTT Complex

The determination for this own motion investigation follows the hearing of a civilian witness in another own motion investigation (in the 2006-2007 reporting period) which was an investigation into the circumstances in which members of the public obtained items of clothing, accoutrements or appointments supplied to any member of the force that would enable them to impersonate a member of Victoria Police contrary to s. 97 of the Police Regulation Act, including identification of police members responsible for providing the items.

The extended investigation, which is continuing, covers instruction in firearms at the range of the Academy, the process by which it is afforded to the public, other government agencies or other organisations and the method in which it is recorded; security of the OSTT Complex generally; and association between operational members of the OSTT Complex with the public, other government agencies, and other organisations and its attitude to sponsorship.

24.10 Alleged involvement of a police member in assault, criminal damage to property, blackmail and in an attempt to pervert the course of justice

This own motion investigation was instigated in relation to the alleged involvement of a police member in offences including assault, criminal damage to another's property, blackmail and attempting to pervert the course of justice.

The investigation is continuing.

24.11 Investigation into the propriety of donations to, and sponsorship of, Victoria Police, by a commercial corporation

This own motion investigation was instigated in relation to determining the propriety of donations to, and sponsorship of Victoria Police by a corporation. The investigation is also focusing on related issues, including the association between Victoria Police and the corporation, compliance by Victoria Police with its own standards with respect to donations and sponsorship, the means by which Victoria Police has solicited for donations and sponsorship, the approval of donations and sponsorship to Victoria Police and the recording by Victoria Police of donations and sponsorships. In addition, the social club established by a squad of Victoria Police is also being investigated in relation to these issues generally and the establishment and conduct of the club, including compliance with its constitutional and reporting obligations.

This investigation is continuing.

24.12 Alleged failure of members of a regional police station to undertake their duty with respect to the arrest, detention and charging of a member of the public resulting in injury to that person

This investigation was instigated as a result of a complaint made by a member of the public in respect of a serious injury that he alleges he had sustained whilst in custody at a regional police station. This investigation raises issues relating to the duty of police members with respect to the arrest, detention and charging of the complainant in this matter.

The investigation is continuing.

24.13 Alleged serious misconduct of a police member in committing criminal offences relating to drugs of dependence

This own motion investigation was instigated in relation to the alleged serious misconduct of a police member in committing offences relating to drugs of dependence and into the relationship of this police member with a convicted drug trafficker. In seeking to clarify the relationship between the police member and the convicted drug trafficker, the investigation is also focusing on whether the member has disclosed confidential Victorian police information to the convicted drug trafficker thereby potentially jeopardising an investigation, conducted unauthorised LEAP checks and generally behaved in a way that could be summarised as misconduct in public office.

This investigation is continuing.

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

The table below provides an overall summary of the incoming material from OPI that relates to s. 86ZB, s. 86ZD and s. 86Q reports under the Police Regulation Act.

Police Regulation Act 1958	2007–2008	2006–2007	2005–2006	2004–2005[12]	Total
s. 86ZB – Director must report summonses	143	106	202	84	**535**
s. 86ZD – Director must report other matters	63	44	60	30	**197**
s. 86Q – Power to require answers etc. of a member of the force	0	4	24	7	**35**

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

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 2005-2006 Annual Report. They continue to be followed by OPI and no issues arose in relation to them during this reporting period.

In the s. 86ZM Report the SIM recommended (Recommendation 5) that a new provision be enacted to replace ss. 17 and 20A of the *Evidence Act 1958* with respect to a witness summons issued by the DPI. That recommendation has been implemented in the Police Integrity Act but at the time of reporting had not come into effect.

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

Reference was made in section 25.2 of the 2005-2006 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.

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 Production of documents at an examination before the Director, Police Integrity or his delegate

In one examination hearing in this reporting period in which a witness was required both to give evidence and produce documents an issue arose as to the documents which were stated in the summons to be required for production. The stated documents were the witness' police official diaries over a certain period of years. However, as the witness correctly pointed out at the end of the examination, he was not asked any questions about that period but about another period of time (the relevant period) without having been required to produce his diaries for that period. The SIM agrees with counsel for the witness that this made it difficult for the witness to recollect certain events in the relevant period about which he was questioned during the examination. The explanation provided in the s. 86ZD report for this examination hearing was that the description of documents in the summons was based on the fact that the witness was initially believed to be the line supervisor for the CIU at which one of the targets of the investigation was stationed during the period in question. However, during the questioning it became clear that the witness was not the supervisor for the CIU in question during the relevant period. In the SIM's view, such issues can be avoided by checking information before requiring witnesses to produce documents which are not relevant to the investigation.

In response to this issue, the DPI has advised that OPI takes every reasonable step to investigate all background issues before conducting hearings. However, it is not always possible for OPI to check every detail prior to an examination without potentially compromising the integrity of an investigation. Further, that the hearing process is itself an investigatory process directed at establishing facts. In respect of the specific matter under consideration, the DPI noted that police are required to retain their official diaries and it is unlikely that any significant burden was placed on the witness by requirement to produce the documents.

Whilst the SIM understands the position put by the DPI, the main concern is that the witness in the specific matter under consideration was questioned about a period of time in the past in respect of which he was not required to produce his diaries (having been required to produce his diaries for another period), which made it difficult in terms of recollecting the information sought from him during the examination.

26.4 Viewing of examinations from a remote hearing room

This matter was discussed in section 25.3 of the 2005-2006 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.

26.5 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 2005-2006 Annual Report. The recommendation made with respect to this matter (Recommendation 1 of 2006) is set out.

The issue of a confidentiality notice is the subject of Recommendation 1 in the s. 86ZM Report. It is recommended that s. 86KA be replaced by a provision modelled on s. 20 of the MCIP Act. This recommendation has been implemented in the Police Integrity Act but at the time of reporting had not come into force.

26.5.1 Explanation of confidentiality to witnesses

In most examination hearings conducted in the period under review there has been an adequate explanation of the confidentiality obligations and the penalties applicable for breach of confidentiality. This has been done as part of the new procedure relating to the information document to be served on witnesses in accordance with the SIM's Recommendation 1 of 2007. This new procedure is described in paragraph 26.9 of the previous annual report.

Basically, the new procedure requires summoned witnesses to be given detailed written advice of their rights and obligations in a document entitled 'Information to Assist Summoned Witnesses' to be given to them at the time that they are served with a summons. In relation to summoned witnesses who are legally represented at hearings, the procedure requires that they be asked by the DPI or 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 DPI or delegate is also to ask the legal representative if he or she had discussed the contents of the document with the witness and whether he or she is satisfied that the witness understands it. If the witness is not legally represented, the DPI or delegate is required to take the witness through the document and be satisfied that the witness understands its contents before the examination begins. At the conclusion of the examination all witnesses are to 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 in accordance with the Police Regulation Act.

Whilst this new procedure has generally been followed in examination hearings conducted in this review period, whereby the witnesses were informed of their confidentiality obligations and of other rights and obligations under the Police Regulation Act, there have been some examination hearings in which it has been overlooked. In respect of the public hearings conducted as part of the investigation into unauthorised communication of confidential information by Victoria Police members, summoned witnesses were generally not asked about their understanding of the rights and obligations set out in the information document which was served on them. This may well have been because most of them were previously examined in private hearings in respect of which this procedure had been followed. However, there were two witnesses who were examined only once in private hearings as part of this investigation and in respect of whom the SIM's Recommendation 1 of 2007 was not followed during those examinations.

In another investigation, relating to the alleged disclosure by former and current Victoria Police members of a police file relating to an informer and the subsequent death of that informer, it appears that because a witness at a private hearing was a lawyer, it was assumed that that witness understood the information document and it was therefore not explained to the witness (who chose to be unrepresented, although as a result of issues which arose in the subsequent examination, the witness sought an adjournment to obtain legal advice and representation). Whilst the witness was asked about, and confirmed, his/her understanding of the information document, the SIM considers that as the witness was unrepresented it was nevertheless appropriate for the delegate to give the witness an overview of the rights and obligations contained in the information document.

The DPI has agreed with the SIM that the procedure recommended by him should be followed strictly in all cases. In the SIM's view it is important that all witnesses appearing at coercive examination hearings are informed of their rights and obligations and that every reasonable effort is made to ensure that they understand those rights and obligations, including but not limited to, the important confidentiality obligations that apply, particularly in cases where witnesses are not represented.

The issue of preliminary requirements at an examination is the subject of Recommendation 10 in the s. 86ZM Report. The enactment of a provision based on s. 31 of the MCIP Act is recommended. This recommendation is implemented in the Police Integrity Act but at the time of reporting had not come into force.

26.6 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 2005-2006 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 two investigations where some of the witnesses who had been examined in private hearings were subsequently examined in public hearings. Issues arising from these two investigations are discussed later in this report including issues relating to the use of non-publication orders.

26.7 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 2005-2006 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.

26.8 Breaches of confidentiality

In the period under review issues relating to breaches of confidentiality were raised with some witnesses, including witnesses examined during the course of the November 2007 public hearings. Apart from these issues there were no instances involving breach of confidentiality by witnesses in this reporting period. 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 2005-2006 Annual Report (section 25.7), has adequately addressed the security issues that may face witnesses. The SIM will continue to monitor this situation.

26.9 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 2005-2006 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. The new provision relating to summonses in the Police Integrity Act provides for service within a reasonable time.

26.10 Claim to LLP in respect of oral advice

In one examination hearing a witness made a claim to legal professional privilege in respect of oral advice he/she had apparently received from a lawyer who was also a friend of the witness. Before the examination was adjourned in order for the delegate to make a ruling on this claim, the OPI examiner submitted that the onus is on the person claiming the privilege that must be discharged by evidence as to the circumstances and context of the communications. In his submission, the evidence given by the witness in relation to the communications the subject of the claim of LPP demonstrated that they were not communications made for the purposes of obtaining legal advice from a lawyer, but rather communications engaged in between people with a long-standing relationship. Counsel for the witness objected as, in his submission, the witness had indicated a number of matters that he/she had sought advice on. The delegate then further questioned the witness on those matters. The witness again repeated that he/she had sought advice about his/her position in relation to any criminal or disciplinary matters as a result of his association with a certain person. The delegate put some propositions to the witness about the circumstances in which the alleged advice was given to him/her and then sought further evidence from the witness in relation to why he/she sought legal advice from the lawyer at the time that he/she did. The witness answered these questions as he/she had previously done. After hearing further from counsel on behalf of the witness, who maintained the witness' claim to LPP, the delegate adjourned the matter to consider whether he thought there was a sufficient basis for the claim or whether he would disallow it or whether he would send it to a third person to consider whether it should be allowed or not (as counsel for the witness had suggested). The witness' attendance was then adjourned to a date to be fixed and the examination was adjourned accordingly. A decision by the delegate on this matter is outstanding as at the date of this report.

In the s. 86ZM Report the SIM has recommended provisions be enacted along the lines of ss. 40-42 of the MCIP Act (Recommendation 9). This recommendation has been adopted and provisions included in the Police Integrity Act that deal with LLP and how a claim is determined. These provisions are in force at the time of reporting through amendments to the Police Regulation Act.

26.11 Compellability of witness who is the wife of target of an investigation

In one examination hearing, a submission was made on behalf of a witness, who was the wife of a police member the subject of an investigation, that she could not be compelled to give evidence in an examination hearing because:

- Section 86PA(3) provides that a person cannot be compelled for the purposes of an investigation to produce any document or give any evidence that he or she could not be compelled to produce or give in proceedings before a court.

- A prospective theoretical court in the future could not compel this witness to give evidence by exercising its discretion under s. 400 of the Crimes Act to excuse the witness from giving evidence on the basis that she is the wife of the possible defendant.

- There is a prospect of criminal proceedings against her husband, being the target of the investigation, and so it is theoretically possible that he is a prospective defendant, and the witness is a prospective prosecution witness and the evidence that she gives in these proceedings is possibly going to be the subject of what she will be required to give evidence of in a pending criminal matter.

- Therefore a prospective theoretical court in the future could not compel her to give evidence.

The delegate responded that the witness is not compellable until a decision is made in respect of s. 400 and if the decision under s. 400 is made contrary to the application to be excused, she becomes compellable.

Counsel for the witness confirmed his submission that there was a theoretical possibility that the witness "could not be compelled" to give evidence because she is the wife of the target of the investigation, such that she cannot be compelled to give evidence at the examination.

Submissions were then invited from the OPI examiner who submitted that:

- Section 27 of the Evidence Act applies to this type of investigation such that the witness would not be compellable to disclose any communication made to her by her husband during the marriage.

- Section 400 of the Crimes Act does not operate to affect s. 27 of the Evidence Act. It appears to be an exception to s. 27 and it is the application of s. 27 to such communications which should be dealt with here. That is, if he asks questions that may be referable to such communications then the witness should be reminded of her right not to answer.

In response, counsel for the witness still maintained his interpretation of s. 86PA(3) that as it is theoretically possible that the witness could not be compelled to produce or give evidence in proceedings before a court, she cannot be compelled to give evidence at this examination.

The delegate ruled against the submission made by counsel for the witness. In his view, until a decision is made under s. 400 of the Crimes Act the person called as a witness is a compellable witness, and only once an order has been made under s. 400 is that person no longer compellable. Further, the delegate considered that s. 86PA and in particular sub-section (3) has as its focus evidence rather than the compellability of witnesses. The heading of the section, evidence in director investigations, suggests that the director and his delegates should focus on the character of the evidence in question rather than the character or characteristics of the person asked to produce or give that evidence.

The submission that if there were to be proceedings against the witness' husband then she would not be compellable was therefore not accepted. The delegate stated that the focus should be on the nature of the evidence to be given. The witness is compellable in respect of evidence other than evidence which may fall within the reach of s. 27 of the Evidence Act: that is to say, communications made between the witness and her husband during the course of the marriage.

The issue raised is of importance and therefore has been referred to in some detail. The SIM agrees with the conclusions reached by the delegate in this case for the reasons he has stated.

26.12 Sufficiency of information provided in a summons

In one case counsel for the witness submitted that the information provided in the summons (being in respect of hindrance or obstruction of investigations and improper associations) was inadequate for the following reasons:

(1) It did not comply with the requirements of natural justice; and

(2) The Police Regulation Act, on its construction, entitled the witness to more information. The summons did not give any indication of any personnel involved, and whether the investigation related to the witness himself allegedly committing or being involved in that type of behaviour.

In relation to (2), he referred to s. 86KA(4) of the Police Regulation Act, submitting that this provision would be meaningless if a witness has not been provided with "the subject matter of the investigation to which the summons relates."

The delegate did not accept this submission that the summons was invalid because of the lack of sufficient information. He referred to s. 17 of the Evidence Act which does not require any particulars whatever to be given in the summons. In relation to procedural fairness, he said that his job was to ensure that the witness was treated fairly in terms of expressing himself on the subject matters raised with him, and that was the essence of natural justice in these particular circumstances. The SIM agrees with the decision of the delegate in this case.

However, following Recommendation 5 of the s. 86ZM Report referred to earlier the Police Integrity Act will require when it comes into force that a summons directed to a person state the general nature of the matters about which the person is to be questioned unless the DPI considers that this disclosure would prejudice the conduct of the investigation.

26.13 Practice of allowing cross-examination of a witness by counsel representing another summoned witness

The SIM makes reference to this matter as it is considered a good practice which the delegate implemented in an own motion investigation which had commenced by way of private hearings, and then proceeded to public hearings. At the stage of the private hearings, the delegate allowed counsel for a witness who had been examined privately to be present at the examination of another witness who had given evidence in relation to his dealings with the subject witness. That evidence was initially given in the form of an affidavit and then, by way of private examination, the witness was asked to confirm the truth and accuracy of the affidavit previously made. The delegate then allowed counsel for the subject witness to cross-examine that witness. The SIM considers that this enables robust testing of evidence and procedural fairness.

The practice is specifically provided for in the Police Integrity Act following the implementation of Recommendation 7 of the s. 86ZM Report with the DPI having the power to allow another person to be legally represented at an examination while a witness is giving evidence and examined if the DPI considers there are special circumstances. This provision is not in force at the time of reporting.

27 Legal Representation

The need to make free legal assistance available to witnesses summoned before the DPI was discussed in the 2005-2006 Annual Report (section 26). Since then, Victoria Legal Aid at the request of the Department of Justice has been assisting witnesses summoned to appear before the DPI and the Chief Examiner although the arrangements have not yet been formalised. The assistance available to witnesses is the provision of legal advice and/or legal representation. The latter is available for witnesses who face a reasonable prospect of prosecution or are at risk of self-incrimination. It is anticipated that the arrangements relating to the provision of assistance by VLA will be formalised in 2009.

The matter of legal assistance to witnesses is addressed in the s. 86ZM Report (Recommendation 11). The provision of legal assistance to witnesses will be the subject of review in future annual reports.

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 2005-2006 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 an application to be legally represented during a coercive examination. A total of 51 applications were granted in this reporting period.

The proportion of police witnesses who were legally represented remained the same as in the previous reporting period, being 81 percent. The proportion of civilian witnesses who were legally represented increased in this reporting period, being 75 percent compared to 60 per cent in the previous reporting period. The table below displays a breakdown of legal representation for the current and previous reporting periods.

Legal Representation	2007-2008	2006-2007	2005-2006	2004-2005	Total
Police witnesses legally represented during examination	34	25	38	9	**106**
Police witnesses not legally represented during examination	8	1	9	1	**19**
Former police members legally represented during examination	4	1	0	0	**5**
Former police members not legally represented during examination	0	0	2	0	**2**
Civilian witnesses represented during examination	12	3	2	2	**19**
Civilian witnesses not represented during examination	4	2	8	3	**17**

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 2005-2006 Annual Report (section 27).

Overall, the SIM is satisfied that the questioning of witnesses in this reporting period was relevant to the investigations the subject-matter of the hearings. In one hearing objection was taken that the topic of improper use of Victoria Police information systems (e-mails), as stated in the summons, was at best borderline in relation to why the witness was in fact summoned. Counsel for the summoned witness submitted that it was more a case of the content of emails being critical of a particular person that prompted the use of the coercive process which was, in effect a political issue relating to the Police Association. In effect, it was submitted that the witness was being questioned because of the views the witness expressed in various emails about the then President of the Police Association and the political campaign that was apparently being run.

However, having reviewed the examination, the SIM agrees with the explanation given by the OPI examiner in that hearing, that the questions were all related to the aspect of the use of Victoria Police information systems and that the content of the emails was raised for the purpose of enabling the witness to identify which emails he/she had drafted and where, which emails he/she had sent and from where and who might have sent others and from where. Questions were relevant to the topic of improper use of Victoria Police e-mail which incidentally uncovered political issues relating to the Police Association. The SIM also notes that the witness did not subsequently make any complaint in relation to the relevance of questions asked at the examination hearing.

In respect of another investigation, questions were asked about the witness' criminal legal practice, the witness being a barrister who had apparently given legal advice to certain police members the subject of the investigation. The SIM considers that such questions were relevant to the purpose of the investigation as they shed light upon the witness' dealings with the subject police members and other relevant associations the subject of the investigation. The SIM also notes that the witness did not subsequently make any complaint in relation to the relevance of the questions asked at the examination hearing.

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 2005-2006 Annual Report (section 28). In the period under review no issues arose concerning the length of time of an 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 2005-2006 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 2005-2006 Annual Report (section 30).

In the period under review, there were no witnesses examined who were brought before the DPI or his 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 2005-2006 reporting period. As stated in the 2005-2006 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 2005-2006 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.

In this reporting period, persons who have been coercively examined have been advised of their right to complain by virtue of a written document given to them at the time of service of the summons in accordance with the practice set out in the SIM's Recommendation 1 of 2007.[13] This document, entitled 'Information to Assist Summoned Witnesses' contains a comprehensive explanation of the rights and obligations of summoned witnesses in relation to an OPI coercive hearing, including the right to make a complaint to the SIM. In addition to having been so advised of their right to complain to the SIM, all witnesses examined in the period under review were reminded of their right to complain to the SIM at the end of their respective examinations.

Following Recommendation 10 of the s. 86ZM Report the Police Integrity Act does require that a witness be informed of their right to complain to the SIM. That provision has not come into force at the time of reporting.

13 This is explained in section 26.9 of the previous annual report.

33 The Use Of Derivative Information

As referred to in section 32 of the 2005-2006 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 arise during the course of one hearing reviewed in this period. In that hearing counsel for the witness sought an adjournment in order to obtain legal advice as to whether the certificate issued to his client, which it was accepted did not protect the witness from any derivative evidence, required the witness to answer questions because it did not go far enough to protect the witness against self-incrimination. In the SIM's view, the delegate correctly noted that he did not see any ambiguity in the Police Regulation Act in this regard in that the witness is placed under an obligation to answer questions upon being granted a certificate. Nevertheless, in fairness to the witness, the delegate granted a short adjournment for further legal advice to be obtained by counsel. After that adjournment, counsel did not press the issue but asked whether the certificate could be amended to add that no use can be made of evidence given by the witness or any derivative use. However, the delegate correctly pointed out this could not be done as the statute in effect prescribes the effect of a certificate being granted to a witness. The SIM agrees with the approach taken by the delegate in this matter.

34 Certificates

As discussed at section 33 of the 2005-2006 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:[14]

- 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*[15]
- 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.

14 Section 86PA(8) of the *Police Regulation Act 1958* (Vic).
15 Section 19 provides that non-attendance, refusing to give evidence is an offence.

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.

In the s. 86ZM Report the SIM recommended (Recommendation 8) the abolition of the certification procedure and the enactment of a provision along the lines of s. 39 of the MCIP Act abrogating the privilege against self incrimination. Such a provision is now in force following amendment to the Police Regulation Act and is also contained in the Police Integrity Act.

35 Issues Arising From Section 86PA And The Common Law Privilege Against Self-Incrimination

As a result of the abolition of the certification procedure this is the last time the SIM will report on its operation.

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 2005-2006 Annual Report. Reference was also made in these sections to the advice obtained by the SIM from Mr John Butler, Crown Counsel (Advising). 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.

The practice observed in the 2005-2006 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.

All certificates issued in the examination hearings reviewed in this reporting period have been confined, except for one. In that hearing, the delegate granted an apparently blanket certificate to the witness conditional on the witness not being convicted of perjury. It appears that the delegate took the view that he would grant a certificate in relation to all evidence that the witness would give at the examination hearing but subject to the condition of not being convicted of perjury. In respect of the condition imposed, it is clear from a review of the examination hearing, that the delegate was imposing a condition which would not protect the witness from anything in the event that the witness gave false evidence. In the SIM's view, this condition in effect removes the use immunity provided by the Police Regulation Act and, as such, is invalid. Overall, it appears clear that the delegate was granting a very broad certificate to the witness intended to cover all the evidence that the witness was to give at the examination, and as part of the blanket certificate a condition was imposed which the SIM considers to be invalid for the stated reasons. When the examination of the subject witness continued on an adjourned date, the delegate again granted a blanket certificate on the same condition.

What the delegate did on this occasion was clearly inconsistent with the agreed practice, based on the advice given by Mr Butler as discussed in the 2005-2006 Annual Report. These issues will no longer arise as a result of the abolition of the certification procedure and the enactment of an abrogation of the privilege against self-incrimination provision.

In this reporting period a conservative approach has generally been taken at examination hearings in relation to the application of the privilege against self-incrimination and the granting of s. 86PA (4) certificates, as suggested by the SIM in the previous annual report. However, as discussed in section 35.1 of the previous annual report, s. 86PA (4) is a difficult provision to administer. It has been considered and discussed in section 17. 11 of the SIM's s. 86ZM report, and in particular section 17.11.2.

36 Procedural Issues

A number of procedural issues relating to certificates were discussed in the 2005-2006 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 2005-2006 Annual Report.

Under the abrogation of the privilege against self-incrimination provision now in the force, the position will be less complicated and will remove difficulties that had arisen under the previous provision.

36.2 Certificates issued

A total of 53 witnesses were compulsorily examined in the 2007-2008 reporting period. Of these witnesses, 34 are serving Victoria Police members at the time of questioning. Four of the witnesses are former members and the remaining 16 are civilian witnesses.

All examinations which were notified to the SIM 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 delegates in this reporting period were outside counsel and a retired Judge was used on a number of occasions including the conduct of Public Hearings. In the s. 86ZM Report (pages 125-126) the SIM discusses the role of the DPI or delegate in the conduct of examinations and the qualifications and experience that best fit a person for that role. There was no examination in which the delegate refused to give the witness a certificate.

The table below displays a breakdown of the types of certificates granted for the current and previous reporting periods.

Types of Certificates	2007-2008	2006-2007[16]	2005-2006	Total
Blanket certificates granted on the application of witness	2	3	15	**20**
Blanket certificates granted on the initiative of delegate	0	0	8	**8**
Confined certificates granted on the application of witness	16	21	1	**38**
Confined certificates granted on the initiative of delegate	1	1	0	**2**
Certificates refused by delegate	0	1	4	**5**
Application not made for certificate	46	20	31	**97**

37 Complaints

The SIM's jurisdiction under s. 86ZE of the Police Regulation Act in relation to complaints was discussed in the 2005-2006 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.

16 Refer to notes to table in 2006-2007 Annual Report at page 27.

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 16 complaints in this reporting period. However, eight of these complaints were either not made pursuant to s. 86ZE or did not fall within the SIM's jurisdiction to monitor compliance with the Act under s. 86Z(a) by the DPI, members of staff of OPI and persons engaged by the DPI under s. 102(1)(b). The SIM therefore could not review these matters or assist the complainants in relation to the matters raised, most of which related to dissatisfaction with an OPI investigation, the progress and status of such an investigation or the failure of OPI to conduct an investigation into a complaint. As advised to the complainants, the SIM's function does not extend to monitoring how the OPI conducts an investigation or the results of any such investigation. Nor does it extend to reviewing any decision made by the DPI not to conduct an investigation and the SIM does not have the power to require the OPI to conduct an investigation into any matter. Section 86N (1) of the Police Regulation Act enables the Director, Police Integrity to determine that a complaint made to the Director does not warrant investigation if in the Director's opinion:

(a) the subject-matter of the complaint is trivial or the complaint is frivolous or vexatious or is not made in good faith; or

(b) if the complainant had knowledge for more than a year of the conduct complained of and fails to give a satisfactory explanation of the delay in making the complaint.

One of the complaints that did not fall within the SIM's functions concerned alleged misconduct of OPI officers in the conduct of an investigation and subsequent prosecution. The complainant had requested the SIM to investigate whether OPI investigators had audio recorded interviews of witnesses and destroyed those audio recordings before the resulting prosecution against the target of the investigation. However, as advised to the complainant, who was the defendant in the subject prosecution,[17] the SIM does not have jurisdiction to investigate the matters raised. The Police Regulation Act does not give the SIM the power to oversight OPI officers/investigators in the conduct of an investigation. Nor does it give the SIM the role of generally oversighting the administration or operation of OPI.

Whilst the SIM could therefore not assist the above complainants, some of the issues referred to in their complaints could be raised with the Ombudsman under his general jurisdiction with respect to OPI. The Ombudsman has an important role with respect to the oversight of OPI. The complaint concerning the prosecution was referred to the Ombudsman by the SIM.

17 It is noted that the Magistrate hearing the prosecution dismissed the charge against the defendant and ordered the Director, Police Integrity to pay the costs of the defendant.

The fact the SIM could not assist many of the complainants is a reflection of the very narrow jurisdiction given to the SIM under the Police Regulation Act to handle complaints. The basis of any complaint that can be investigated by the SIM is clearly circumscribed by the legislation, as set out above, and is only exercisable after the subject of a complaint has occurred.

The remaining eight complaints can be divided into those which related to the examination and/or summons process or issues (four complaints received) and those which concerned alleged unauthorised disclosure of confidential information to the media (four complaints received, two of which were in respect of the same confidential information). Whilst the DPI does not consider the latter category to fall within the complaints jurisdiction of the SIM, they are nonetheless matters which the SIM may consider as part of his jurisdiction to monitor compliance with the Act under s. 86Z(a) by the DPI, members of staff of OPI and persons engaged by the DPI under s. 102(1)(b).

37.1 Complaints about unauthorised disclosure of confidential information to the media (leaks)

The SIM received a number of complaints about the alleged unauthorised disclosure of confidential information to the media, being information contained:

- In two *Age* newspaper articles written on 14 and 15 September 2007 by Nick McKenzie about Operation Briars (the Briars Taskforce media articles); referred to hereunder as the first complaint;
- In an *Age* newspaper article written on 17 September 2007 by Nick McKenzie which contained personal information given by a summoned witness during the witness' examination by the OPI; referred to hereunder as the second complaint; and
- In the report of delegate Mr Murray Wilcox QC in relation to the investigation conducted by the OPI in relation to alleged unauthorised communication of confidential information by senior police members (known as Operation Diana); referred to hereunder as the third complaint.

All three of these complaints relate to matters arising as a result of a confidential and sensitive joint Victoria Police and Office of Police Integrity (OPI) investigation into possible involvement in the offence of murder of a former sworn officer and a currently serving sworn officer of Victoria Police. This investigation, known as Operation Briars, had at the time of this report become well known publicly because of the subject media reports referred to above and the subsequent OPI investigation into the unauthorised disclosure of confidential information, which included the conduct of public hearings by the OPI in November last year. During the course of the Briars investigation concern had arisen within the Victoria Police-OPI Board of Management about a suspected leak of confidential information concerning that operation by senior officers of Victoria Police. Accordingly, the Director, Police Integrity commenced an own motion investigation under s. 86NA of the Police Regulation Act into the suspected unauthorised disclosure of confidential information by senior officers of Victoria Police. This investigation was known as Operation Diana. As part of that investigation the OPI conducted a number of private and then public examination hearings of witnesses. Some of the witnesses examined in private hearings were re-examined in public hearings,[18] and others were examined in private hearings only. Mr Murray Wilcox QC was appointed as delegate to conduct the hearings, and having done so, subsequently prepared a report setting out his conclusions and recommendations. That report was tabled in parliament on 7 February 2008. This report comprehensively sets out the chronology and background to Operation Diana, including the related Briars Operation, and the relevant evidence given by witnesses during the course of examination hearings conducted during the investigation.

The first complaint referred to above was made to the SIM by two interested parties. Both complainants expressed concern that the leak to the media of information relating to OPI/Victoria police investigations may have come from either the OPI or Victoria Police. The second complaint referred to above, made by a witness who had been privately coercively examined, also suggested that the information about the witness could only have been leaked to *The Age* newspaper by the OPI given that the complainant was questioned by the OPI on the matters referred to in the article prior to the publication of that article in *The Age* newspaper some eleven days later. The complainant stressed that the subject *Age* article included specific information, which directly resembled the evidence that was given at the preceding examination hearing.

In response to all three complainants, the SIM referred to the importance of s. 102G of the Police Regulation Act, which imposes a confidentiality obligation on those receiving information as a result of the conduct of hearings by the DPI or his delegate in accordance with that Act. However, as advised to the complaints, whilst the SIM has jurisdiction to monitor compliance with the Police Regulation Act by the DPI and staff of the OPI, which would include consideration of whether the DPI and staff of the OPI have complied with the s. 102G confidentiality obligations in the Police Regulation Act, there was no evidence of such non-compliance provided by the complainants.

18 It was at this stage of the public hearings that lawfully intercepted information obtained from telecommunications interception was introduced. During the course of the public hearings OPI posted hearing transcripts (which included transcripts of telecommunication interception excerpts played at the hearing) on its web site. Selected portions of audio recordings and accompanying transcripts were provided to the media on compact disks (CDs). This matter, and in particular the release to the media of the audio obtained as a result of the telecommunications interception, is the subject of another report prepared by the SIM to the Minister of Police and Emergency Services pursuant to the *Telecommunications (Interception)(State Provisions) Act 1998* (Victoria).

One complainant suggested that the obvious remedy available to the OPI was to coercively examine Mr Nick McKenzie of *The Age* Newspaper in order to ascertain how he had derived the information that he had published in the subject article. However, as advised to the complainant, the SIM does not have jurisdiction in relation to how the OPI conducts any investigation, nor can he direct that the OPI undertake any investigation into a complaint or to require the OPI to coercively examine a witness. These are operational matters which do not come within the statutory role given to the SIM by the legislation.

In relation to the suggestion in the above complaints that the leak may also have come from within Victoria Police, the SIM advised the complainants that he does not have jurisdiction to monitor compliance by police with s. 127A of the Police Regulation Act, which relates to unauthorised disclosures by members of the police force. A breach of this provision is a criminal offence, which is to be dealt with by the courts upon evidence establishing that the offence has been committed. Oversight of Police with respect to compliance with this provision is the responsibility of OPI.

Whilst no evidence was provided by complainants as to the source of the leaks, the SIM was nevertheless concerned that they raised important matters relating to confidentiality. Therefore he wrote to the DPI enclosing a copy of the complaint letters received and his response to those complaints. In respect of the second complaint, the SIM was particularly concerned that the article contained information which resembled the evidence that a summoned witness had given at an OPI examination. The confidentiality of private coercive examinations is clearly an important matter and serious consequences, such as adverse publicity, can arise from it being breached. Therefore, in referring these matters to the DPI, the SIM requested the DPI to advise him of any action taken or proposed to be taken or whether he had any other comments. In response, the DPI advised the SIM that he was conducting an investigation into leaks of sensitive information, including the leaking of the information published in *The Age* newspaper articles referred to.

The investigation referred to by the DPI in his response was, it would appear, the Diana Operation. However, whilst that investigation appeared to have concluded as evidenced by the report of Mr Murray Wilcox QC, there was no information or any conclusions reached relating to the leak of information to *The Age* newspaper (although the report does refer to it). Accordingly, in March 2008 the SIM wrote to the DPI referring to the complaints relating to the information leaked to *The Age* and requested the DPI to advise of the current position of that investigation.

The third complaint concerned the leak to the media of information contained in the delegate's report in relation to Operation Diana, including details of the date that report was to be tabled in Parliament. The complainant, being a lawyer representing one of the witnesses who had appeared at the OPI public hearings, had given the SIM a copy of his letter to the OPI asking whether an investigation would be conducted into how the media had obtained information that was in the report before it was tabled in Parliament. The complainant further asked the SIM if he could advise as to what steps have been taken to identify whether there is a leak of information from the OPI. The SIM considered that the arguments put forward by the complainant that there had been a leak of the report or parts of its contents carried weight. The nature of the reporting in the media article indicated that the reporter might have seen the report or been briefed by a person who was familiar with it. The persons in that position would seem to be limited. Accordingly,

the SIM considered the matter of importance and raised it with the DPI, requesting his advice as to whether any investigation is being conducted by OPI into the leak and the status of that investigation. The SIM also asked the DPI whether, if no investigation is being conducted into the matter, why that is the position and any other comments the DPI may wish to make.

In referring this matter to the DPI, the SIM noted that in his submission to the s. 86ZM review the DPI had stressed the importance of s. 102G of the Police Regulation Act and compliance with it. In a response to the SIM relating to the DPI's Police Shootings report (Appendix B – 2005–2006 SIM Annual Report) the DPI had stressed the importance of the confidentiality of reports to Parliament before they are tabled. In relation to the distribution of a draft report, the DPI had said:

> *"I need to be satisfied that the use and distribution of a draft Parliamentary report or extracts from such a report is not one which will be in contempt of Parliament. Furthermore, it must not be one which is in contravention of the stringent confidentiality requirements located in s. 102G of the Police Regulation Act. In my view in the absence of statutory authority, extracts of a draft Parliamentary report can only be distributed to another body or person if there is no other means of obtaining necessary information to finalise the report or if there is no other means of providing procedural fairness to those who will be adversely affected by the report."*

In respect of the subject report, procedural fairness clearly required the provision of information from the draft report to those who would be adversely affected by it and this was done. The SIM considered that, bearing in mind that it is an OPI report and the nature and extent of the reporting, a possible source of the leak of the information could be from within the OPI. If that was the case such a leak would be in contravention of s. 102G of the Police Regulation Act and could amount to contempt of the Parliament, both serious matters. The SIM therefore considered it appropriate to take the matter up with the DPI.

37.1.1 DPI's response to complaints regarding alleged leak of confidential information by the OPI

In response to the issues raised above, the DPI wrote to the SIM on 18 March 2008. For convenience, his response to the issues raised is quoted below in so far as considered appropriate for the purposes of this report.

i. In relation to the McKenzie Articles of 14 and 15 September 2007, the DPI stated:

> *"I share your view that The Age articles of 14 and 15 September 2007 revealing details of the activities of the Briars Taskforce leave little doubt that there was a leak of very sensitive information to Mr McKenzie. It is noteworthy that, throughout the articles, references to the investigation were by the codename 'Briars'. Although the. investigation in question is a joint Victoria Police / OPI operation, it has a different codename for internal OPI purposes: ....(code name deleted for the purpose of this report). The article made no mention of this OPI codename, suggesting that the source of the information to Mr McKenzie is not from within OPI.*

I assure you that the possible leak to Mr McKenzie is actively under investigation by OPI, although it must be recognised that these matters are extremely difficult to investigate, particularly in the early stages. In my view it would be inappropriate to reveal any further details of my investigation in this correspondence, but I will be happy to arrange for a confidential oral briefing to be provided to you at your convenience should you so wish."

In relation to the complainant's suggestion that the OPI should use coercive powers to compel Mr Mckenzie to identify his sources, the DPI responded that:

"....to adopt the course urged ..... would be, at best, a very oppressive and unsophisticated investigative strategy...."

ii. In relation to the alleged leak of the DPI's report to Parliament, the DPI stated that he was satisfied that there was no leak of that report from the OPI. In referring to the relevant media report said to contain the leak, being that reported in *The Australian* on 5 February 2008 by Cameron Stewart, he notes that the story contained in that article was picked up in later editions of *The Age*. His reasons for reaching the conclusion that there was no leak from the OPI are as follows:

".....OPI did not speak to The Age at any time and it appears The Age articles were composed not from primary sources but were based on the The Australian articles. There was a certain amount of media speculation about the possibility of a leak..... but OPI did not make any significant contribution to the public discussion. However, in response to your request for my advice on this issue I have had enquiries made and I am able to offer the following comments.

1. It is to be noted that neither the article in question, nor any of the articles it spawned in other media outlets, make any reference or speculation about possible action against Inspectors Weir and Rix. This suggests the report was not leaked, as Messrs Weir and Rix were also prominent in the public hearings, were the subject of intense media coverage, and were the subject of discussion and recommendations by Mr Wilcox in the report to Parliament.

2. The opening address by Dr Lyon at the commencement of the public hearings made specific reference to the offence of 'misconduct in public office'. Dr Lyon referred to an example from case law about the leaking of confidential information by a police officer. Dr Lyon went on to say that, 'a key focus of this examination to be conducted into this matter will enquire into the very same type of conduct'.

There could not be a more obvious or more public reference to the fact that one possible offence to be highlighted by the evidence was the offence of 'misconduct in public office'.

3. In the course of the public hearings there were frequent references in the media to the likely charges against the five main witnesses, Messrs Ashby, Linnell, Mullett, Rix and Weir. A number of press articles are attached illustrating this point ..... . It can be seen that frequent reference was made to the offence (among others) of 'attempt to pervert the course of justice'.

4. As can be seen from my report to Parliament, notices were despatched on 27 November 2007 under the signature of Mr Carroll to each of the five main witnesses, Messrs Linnell, Ashby, Mullett, Weir and Rix. These notices made it clear that Mr Wilcox was considering, among other things, possible offences of 'misconduct in public office' and 'attempt to pervert the course of justice' by each of the witnesses. It is significant that on 1 December 2007, shortly after these notices were sent to the relevant parties, an article appeared in The Herald-Sun referring to the notices .... OPI was not the source of this information and, when approached by The Herald-Sun, OPI declined to comment. It is apparent that this information, arguably in breach of s. 102G, could only have come from one of the witnesses or their advisers.

5. The date on which I intended to table my report in Parliament was not finally determined until I was satisfied that the report was complete. When I was so satisfied, a date for tabling the report was set. This date was not a secret, and journalists were generally advised of approximate date of tabling. Nothing can be read into the fact that the date was known or anticipated by a reporter or by anybody else.

6. It is acknowledged that none of the media speculation at the time of the public hearings specifically predicted that a charge of 'attempt to pervert the course of justice' would be recommended against Mr Mullett, and that a charge of 'misconduct in public office' would not be recommended against him. Similarly, none of the media speculation at the time of the public hearings specifically predicted that charges of 'misconduct in public office' would be recommended against Messrs Ashby and Linnell, and that charges of 'attempting to pervert the course of justice' would not be recommended against them. This is not surprising because the hearings were still in progress, evidence was still emerging and any speculation at that time could only have been based on incomplete evidence and must by necessity have been very broad.

Once the public hearings were concluded, the news media moved on to other matters and the story largely disappeared until it became known that my report to the Parliament was imminent. By this time the evidence had been publicly available for over two months. It is also apparent that the content of the notices to the witnesses were probably available to the news media, or certain sections of it.

In these circumstances I cannot agree ..... that no one with experience in criminal law could predict the recommendations made by Mr Wilcox, which recommendations were, of course based on the publicly available evidence. Mr Wilcox reached the view that the relevant conduct by Mr Mullett was not connected with the holding of a public office and therefore a charge of 'misconduct in public office' was not recommended against Mr Mullett. Conversely, Mr Wilcox reached the view that the publicly mooted charges of 'attempt to pervert the course of justice' against Messrs Linnell and Ashby should not be pursued, and recommended instead (among other things) the more suitable charges of 'misconduct in public office'. I stress that Mr Wilcox, who is of course experienced in the criminal law, reached these views based on the evidence and.....there is no reason why any other person experienced in the criminal justice system would not, or could not, have reached the same conclusions as those reached by Mr Wilcox....."

7. With respect to the particular article on which (the allegations are based), I offer the following comments.

My Deputy Director, Mr Ashton, met with The Australian reporter Cameron Stewart on 1 February 2008. OPI agreed to this briefing on the basis that Mr Stewart was preparing a thematic feature article to be published following the tabling of my report in Parliament. Mr Stewart had apparently sought his own legal advice prior to the meeting and it was clear that he was of the view that charges of attempt to pervert the course of justice were likely to be recommended against Mr Mullett, and possibly Messrs Ashby and Linnell. Mr Stewart enquired about any other general themes the Director intended to highlight in the light of the evidence that had emerged from the public hearings. Mr Ashton referred Mr Stewart to the publicly available transcript of Dr Lyon's opening address. No information was provided to Mr Stewart about Mr Wilcox's recommendations. No advance copy of the report was given to Mr Stewart, nor was an advance copy given to any other person.

On the evening of 4 February 2008 Mr Stewart contacted Mr Ashton and advised that The Australian planned to publish what Mr Stewart referred to as a 'speculation piece' and asked Mr Ashton to confirm that the charges that were subsequently described in an article appearing on 5 February 2008 would be recommended by Mr Wilcox. Mr Ashton declined to make any comment and urged Mr Stewart not to run the article in the form proposed....

Mr Stewart's article appeared on 5 February 2008 in The Australian and, as described above, was picked up in later editions of The Age. None of the articles attribute the speculation about charges to any source, anonymous or otherwise.

Upon reading the article, Mr Ashton, through Mr Paul Conroy, conveyed to Mr Stewart his concern that the article did not clearly reflect Mr Stewart's earlier advice that its content was speculative. Mr Stewart confirmed that the content of the article was speculative based on legal advice he had received. On 6 February 2008, Mr Stewart sent an unsolicited email to Mr Ashton and Mr Conroy containing the following text,

'Dear Paul and Graham,

I see the Police Association is trying to accuse the OPI of leaking information in relation to news reports on Tuesday about the likely contents of the Wilcox report.
I would like to make it clear to that [sic] my report in The Australian was not based on any alleged OPI leak.
I apologise for any inconvenience which my story has caused at your end and trust that this note will help set the record straight.

Yours sincerely
Cameron Stewart
Associate Editor, The Australian.'

In conclusion, I emphasise that the suggestion that The Australian was in possession of knowledge of, or a copy of, the OPI report is not borne out by the fact that the Parliamentary report contained considerably more reportable content than was contained in Mr Cameron's article. This includes details of recommendations against other public hearing attendees about whom the evidence might be considered less obvious; details of additional serious charges recommended by Mr Wilcox against Messrs Mullett, Ashby and Weir; and some of the more colourful images painted by Mr Wilcox, the prime example being his reference to a plan to install a "puppet" Chief Commissioner. The last was subsequently shown to be an irresistible reference that was picked up with alacrity by the media."

As part of the DPI's explanation that the leak did not come from the OPI, he further states that the suggestion made by the Chief Commissioner that the media reports were the result of well educated speculation is in fact the most likely explanation.

The explanation given by the DPI is detailed and comprehensive. Because of the importance of the matter the SIM has considered it appropriate to set it out in detail. There is no direct evidence that the report was leaked by someone within the OPI. It is a matter of what inferences can reasonably be drawn. In the SIM's view, it is more probable that the media reports were based upon speculation which was in turn based on information publicly available than access to the contents of the report before it was tabled. The SIM therefore does not intend to pursue the matter further.

However, as the DPI did not deal with the second complaint referred to above in his response, the SIM sought further explanation from the DPI as to whether this complaint was also under investigation and the OPI's position in respect to the allegation. In response in April 2008, the DPI assured the SIM that the OPI was investigating this matter and that its investigations into leaks of confidential information are not confined to possible leaks to Mr McKenzie nor to any particular source. As to the subject complaint, the DPI notes that it appears that the allegation of an OPI leak is based on the simple fact that the summoned witness gave evidence at a private OPI hearing of his involvement in a company and, eleven days later, this same information appeared in an article by Mr McKenzie in the *Age*. Whilst the DPI can see that there is a possible connection between the two events, he sets out a number of factors which suggest that there is no basis for making that link. There is no need to set those factors out.

Thus, the DPI maintains that there is no reasonable basis for concluding that there was a leak by OPI of information given at the private hearing. Again there is no direct evidence as to the source of the newspaper report. It is a question of drawing inferences. In the face of competing inferences that could be drawn the SIM is not persuaded that the only reasonable inference that can be drawn is that the information came from an OPI source. Consequently, the SIM does not intend to pursue the matter further.

37.2 Complaint that the OPI did not have jurisdiction to examine an unsworn member of Victoria Police or a member of the general public who has resigned as a public servant

The SIM received a complaint from an examined witness that, being an unsworn member of Victoria Police during the first examination hearings and then at the subsequent examination hearing, being a member of the general public having resigned from his position as a public servant, the OPI did not have jurisdiction to examine the complainant.

The SIM considered that this complaint fell within his jurisdiction to monitor compliance by the DPI and staff of the OPI with the Police Regulation Act, which would include consideration of whether the OPI had jurisdiction to examine the complainant. For the reasons that were explained to the complainant, the SIM considered that the OPI did in fact have jurisdiction to conduct the subject examination hearings notwithstanding that he was not a sworn member of police and that he had subsequently resigned from his role as a public servant. These reasons are set out below:

- Pursuant to s. 86NA(1) the DPI has the power to conduct investigations in respect of any matter that is relevant to the achievement of the DPI's objects.[19]
- Such investigations may be conducted into the conduct of a member of the force or may extend to police corruption or serious misconduct generally.[20]
- Section 86P(1)(b) of the Police Regulation Act provides that for the purposes of an investigation the DPI may obtain information from any persons and in any manner he considers appropriate.
- Section 86QA(1) of the Police Regulation Act provides that at any time during or after completing an investigation the DPI may refer to the Director of Public Prosecutions (DPP) any matter that is relevant to the performance of functions or duties by the DPP, which would include referral of criminal conduct by any person, whether a sworn member or not, which has been detected as a result of an investigation, including an investigation into the conduct of a member or police corruption or serious misconduct generally.

19 These objects are set out in s. 102BA of the Police Regulation Act, namely:
- To ensure that the highest ethical and professional standards are maintained in the force; and
- To ensure that police corruption and serious misconduct is detected, investigated and prevented.

20 Refer to ss. 86NA(1)(a) & (b) in particular.

Further, with respect to the submission made by counsel for the complainant at one of the examination hearings that the OPI does not have the power to investigate public servants within the police force, the SIM considers that the delegate had correctly pointed out at the hearing that this was not an investigation into the summoned witness per se but into the unauthorised leakage of information in respect of Operation Briars. Further, there was evidence, including telephone intercept material, that the summoned witness had a role in that leak. In those circumstances, and to test the evidence of other persons who had given evidence at the public hearings, it was necessary for the delegate to hear the evidence of the summoned witness and thereby give the summoned witness the opportunity to explain conduct in light of the evidence that had emerged during the course of the public hearings. The SIM also notes that, as stated by the delegate, he was required to prepare a report on this investigation, which was generally in relation to unauthorised communication of confidential information by Victoria Police members, and that any such report would necessarily deal with the summoned witness' conduct given the evidence that had emerged from the taped telephone calls. Further, it is clear that the evidence of the summoned witness was relevant to the investigation the subject of the examination.

The SIM also noted that during the course of the examination hearing, it had been submitted on behalf of the witness that he should have been advised if there were going to be specific allegations made against him. However, as the delegate explained, this was still an investigation at that stage and it had not reached the stage of formulating specific allegations. The delegate had further assured counsel for the witness that if there were any matters that could form the basis of adverse findings or comments then these would be squarely put to the witness in compliance with the obligations of procedural fairness.[21] The SIM agrees that the investigation was still continuing and specific allegations were yet to be formulated at the time of the examination hearings. As section 86NA(1A)(a) of the Police Regulation Act provides, the DPI may conduct an investigation whether or not any particular member of the force or other person has been implicated. In the circumstances of this investigation, it was therefore not possible for the OPI to have advised the witness at that stage whether he was considered a witness or a target. In some investigations it may be possible for a witness to be clearly advised that they are not a target of the investigation but only a witness. However, this was not such a case.

37.3 Complaint relating to lack of particulars in summons (examination/summons process)

The SIM received a complaint from the solicitor representing a police member who had been summoned to attend before the DPI on two occasions in respect of two separate investigations. The first investigation, known as the 'Kit Walker' investigation, concerned the unauthorised use of the Victoria Police e-mail system to send offensive e-mails. The second investigation concerned the alleged complicity of a police member in a murder.

21 This is in fact what occurred subsequently before Mr Wilcox QC finalised his report, which was tabled in Parliament in February 2008.

The complaint related to the witness' attendance at an OPI examination hearing in relation to the second investigation, which occurred after the first attendance for the 'Kit Walker' investigation. There were two issues raised in the complaint, the first being the alleged failure of the delegate to adjourn the matter long enough for legal advice to be obtained,[22] and the second being that there was a lack of particulars provided to the witness prior to the examination of the witness. In regard to the second matter, it was said that the investigation was into an allegation of complicity in a murder and it was difficult to see how this fell within the category of misconduct set out in the summons.

The summons which required the witness to again attend an OPI examination hearing contained the same description of the investigation as that contained in the previous summons which had been served on him/her in respect of the 'Kit Walker' investigation. During the course of the subsequent examination hearing of the witness objection was raised about the subject matter of the questions asked given the description of the investigation in the summons.

In respect of the complaint that there was a lack of particulars provided to the witness before the hearing, it was acknowledged that examination hearings before the OPI are inquisitorial. As such, there is no requirement to provide particulars as there is in adversarial court proceedings. However, it was submitted on behalf of the complainant that procedural fairness dictates that a person who is to be coercively examined ought to be provided with some particularity of what he is going to be questioned about, especially in circumstances where the use immunity provided by s. 86PA(8) of the Police Regulation Act probably does not cover the use of derivative evidence. However, in the SIM's view, the requirements of natural justice and procedural fairness in relation to the provision of notice about the matters a witness is to be questioned upon need to be considered in the context of the inquisitorial nature of the OPI hearings and the legislative regime that applies. As noted previously in this report, following Recommendation 5 of the s. 86ZM Report, the Police Integrity Act provides that a summons state the general nature of the matters about which the person is to be questioned unless the DPI considers this disclosure would prejudice the conduct of the investigation. Further, following Recommendation 7 of the s. 86ZM Report, that Act provides that before an examination is conducted the DPI is to inform the witness of the general scope and purpose of the investigation unless the DPI considers it would be undesirable to do so because the effectiveness of the investigation might be prejudiced. Neither of these provisions are in force at the time of reporting.

22 Having reviewed the examination, the SIM did not consider this complaint to be substantiated. Although the delegate did not grant the initial adjournment sought of 2 days, he had stood the matter down in order for counsel to obtain advice on the issues raised, namely whether the witness was obliged to answer questions in circumstances where a certificate issued under the Police Regulation Act does not protect the witness from derivative evidence. Counsel was given an opportunity to seek this advice and, after the adjournment further discussions took place relating to the extent of the protection afforded by a certificate. A request by counsel for the certificate to be extended to cover any derivative evidence obtained as a result of the witness' evidence was not acceded to given the provisions in the Police Regulation Act relating to the certificate issued under s. 86PA(4) and the examination proceeded accordingly. In the SIM's view, it was within the delegate's discretion to decide whether or not the longer adjournment sought by counsel should be granted in the circumstances of this investigation. Section 86P(1)(d) of the Police Regulation Act, which provides that the DPI may regulate the procedure as he or she thinks fit subject to the Act, gives the DPI or his delegate the power to, inter alia, decide whether or not to grant any adjournment sought. In the SIM's view, there was extensive argument and discussion of the issues raised by counsel at the examination hearing, and it was within the discretion of the delegate to decide not to accede to the adjournment sought by counsel.

In response to this issue, the DPI has stated that whilst provision of detailed particulars to witnesses may assist the examination in some cases, it will often raise issues of actual or perceived collusion, destruction or contamination of evidence, and may have the effect of unnecessarily confining the scope of relevant and justified enquiry. In this case, it was considered that provision of such particulars prior to the hearing would be likely to result in collusion amongst witnesses. Details were provided by the DPI of the basis for such consideration. There is no need to set them out.

In the circumstances relating to the subject examination hearing and the investigation, and noting the reasons provided by the DPI as to why particulars were not provided in this case, the SIM is not persuaded that there was a failure of natural justice or procedural fairness by the non-provision of particulars to the witness prior to the examination. Section 86P(1)(b) of the Police Regulation Act provides that the DPI may obtain information from any persons and in any manner he or she considers appropriate. As stated, there is no requirement currently in the Police Regulation Act for particulars to be provided to a witness before an examination hearing. The fact that the subject witness was a suspect in relation to the investigation itself does not preclude the OPI from examining him/her in relation to the subject criminal allegations under the Police Regulation Act and, in the circumstances, there was no reason why the examination of the witness should not continue.[23]

Further, the SIM does not consider that the questions asked of the witness at the subject examination were irrelevant to the purpose of the investigation. In this regard, the SIM has considered the DPI's own motion determination[24] for this investigation, which was exhibited in the subject examination proceeding and which was available to the witness and his counsel at that time. Having regard to the terms of that notice of determination which sets out the scope of the subject investigation, the SIM is satisfied that the questions asked of the subject witness at the examination hearing were relevant to the purpose of the investigation.

However, the SIM is concerned that the same description of the investigations was contained in both summonses served on the witness in circumstances where each related to a different investigation. Whilst this is not specifically referred to in the written complaint, it became apparent to the SIM upon review of the s. 86ZD reports for both investigations and the related examination hearings. As previously noted, there is no current requirement for a summons to provide any information about the investigation to the witness.[25] If there had been no description in the summons, there would have been no issue. However, having chosen to provide that description, the SIM raised with the DPI the use of that description in the subject summons.

23 The solicitor submitted that the witness ought not to be coercively examined because he was a suspect in relation to serious criminal charges and referred to case law authority to support this argument. However, the SIM did not consider this authority to be relevant to the present issue.

24 Whilst this determination was not annexed to the summons served on the witness, there is no requirement in the Police Regulation Act for this to be done.

25 This is in contrast to the situation which applies under the *Major Crime (Investigative Powers) Act 2004* which requires a summons to state the general nature of the matters about which a person is to be questioned, unless it is considered that this disclosure would prejudice the conduct of the investigation of the organised crime offence: ss. 14(11) & 15(10).

In response, the DPI provided information which revealed that there was some connection between the description in the subject summons and the scope of the subject investigation in that it also involved the use of, and/or access to, Victoria Police information systems. Specifically, it was said that the 'Kit Walker' investigation was concerned with the witness' role as the author and distributor of offending emails by use of Victoria Police information systems. The other, being the subject investigation, was concerned with the witness' alleged accessing and disclosure of information from Victoria Police systems, and also with his/her later misuse of Victoria Police information systems. In the DPI's view, the descriptions on the summonses were not inaccurate and revealed as much as was consistent with the security and efficient and effective conduct of the two investigations concerned, nor did it mislead or disadvantage the witness.

As stated by the DPI, the SIM agrees that the purpose of the description on the face of the summons is not to alert a witness to the scope of the investigation as contained in the relevant 'own motion' determination[26] but to give the witness information about the investigation as it relates to his/her examination. A general but accurate description of the intended subject-matter of the examination is sufficient if one is given in the summons. Whilst the SIM considers that there is a connection between the description in the subject summons and the scope of the subject investigation as demonstrated by the DPI in his response to the issues, he remains concerned that exactly the same description was used in relation to both summonses when the focus of the respective investigations was clearly and substantially different, namely unauthorised use of Victoria Police e-mail system ('Kit Walker') on the one hand, and, on the other hand, alleged complicity of a police member in a murder. Whilst the description in the subject summons was very general, the SIM does not consider that it was inaccurate as it was connected to the scope of the investigation as set out in the notice of determination. However, the SIM does not consider that it was appropriate to use the same description in the subject summons when the focus of the subject investigation (alleged complicity of a police member in a murder) was clearly and substantially different to the 'Kit Walker' investigation. Nevertheless, the SIM is not persuaded that the witness was thereby prejudiced or disadvantaged by such a description. This is because, as already stated, there is no requirement in the Police Regulation Act for a summons to contain any description of the investigation or the intended subject of the examination and it was therefore open for the DPI to not have included any description in the summons. It was concern about the adequacy and fairness of the current provisions that led to the recommendations referred to in the s. 86ZM Report and which have been enacted but not come into effect at the date of reporting.

26 In this regard, the SIM notes that there is no requirement in the Police Regulation Act for a copy of the own motion determination to be served on the witness either at the time of service of the summons or at all.

37.4 Complaint about lack of particulars provided before examination (scope of description in summons)

The SIM received another complaint by a summoned witness about the lack of particulars provided to that witness before the examination hearing about the scope of matters to be asked of the witness. In particular, the witness complained that he was informed by an OPI staff member prior to the examination hearing date that he would not be questioned on matters outside the ambit of the matter described in the summons served on the witness and that at the subsequent examination hearing the witness was in fact examined on a matter outside the described matter.

In considering this complaint the SIM noted that:

- The description of the investigation in the summons was into an alleged breach of discipline relating to the Victoria Police outside employment policy.
- The terms of reference, contained in the Director's own motion determination, extended to alleged involvement in the operation of licensed premises and inappropriate association with a person convicted of criminal offences.

The SIM also had regard to the video recording of the examination of the witness and, having done so, did not consider that there were grounds for complaint for the following reasons:

- The Police Regulation Act does not require that particulars of an investigation be provided to a witness prior to the examination hearing.
- As explained to the witness during the examination hearing, the summons gives a general overview of what the OPI intends to question a witness on during an examination, but the scope of the investigation is more particularly defined in the Director's own motion determination.
- The OPI is not obliged to give a summoned witness a copy of the Director's own motion determination prior to the examination hearing.
- Hearings conducted by the OPI are in effect inquisitorial proceedings and the requirements of natural justice in relation to the provision of notice about the matters a witness is to be questioned upon have a more limited application in that context.

Further, the SIM considered that the questions asked of the witness at the examination hearing, in particular those relating to the witness' association with a person convicted of criminal offences, were relevant to the purpose of the investigation having regard to the terms of reference in both the summons and the Director's own motion determination. As advised to the complainant, the concept of relevance in the context of inquisitorial proceedings conducted by the OPI is broad, and in the SIM's view, would extend to the matters upon which the witness was questioned during the course of the examination hearing. In the SIM's view, those matters would be relevant to the general description given in the summons about alleged breach of Victoria Police outside employment policy. Again the point is made that the position will change when the new provisions previously referred to come into effect.

37.5 Complaint about the conduct of an examination hearing

The SIM received a complaint from a summoned witness about the conduct of an examination hearing. The complaint was essentially that the witness considered that the whole video recording obtained by the OPI in respect of the subject incident was not played during the course of the examination hearing, that accusations or insinuations were made during the hearing about the witness' size as compared to that of the complainant and that the witness was not given an opportunity to give evidence as to his/her history as a police officer.

Having reviewed the examination hearing, the SIM considered that it was conducted fairly and that all questions put to the witness were relevant to the purpose of the investigation. At the end of the examination, counsel for the witness was given the opportunity to examine the witness on matters arising out of the examination, including on matters which would explain or put in context actions taken or issues arising as a result of the incident the subject of the OPI investigation. As explained to the witness, OPI examination hearings are inquisitorial and it is up to the OPI as to which questions or what parts of any evidence it has obtained during the course of an investigation, including video footage, will be put to a particular witness examined as part of an investigation. In this particular examination, clearly matters arising out of the witness' actions were put to the witness and responses were sought from the witness on these matters, including the witness' responses to suggestions arising out of the evidence. Whilst the witness was extensively questioned on such issues, the SIM did not consider that there were accusations or insinuations and this was not the purpose of the questioning. The witness was given an opportunity to present his/her version of events and why he/she had acted in certain ways, including the reasons for so acting. The questioning explored the witness' motives/reasons and no conclusions were reached at the time of the examination.

Overall, the SIM considered that the witness was given an opportunity to convey his/her appreciation of the relevant facts, including his/her explanations of actions taken during the course of the subject incident, and that the examination hearing was conducted fairly.

38 Publicly Released Information In The Course Of OPI Public Hearings

In the period under review the OPI conducted public hearings in relation to two investigations, namely:

- an investigation into the unauthorised disclosure of confidential information (referred to above);
- an investigation into alleged hindrance or obstruction by current and former police members of a Victoria Police taskforce investigation into the murders of a Victoria police informer and his wife, in respect of which a former serving police member was a person of interest to the investigation.

The public hearings for the first investigation referred to above were held in November 2007 and those for the second investigation referred to above were held in June 2008. The SIM wishes to raise a matter relating to the release of information in the course of public hearings and in particular, information about third parties who are not themselves the subject of examination or the investigation where there is a potential to damage the reputation of such parties. Information about third parties may arise in the context of telephone intercept material being played in the course of public hearings conducted by the OPI. In circumstances where it is necessary and relevant to the subject matter of the examination for a witness to be examined on matters which would reveal information about a third party or parties, the SIM considers that, in fairness to those parties, care should be taken to ensure that sensitive and personal information is not released publicly where it has the potential to unfairly damage the reputations of such third parties. This could be done by the making, on application by the OPI examiner, of a suppression order or an exclusion and non-publication order in respect of that part of an examination hearing in which questions are proposed to be asked which would reveal information about such third parties. In this regard, the SIM notes that this occurred during the course of the public hearings relating to the first investigation referred to above, the delegate having acceded to an application made by the examiner to close a certain part of the hearing. The delegate had excluded the public and made a non-publication order in relation to part of the examination in which it was proposed to play, and question a witness about, certain lawfully intercepted phone calls as they exposed a third party, being a social contact of the witness, who was not under investigation. In the SIM's view the delegate took the appropriate course of closing the hearing as the questions to be put to the witness and the telephone calls intended to be played gave rise to material that was potentially embarrassing to a person or persons who were not in any way involved with the conduct under consideration, and in fairness to them.[27]

The SIM endorses this practice of ensuring that information about third parties and other sensitive information is not released publicly where it would be unfair or inappropriate to do so. Further, in the SIM's view material which is disclosed in the course of public hearings, and which thereby enters the public domain, should contain only information that is necessary and relevant to the investigation which is the subject of the public hearings.

Particular care needs to be taken with telephone intercept evidence given at public hearings. It is important that any tape or transcript of lawfully intercepted information given in evidence contain only extracts that are strictly necessary to the investigation the subject of the hearings. If a tape or transcript contains excessive or irrelevant information then such information should not be given in evidence or should be suppressed from publication. Further, even if the information is necessary to be disclosed in evidence, such as a name, care should be taken as to whether it is necessary in the public interest for it to be published having regard to the potential prejudice.

27 The SIM also notes that during the course of those public hearings, the delegate had also appropriately made a non-publication order in respect of those parts of a lawfully intercepted call in respect of which legal advice was alleged to have been given to the witness under examination by his/her lawyer on the basis of legal professional privilege.

In *John Fairfax Publications Pty Ltd v Doe* (1995) 80 A Crim R 414 (*Fairfax v Doe)* Kirby P discussed the relevant provisions of the Commonwealth *Telecommunications (Interception and Access) Act 1979* relating to lawfully intercepted telephone conversations in regard to court proceedings:

> *It would be an affront to the obvious purpose of the parliament in the Act if the record of such conversations, or any of them, came into the public domain except to the extent permitted by the Act, relevantly, in a prescribed proceeding. In such a proceeding it would be expected that the prosecution and the court would ensure against the misuse of the record, that is, the use of a single extract of supposedly private and confidential conversation which was not strictly necessary to the proof of the criminal charges against an accused upon which it was tendered. The notion of permitting the appellant a free hand, at its own entire discretion, to publish extracts from such a record as it chose to do, is antithetical to the provisions of the Act*

Subject to what is discussed below, the SIM does not consider that excessive or irrelevant information was contained in the TI material that the OPI released to the media during the course of the public hearings referred to.

In respect of the public hearings for the second investigation referred to, the SIM received a complaint from a third party (A) whose name had been raised in the course of public hearings. The complaint, made on behalf the third party by his/her lawyer, was that his/her name was released publicly by the playing of an intercepted phone call in which he/she was identified by his/her nickname and that he/she was then identified by the OPI examiner in the course of questions asked of the witness. In the course of that examination the third party was publicly named as a suspect in respect of criminal offences which were the subject of another unrelated and confidential OPI investigation. As a result of information released about him/her during the course of the public hearings relating to the first abovenamed investigation, the third party's family and friends ascertained from the resultant media coverage that he/she was under investigation for alleged criminal activity the subject of a confidential OPI investigation. It was submitted by the lawyer representing the third party that care ought to be taken in these types of inquiries to ensure that people are not 'smeared' publicly when they have no opportunity to defend themselves.

In referring this issue to the SIM the lawyer also raised a similar issue which had previously occurred in the public hearings relating to the first investigation referred to above in which two witnesses who were publicly examined were asked questions about a third party (B),[28] being a Victoria Police member who was not a subject of any examination or the investigation itself. This third party had been referred to in the course of the public hearings and personal matters relating to the third party were referred to. The lawyer noted this third party had not been summonsed to appear, and was not given any notice of being mentioned by name in the examination. Telephone intercept material was released by the OPI to the press with the transcript of the recorded conversations being permanently available on the OPI website. The lawyer stated that the public release of personal details caused distress to the third party and his/her family.

28 Although this was not the subject of a complaint made to the DPI by the third party, the SIM considered it appropriate to consider as part of the issues raised by the complaint made on behalf of third party (A).

The transcript of the relevant examinations in which third party (B) was identified in the course of the public hearings has been reviewed by the SIM. The SIM agrees that unnecessary and irrelevant information, being personal matters, about this third party was given in evidence through the TI recordings that were played during the course of the public hearings. Whilst the OPI examiner did not then ask any questions about that third party or refer to any personal information, having asked only questions which were relevant and appropriate to the subject matter of the investigation, the SIM considers that the name of the person should have been suppressed and details of the personal matters deleted from the tape that was played in the evidence. If this was not practicable the details should have been suppressed.

In relation to the complaint made on behalf of the third party (A) referred to above, the SIM reviewed the relevant examination hearings and noted that, in addition to the specific information about which the third party had complained in which he/she had been identified, there was also an earlier reference to this third party in the examination of a previous witness. In that part of the examination, the OPI examiner had specifically asked the witness whether he/she knew the third party and what his/her knowledge was about criminal charges the third party was facing. In relation to the subsequent identification of the third party who was referred to by his/her nickname in telephone intercept material played during the course of the public hearings, the SIM notes that the OPI examiner specifically asked the relevant witness to identify the person referred to by nickname in that telephone intercept material. In the SIM's view, the identity of the third party who was referred to during the examination of two witnesses in the course of the public hearings should have been suppressed. It was not necessary in the public interest for it to be made public. There was potential for unfair prejudice.

The SIM also notes that, in relation to the complaint made by third party (A), the DPI advised that, after having spoken to the delegate conducting the public hearings, the omission to suppress the third party's name was regrettable and he had written to the third party's solicitor in those terms. He further advised that the evidence that emerged in those public hearings was dramatic and that the direction of those public hearings was to no small extent determined by the evidence. In his view, in hindsight the matter should have been considered when the evidence emerged. The DPI advised further that the delegate assured him, and he accepted, that there was never any intention to prejudice the third party's right to a fair trial on any charge or charges that he/she may face.

Having reviewed the relevant examinations, it is clear to the SIM that there was no such intention. In fact, the delegate was at pains to stress that any criminal charges were allegations only. Nevertheless, the SIM considers that the issues raised by this case highlight the importance for the OPI to develop some procedure and policy in relation to the publication of information about third parties in the course of public hearings. Clearly, careful consideration of the evidence to be released at public hearings, particularly in the form of telephone intercept material, should take place prior to the conduct of a public examination hearing and consultation should take place between the OPI examiner and the delegate hearing the matter. In some cases, it may be appropriate in the first instance to make a suppression order in respect of any third parties referred to in telephone intercept material and any questioning on matters relating to such third parties should be tailored accordingly. The DPI has stressed that the OPI is sensitive to these issues, which are given careful consideration in relation to public hearings and reports.

In relation to the conduct of public hearings Recommendation 7 of the s. 86ZM Report, which has been enacted in the Police Integrity Act, requires examinations to be in private unless the DPI, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, considers it is in the public interest for the examination to be public. This provision had not come into force at the time of reporting. The SIM will monitor its operation when it comes into force. The placing on record of case specific and comprehensive reasons by the DPI for opening an examination to the public will be an important aspect of monitoring this provision.

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 2005-2006 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 not been informed by the DPI of any occasions in this reporting period in 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 2005-2006 reporting period.

The search warrant provisions and those relating to the power to search public authority premises have been analysed in the SIM's s. 86ZM Report and the SIM's opinion on the operation of these provisions has been set out in sections 18.1, 18.2 and 18.4 of that report and Recommendations 11, 12, 13 and 14. These recommendations have largely been implemented in Division 8 of the Police Integrity Act and by amendments to the Police Regulation Act. The amendments to the Police Regulation Act are now in force.

40 Meetings With The Director, Police Integrity And Co-operation Of The Director, Police Integrity

The SIM and his staff continued to have meetings with the DPI and his staff in this period. The 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.

In this reporting period the SIM considered it appropriate to provide a half yearly review letter to the DPI. This was done in January 2008. Some of the issues that arose from this review have been discussed in this report and do not require further discussion. Other issues which have arisen since this review have been separately raised with the DPI and referred to in this report.

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 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.

41.4 Relevance

This matter has already been reviewed in some detail. Subject to what has already been said, 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, there have been no issues in relation to the comprehensiveness and adequacy of reports. As stated in the previous annual report, this has been as the result of an ongoing consultation process between the SIM and the DPI.

42.1 Section 86ZB reports

As requested by the SIM in the 2005-2006 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 2005-2006 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 2005-2006 Annual Report (section 41.2) to deal with the adequacy of information contained in s. 86ZD reports have continued to be implemented as evidenced in the reports received in this period of review.

Generally, s. 86ZD reports have been sufficiently adequate and comprehensive in respect of the hearings and examinations conducted in the period under review 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 s. 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.'

Whilst there have been reports which have provided a very general reason for the witness' attendance, namely 'to give evidence in relation to the investigation', there has been other information provided in these reports, including the reason for the issue of the summons and the relevance of the attendance to the purpose of the investigation. This has assisted the SIM to assess the relevance and appropriateness of questioning of persons in relation to the purpose of the investigation. As discussed in section 42.2 of the previous annual report, the SIM considers that as much information should be included in the s. 86ZD report as possible in order to facilitate the assessment of relevance and appropriateness of questioning. Whilst the SIM also has access to the video recording of the examination and may cross reference other material provided by the OPI such as s. 86ZB reports and own motion determinations, it is important for the report to include the reason for a witness' attendance.

In addition, the SIM continues to be of the view that the scope of the investigation should be sufficiently set out in s. 86ZD reports. This has generally been the case in relation to s. 86ZD reports received in the period under review which have set out the scope of the investigation so far as relevant and appropriate in respect of the witness being examined. As stated in section 42.2 of the SIM's previous annual report, providing a more comprehensive explanation of the investigation in the s. 86ZD reports will assist in assessing the relevance and appropriateness of questioning of persons in relation to the purpose of the investigation.

Overall, the SIM is satisfied with the s. 86ZD reports received in the period under review. They have included comprehensive information about the reasons for the witness' attendance and the nature of the investigation. The SIM will continue to monitor the comprehensiveness and adequacy of s. 86ZD reports, in particular in relation to the reasons for the witness' attendance and the nature of the investigation.

Finally, the SIM notes that the s. 86ZD reports received in the period under review have continued to include the reasons for the issue of certificates in appropriate cases. In this regard, the SIM notes that as a result of the recent amendments to the Police Regulation Act following the SIM's s. 86ZM Report the certificate procedure no longer applies.

42.3 Other issues

One s. 86ZD report noted that part of the hearing was not video recorded, although the OPI had arranged for that part to be audio recorded. This part related to a discussion which took place after the examination of the witness between counsel for the witness and the delegate in relation to counsel's notes of the examination and his undertaking to ensure that he would arrange for these notes to be locked in a drawer in his office. Whilst s. 86PB of the Police Regulation Act requires that a witness' attendance is video recorded, in this matter it appears that the examination of the witness had been completed. In response to issues raised about this matter, the DPI agreed that the examination had been completed and it was for that reason the video recording system used by the OPI to ensure compliance with the legislative requirements had been switched off. The DPI further explained that once that system is switched off a computerized process of backing-up recordings commences that cannot be interrupted and takes up to 15 minutes. In those circumstances it was not technically possible to recommence video recording in less time. For that reason, an audio recording of that part of the hearing was made. Finally, the DPI confirmed that the subject matter of the discussion did not involve the use of a coercive power or the questioning of a witness. Whilst the SIM is satisfied with the explanation given by the DPI in relation to this matter, caution should be exercised in all cases to ensure that the whole examination of a witness is recorded and that the system is not switched off pre-maturely.

42.4 Remaining issues

The practice noted in section 42.4 of the SIM's previous annual report whereby transcripts for some examination hearings are not provided has continued in this reporting period. This has not caused any significant issues as the examination hearing has been assessed on the basis of the video recording provided. However, as referred to in the previous annual report, transcripts are of great assistance to the SIM in his monitoring function.

The practice of issuing a new summons to some witnesses who had been examined privately to ensure their subsequent attendance at a public examination hearing has continued to occur in this reporting period. The SIM has no issues with this practice and considers that it has been an appropriate exercise of the DPI's coercive powers under the Police Regulation Act.

42.5 Delegates' Manual

As referred to in the 2005-2006 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.

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

The SIM has made no recommendations in this reporting period pursuant to the SIM's power under s. 86ZH. However, the SIM wishes to foreshadow a recommendation which he is considering in relation to the implementation of the new provisions relating to the conduct of public hearings by the OPI in the *Police Integrity Act 2008* (Police Integrity Act) when those provisions come into force. As previously discussed, under s. 65 of the Police Integrity Act, the starting point will be for all hearings to be conducted in private unless the criteria for conducting a public hearing are satisfied, as recommended by the SIM in Recommendation 7 of the s. 86ZM Report. This is a substantially different position to that currently applying to the conduct of public hearings by the OPI under the Police Regulation Act and the Evidence Act.

Some of the issues which have arisen in the conduct of public hearings by the OPI have revolved around the decision to conduct public hearings. This and other issues have been addressed previously by the SIM in the s. 86ZM Report, and in particular in the consideration of the issues relating to the public hearings conducted by the OPI in the investigation into the activities of the Armed Offenders Squad (AOS).[29] In relation to that matter, the SIM had queried what matters had been taken into consideration at the time that the decision to conduct public hearings was made. In response the DPI set out a number of factors which were said to support the conduct of the public hearings. However, he had prefaced his response on the basis of his view that the legislation does not provide a simple discretion as to whether the hearings are to be held in public but establishes an expectation that hearings are to be held in public unless one of the two statutory tests are made out. Under s. 19B of the Evidence Act the DPI has the power to exclude the public if satisfied that it would facilitate the conduct of the inquiry by the DPI or otherwise be in the public interest. However, as noted by the SIM in his consideration of this matter in the s. 86ZM report, there is nothing in the Police Regulation Act which expressly prescribes whether the hearings of the DPI are to be held in public or private.

As previously stated, having considered the issues which arise with the existing provisions, the SIM recommended that these provisions be repealed and that new provisions be inserted in the Police Regulation Act which allow the DPI to open an examination to the public if, having weighed the benefits of the public exposure and public awareness against the potential prejudice or privacy infringements, the DPI considers that it is in the public interest to do so.[30] In making this recommendation, the SIM has made it clear that in his view the starting point should be that examinations should be in private, subject to the discretion of the DPI to open an examination to the public. This recommendation has been implemented in s. 65 of the Police Integrity Act.

29 Refer to Appendix B of the SIM's s. 86ZM Report, pp. 138-151.
30 Refer to Recommendation 7 (9) – (11) in the SIM's s. 86ZM Report, at p. 77.

For present purposes, as indicated earlier, it is sufficient to say that the SIM considers that it is important that any decisions by the DPI to conduct a public hearing should be recorded and documented appropriately. In relation to the new provisions in the Police Integrity Act the SIM will consider making a recommendation that any decision by the DPI to conduct a public hearing should be documented when these provisions come into force. Consultation will take place with the DPI before any decision is made as to a recommendation with respect to this matter. At this stage no consultation has taken place as the provisions are not in force.

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. When assistance or information has been requested it has readily been provided.

The issues that have arisen have been reviewed in this report. That is one of the most important objectives of the report. Bearing in mind the nature and extent of the investigative activities undertaken by OPI, there are not a lot of issues. However, as previously referred to, the oversight of the OPI by the SIM is a limited one. Although expansion of that oversight has been recommended in the s. 86ZM Report (Recommendation 23), that recommendation was not implemented in the Police Integrity Act. Consequently the role of the SIM will remain the same under that legislation when it comes into force. The SIM maintains the same views as are set out in the s. 86ZM Report (pages 131-132).

As stated in earlier annual reports, the investigation of alleged police corruption and related matters is difficult and complex. That is why coercive powers have been given to the OPI. The SIM's role is to monitor the use of these powers in the public interest. An important purpose of this report is to explain what has been done in the exercise of that role.

On 1 May 2008 Mr Michael Strong, a former Judge of the County Court, replaced Mr George Brouwer as DPI. Mr Brouwer continues in his position as Ombudsman. The SIM reiterates the comments made in the s. 86ZM Report (page 27) about Mr Brouwer's efforts in establishing the OPI, a difficult task. There is no need to set them out again. The SIM acknowledges in this report the value and importance of Mr Brouwer's work as DPI and the co-operation and assistance he has provided to the SIM. It has been much appreciated and the SIM is in no doubt it will be continued by Mr Strong.

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

As already mentioned a report relating to this Act (s. 62 Report) has been completed by the SIM and was tabled in Parliament in June 2008. Further reference will be made to this report which at the time of reporting was still under consideration by government.

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".[31] 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. The SIM also notes that in this reporting period Mr Stephen McBurney was appointed as an Examiner by order of the Governor in Council on 18 December 2007 pursuant to s. 21 of the MCIP Act. Mr McBurney took up his appointment on Tuesday 19 February 2008 and has since then conducted examination hearings under delegations made by the Chief Examiner under s. 65(4) of the MCIP Act.

Section 65(4) of the MCIP Act provides that the Chief Examiner may, by instrument, delegate to an Examiner any function, duty or power of the Chief Examiner under this Act other than:

(a) the power to make arrangements under s. 27; or

(b) this power of delegation.

In all instances where the Chief Examiner has delegated his powers to the Examiner in respect of an examination hearing to be conducted pursuant to the Act, a copy of the instrument of delegation has been provided to the SIM as an attachment to the relevant s. 53 report.

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

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[32] and academics about the undermining of traditional rights of citizens and the use of coercive powers.[33] 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. They are also referred to in the s. 62 Report.

31 Section 1(a) *Major Crime (investigative Powers) Act 2004*.

32 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.

33 Corns, C., "Combating Organised Crime in Victoria: Old Problems and New Solutions", *Criminal Law Journal*, Vol. 29, 205, pp. 154 – 168.

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, 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) form 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 coercive powers order (CPO) by the Supreme Court of Victoria under s. 4. A CPO approves the use of coercive powers to investigate an organised crime offence.

The Supreme Court is the only body that can grant a CPO. All applications for a CPO must be heard in closed court.[34] Section 7 prohibits the publication or reporting of an application for a CPO unless the court otherwise orders if it considers publication appropriate.[35]

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.[36] 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."[37]

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 cannot exceed 12 months.

34 Section 5(8) *Major Crime (Investigative Powers) Act 2004*.
35 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).
36 Section 5(2) *Major Crime (Investigative Powers) Act 2004*.
37 ibid., s. 5(1).

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.[38]

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.

38 ibid., s. 6.

Only when the Supreme Court is satisfied that an application meets each criterion specified under sub-sections 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.[39] In the previous reporting period an application had been made to the Supreme Court on behalf of a summoned witness seeking to have the subject CPO revoked under s. 12(1) of the MCIP Act. The revocation was sought 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. In the first instance the summoned witness had made a successful application to the Supreme Court for an injunction to restrain the Chief Examiner from examining the witness under the summons until resolution of the application seeking revocation of the CPO.

The Supreme Court heard the application on 30 October 2007 when submissions were made on behalf of the summoned witness (the plaintiff) and on behalf of both the Chief Examiner and the Chief Commissioner (the defendants) in opposition to the application. On behalf of the plaintiff it was submitted that, inter alia, any person whose interests were affected by the CPO would have standing to apply under s. 12 of the MCIP Act to have the CPO revoked. In opposition to this submission, it was argued on behalf of the defendants that the power to revoke under s. 12 may be initiated only by the court on its own motion and no one can apply to the court to revoke the CPO. Both parties made submissions supporting their respective construction of s. 12 based on a comparison with ss. 5 and 10 of the MCIP Act, which relate to applications for CPOs and for extensions and variations of CPOs. The plaintiff submitted that s. 12 is a wide free standing power with no limits whatsoever expressed as to who may apply or how the application may be considered, in comparison to the prescriptive requirements for applications under ss. 5 and 10 of the MCIP Act. On the other hand, the defendants submitted that the absence of any provisions in s. 12 about who may apply to revoke or how the application is to be made indicates that Parliament did not intend that there be an application.

39 ibid., ss. 10 and 11.

After considering the detailed submissions made by both parties at the application, the Supreme Court handed down its decision on 29 February 2008. In summary, the court concluded that the plaintiff is entitled to apply to the court for revocation of the CPO under s. 12 of the MCIP Act. In the court's view, Parliament intended a broad and flexible approach to s. 12 so that any person whose rights were affected directly or indirectly by the coercive powers order could apply to have that order revoked. The decision of the court is considered in detail in the SIM's s. 62 Report (pages 91-96). There is no need to repeat what is said there.

The result of the decision of the Supreme Court in this instance was that the substantive application for revocation by the plaintiff was referred to the judge who made the original CPO or the judge who made the extension order for determination. However, this issue was subsequently resolved as been the parties on the basis that the witness would make himself available to investigating members of the relevant operation for the purpose of making a sworn witness statement. This occurred when the witness attended police premises represented by counsel and made a witness statement to the satisfaction of investigating police. Accordingly, the parties agreed to enter into consent orders that the proceeding be discontinued and the witness summons issued by the Supreme Court under s. 14 of the MCIP Act and directed to the witness be revoked. These consent orders were subsequently made by the Supreme Court.

Victoria Police submitted to the SIM's s. 62 review that the legislation should be amended to remove the right of an interested person to apply for revocation of a CPO. The SIM did not support such an amendment (s. 62 Report page 97).

47.1.1 Extension of CPOs

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.

There were a number of applications for extensions of CPOs in the period under review. The extension applications were made in respect of three CPOs, two of which were made in previous reporting periods. In respect of one extension order, the date to which the extension was granted was specified. In all other extension orders, the duration of the extension was specified, being in most cases 6 months. As stated in section 47.1 of the SIM's previous annual report, it is preferable for an extension order to specify the date to which the extension is granted rather than the duration of that extension as this will avoid any uncertainties.

As requested in the previous reporting period, the Chief Examiner has continued to provide the SIM with a copy of CPOs applicable to each summons issued. This has assisted the SIM with his monitoring function which comes into operation after a coercive power has been exercised pursuant to a CPO. As noted in the previous annual report at section 47.1 the SIM does not have any oversight role in the application and grant process. However, once a CPO is made and coercive powers are exercised, it is important for the SIM to have a copy of the CPO. The table below displays a breakdown of CPO's for the current and previous reporting periods.

Coercive Power Orders	2007-2008	2006-2007	2005-2006	Total
Number of CPO's Issued by the Supreme Court	1[40]	6	4	**11**
Duration of Orders	6 months	6 months [41]	6 months	-
Number of Orders with Conditions Attached	1[42]	6	1	**8**

47.1.2 Request by summoned witness for copy of CPO

In one examination hearing conducted by the Chief Examiner in this reporting period counsel for the summoned witness had made a request for a copy of the CPO relating to the organised crime offence the subject of the examination as he wanted to know whether his client was a suspect in respect of that offence. However, the Chief Examiner refused Counsel's application for the following reasons:

i. An application to the Supreme Court is made by Victoria Police independent of his role. Such applications must be heard in closed court and s. 7 makes it an offence to publish a report of proceedings. The Supreme Court can make an order allowing publication of the proceedings. Therefore if any CPO is to be provided, it should be provided by the Supreme Court and in any event the Chief Examiner is prohibited from providing a copy of the order. It seems that the legislation envisages that a witness or a legal representative should not have access to the CPO, the basis upon which summonses and custody orders are issued.

ii. Section 15 only requires that a summons state the general nature of the matters about which a witness is to be questioned about (unless the Chief Examiner considers that disclosure would prejudice the conduct of the investigation) and to state that a CPO has been made by the Supreme Court (including the date of the order). A witness is therefore not entitled to receive any further information which might be contained within the CPO.

Although the Chief Examiner refused the application for a copy of the CPO, he nevertheless advised the summoned witness that he was regarded as both a suspect and a witness in relation to the organised crime offences the subject of the CPO.

40 This CPO was extended once for a further 6 month period.
41 In three cases an extension being granted for six months, one of which was initially extended for 14 days and then for six months.
42 However there were also two extension orders made in respect of two CPOs issued in a previous reporting period which were subject to conditions.

The SIM agrees with these reasons given by the Chief Examiner for refusing to give a copy of the relevant CPO to counsel. Further, the SIM considers that it was appropriate for the Chief Examiner to have advised the witness at the examination hearing that he was regarded as both a suspect and a witness.

47.2 Summary of Organised Crime Offences

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

1. The original CPO issued by the Supreme on 13 February 2007 and extended by further order of the court on 7 August 2007 for a further 6 month period was made in respect of the organised crime offence involving a number of gangland murders. This CPO was further extended on 5 February 2008 for a 6 month period from 6 February 2008 to 5 August 2008.

2. The Supreme Court issued a CPO on 25 October 2007 for a 6 month period in respect of the organised crime offence involving the illegal importation of motor vehicles, the re-birthing of these vehicles, false registration of these vehicles and their on-sale to the public for profit over a 3 year period. The offence also involved the re-birthing of wrecked or stolen vehicles. This order was extended and varied on 21 April 2008 for a further six month period and was subject to a special condition.

3. The original CPO was issued on 2 November 2006 and then further extended on 18 April 2007, 14 May 2007 and 13 November 2007 in respect of the organised crime offence involving arson, criminal damage to property and extortion against the owners of the properties subject to the arson/criminal damage. This CPO was again extended on 12 May 2008 for a further 6 months by the Supreme Court because of the then pending determination by the Supreme Court of the proceedings commenced by a summoned witness in relation to the application of section 12 of the Act and to maintain the right of the Chief Examiner to examine the summoned witness pursuant to the CPO. The order was subject to a condition that an application for a witness summons with respect to a particular witness, who had already been coercively examined, is to be brought before the Supreme Court and the Court will exercise supervision/discretion over any other summons applications with respect to this Coercive Powers Order thereafter.

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 of this report.

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 2005-2006 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 2005-2006 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 were no issues which the SIM raised in relation to the information provided by the Chief Examiner in s. 52 reports received. All reports indicated that, where applicable, the relevant CPO had been extended. In addition, the Chief Examiner has continued to provide the SIM with copies of any extension orders as soon as they are available.

49.2 Section 52 reports received

A total of 36 s. 52 reports were received for the 2007-2008 reporting period. Every s. 52 report received by the SIM during the period under review was prepared and signed by the Chief Examiner or Mr McBurney, acting as Examiner pursuant to a delegation from 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.[43]

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

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

The Chief Examiner has continued to include the further information requested by the SIM in the 2005-2006 reporting period (refer to section 49.2 of the previous annual report) 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.

49.4 Section 53 reports received

The SIM received 25 s. 53 reports relating to 3 CPOs for the 2007-2008 reporting period.

All s. 53 reports provided to the SIM in this reporting period were prepared and signed by the Chief Examiner or Mr McBurney acting as Examiner as soon as practicable after a person had been excused from attendance.

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. The DVD recordings of the examination provided to the SIM were able to be played on the DVD player at the SIM's office.

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

The table below displays the breakdown of reports received by the SIM relating to s. 52 and s. 53 of the *Major Crime (Investigative) Powers Act 2004*.

MCIP Act	2007-2008	2006-2007	2005-2006	Total
s. 52 – Chief Examiner must report witness summonses	36	10[44]	14	**60**
s. 53 – Chief Examiner must report other matters	25	50	16	**91**

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 no complaints in the period under review.

44 Some reports included information for two or more witnesses.

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 or 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.[45]

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.[46] 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.[47]

45 Section 58 *Major Crime (Investigative Powers) Act 2004*.
46 ibid., s. 60.
47 The penalty for breach of these requirements is level six imprisonment (five years maximum).

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

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 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.[48]

48 Section 14(10) and 15(9) Major *Crime (Investigative Powers) Act 2004*.

54.1 Types of summonses issued

In the reporting period 1 July 2007 to 30 June 2008 a total of 27[49] summonses were issued. Of these, 20 summonses were to give evidence, and 5 were to give evidence and to produce documents or other things. There was only 3 summonses to produce specified documents or other things. There were no summonses for immediate attendance during this period.

The table below reflects the breakdown of summonses issued for the current and previous reporting periods.

Types of Summonses Issued	2007-2008	2006-2007	2005-2006	Total
To produce a specified document or other thing	3	1	0	**4**
To give evidence	20	46	17	**83**
To give evidence & produce documents or other things	5	4	1	**10**

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.[50]

54.2 When a summons can be issued

The Supreme Court can only issue a summons once an application has been made by a police member. An application to the Supreme Court can be made at the time of the making of a CPO or at any later time while the CPO is in force.[51]

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

49 This number does not include 3 summonses which were issued but not served on the subject witnesses. Either a new summons or a custody order were issued to these witnesses.
50 Section 16 *Major Crime (Investigative Powers) Act 2004*.
51 ibid., s. 14(3).
52 ibid., s. 15(3).

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

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

The power of the Chief Examiner to issue a summons of his own motion is reviewed in the s. 62 Report (pages 97-100). The SIM is of the view that the Chief Examiner should continue to have the current power to issue a summons.

54.3 Summons issue procedure

The Chief Examiner provides the SIM with a video recording of each application for the issue of a summons or s. 18 order by a police member.[53] Reference has already been made to this.

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

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

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

53 A video recording has been provided for all applications made to the Chief Examiner in the period under review.

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. 5(6)(b) of the Act.

In the reporting period 1 July 2007 to 30 June 2008 a total of 30 summonses were issued.[54] All of these summonses were issued by the Chief Examiner on application by a member of the police force. None were issued by the Supreme Court. The Chief Examiner did not issue any summonses on his own motion during this period.

The table below reflects the number of summonses issued by the Chief Examiner on application by a member of the police force and the Supreme Court for the current and previous reporting periods.

Summonses Issued	2007–2008	2006–2007	2005–2006	Total
Supreme Court	0	35	3	**38**
Chief Examiner (on application by a member of the police force)	30	10	14	**54**

54 This number includes three summonses which were issued but not served. One of these was not served personally, hence a further summons was issued. Another was not proceeded with as the witness was in custody and a custody order was therefore issued in lieu thereof.

54.4 Conditions on the use of coercive powers

Section 9(2)(g) of the MCIP Act requires that a coercive powers order must specify any conditions on the use of coercive powers under the order. There have been two types of conditions which the Supreme Court has imposed in coercive powers orders made in the last two years.

The first type of condition is one which has had the effect of precluding the Chief Examiner from issuing witness summonses under s. 15 of the Act. This is discussed further at paragraph 55.4.1 below. The second type of condition has arisen as a result of the apparent conflict between s. 25(2)((k) of the *Charter of Human Rights and Responsibilities Act 2006* and s. 39 of the MCIP Act which abrogates the privilege against self-incrimination. This is discussed further at paragraph 55.4.2 below.

54.4.1 Condition with the effect of precluding the Chief Examiner from issuing a summons

As noted in the previous annual report, most summonses issued in that period were issued by the Supreme Court as a result of a condition which had been imposed by the Supreme Court on a number of CPOs to the effect that any summonses must be issued by the court. Specifically, in four coercive powers orders made by the Supreme Court there had been a condition imposed by the court on the exercise of coercive powers in the following terms:

> *"This order is made on the condition that an application for a witness summons with respect to [named person] is to be brought before the Supreme Court and the Court will exercise supervision/discretion over any other summons applications with respect to this Coercive Powers Order thereafter."*

The office of the Chief Examiner commenced legal proceedings in the Supreme Court to, in effect, challenge the power of the Supreme Court to impose such a condition. Specifically, an application was made to set aside the condition which had been imposed by the Supreme Court in each of the subject four CPOs on the basis that the Court did not have the power to impose a condition which has the effect of ousting the power of the Chief Examiner to issue a witness summons under s. 15 of the MCIP Act. The application has been heard and determined by the Supreme Court. The decision of the Court is an important one and it is therefore necessary to refer to it in some detail.

The Court agreed with both parties that the effect and construction of this condition is to effectively exclude the power of the Chief Examiner to issue a witness summons of his own motion and that the intent and purpose of that condition is that a witness summons may only be issued, with respect to the CPO, by the Court. After hearing submissions from both parties, the Judge concluded that the Supreme Court does have power under s. 9(2)(g) to impose such a condition on a CPO which has the effect of precluding the Chief Examiner from issuing a witness summons under s. 15 of the MCIP Act. It was noted that s. 9(2)(g) of the MCIP Act expressly provides that the CPO, which is the source of authority for the use of the coercive powers, may specify conditions 'on the use' of those powers. In the Judge's view, s. 9(2)(g) entitles the Court, in a CPO, to specify a condition which has the effect of limiting, restricting or derogating from the use of coercive powers given to the Chief Examiner by the Act, including the power under s. 15 to issue a witness summons.

In reaching his decision, the Judge considered that there is a necessary and relevant interrelationship between the making of a CPO on the one hand, and on the other hand, the determination of whether conditions should be imposed on the power of the Chief Examiner to use coercive powers provided under the Act, including those under s. 15. In forming the view that this relationship supports the existence of the power of the Court under s. 9(2)(g) to impose conditions which might limit or restrict the coercive power of the Chief Examiner to issue a witness summons under s. 15, the Judge considered s. 8(b) of the MCIP which relates to the determination by the court to make a CPO. This provision requires the Court to determine whether it is in the public interest to make a coercive powers order, having regard to the nature and gravity of the alleged organised crime in respect of which the order is sought, and the impact of the use of the coercive powers on the rights of members of the community. The Judge stated that:

> *....in determining whether to make a coercive powers order, the Court may take into account the potential effect of the "use of the coercive powers" on the rights of members of the community, both in a general sense and specifically. A fortiori, in determining where the public interest lies under s. 8(b) the Court may, and should, take into account the potential effect, both general and specific, of the use by the Chief Examiner of the coercive powers under s. 15, should a coercive powers order be made.*
>
> *It is at this point, again, that s. 9(2)(g) comes into play. It is important to bear in mind that the conditions contemplated by that sub-section are conditions on "the use" of coercive powers under the coercive powers order. Those conditions are not to be found "in the air". Rather, the Court would determine those conditions by a proper judicial consideration of the materials before the Court in assessing where the public interest lies under s. 8(b). Such an assessment itself would involve consideration by the Court of the effect of the "use" of coercive powers – including those under s. 15 – on the rights of the community. ....*
>
> *Indeed, it is only logical and sensible that, in assessing and determining the balance to be struck between the nature and gravity of the offence alleged, and the potential impact of the use of coercive powers under s. 8(b), the Court take into account any conditions which it might impose on the use of coercive powers under s. 9(2)(g). The imposition of such conditions might so ameliorate the potential impact of the use of coercive powers as to weight the public interest in favour of the making of the order, where the Court would otherwise not be minded to make such an order.*[55]

55 *Rust v Attorney-General of Victoria* [2007] VSC 263R, pp. 17-18.

Further, the Judge stated that:

> *In each case, the determination of what condition or conditions is or are to be specified will be the product of the Court's assessment, on the materials before it, of what is required to ensure that an appropriate balance is maintained between, on the one hand, the need to use coercive powers to investigate the alleged organised crime offence, and on the other hand, the potential impact of the use of such coercive powers on the rights of members of the community. In some cases, the Court, under s. 8, might only be satisfied that it is in the public interest to make a coercive powers order if the Court were to specify a condition or conditions affecting or limiting the use of one or more of the coercive powers provided to the Chief Examiner under the Act. Thus, in some cases, it might be appropriate to specify a condition which affects or limits the use by the Chief Examiner of his power under s. 15 to issue a witness summons.*
>
> *In particular, the Court's assessment, on the materials before it, of the potential impact of a coercive powers order on the rights of members of the community may give rise to a concern as to the potential reach and effect of the inquiry which is intended to be undertaken by the Chief Examiner under the coercive powers order which is sought from the Court. The materials which are before the Court may, of necessity, be such that without the imposition of a relevant condition affecting the Chief Examiner's powers under s. 15, the Court might consider that the impact on the rights of members of the community might be disproportionate to the nature and gravity of the organised crime offence which is to be the subject of the coercive powers order sought from the Court. In such a case, and without the specification of a condition affecting or limiting the Chief Examiner's powers under s. 15, the Court may not consider that it is in the public interest to grant a coercive powers order. Equally, in other cases, because of the nature of the subject matter which is to be the subject of the examination by the Chief Examiner under the coercive powers order, or because of the identity or characteristics of persons who it is anticipated may be the subject of witness summonses to be issued under the coercive powers order, the Court may be unable to be satisfied, under s. 8, that it is in the pubic interest to make a coercive powers order, unless at the same time, the Court imposes a condition affecting or limiting the powers of the Chief Examiner to issue a witness summons under s. 15.*[56]

The Judge emphasised that regardless of whether the Court, in granting a CPO, was exercising an administrative or a judicial power,[57] the Court must act judicially and

> *"must by appropriate analysis, only impose conditions which, on the facts, are necessary to ensure that there is an appropriate balance between, on the one hand, the need to use the coercive powers provided by the Act to properly investigate the alleged organised crime offence and, on the other hand, the potential impact on rights of members of the community resulting from the exercise of coercive powers under the coercive powers order sought from the Court".*[58]

56 ibid., pp. 21-22.

57 This is an issue which the Judge expressly refrained from expressing any view on. The applicant had submitted that the power of the Supreme Court to make a coercive powers order is essentially an administrative power, and not an exercise by the Court of a judicial function, and that a coercive powers order does not determine the rights of a party but acts as a foundation for the investigative role of the Chief Examiner. The respondent submitted that whether the Court was acting in a judicial or administrative capacity had limited relevance to the issue before the Court.

58 Supreme Court decision, op cit., p. 25.

In response to the argument made on behalf of the applicant that it is the role of the SIM, rather than the Supreme Court, to supervise the exercise by the Chief Examiner of the coercive powers invested in him by the Act, the Judge said that:

> *...while it is correct that the Special Investigations Monitor has detailed powers by which he might monitor the examinations undertaken by the Chief Examiner, on the other hand the Monitor has no power to impose a direction or regulation on the use by the Chief Examiner of the coercive powers stipulated by the Act. Only the Supreme Court has the power expressly given to it under s. 9(2)(g), to expressly regulate or direct the use by the Chief Examiner of the coercive powers provided under the Act. There is nothing in the role of the Special Investigations Monitor which restricts or qualifies the power given to the Court under s. 9(2)(g).*[59]

Further, the Judge considered that the application of ordinary principles of statutory interpretation supported his construction of s. 9(2)(g). He said that:

> *The provisions of the Act constitute a far reaching intrusion into, and derogation of, basic rights of members of the community. The powers provided by the Act affect the liberty of any person who is the subject of a witness summons. They also derogate from the right of a person summonsed before the Chief Examiner to exercise his or her right to silence, and expressly derogate from the right of a person not to incriminate himself or herself. It is fundamental that courts apply a strict construction to statutory provisions which derogate from or affect longstanding common law rights. ..... It is a corollary of, and consonant with, that principle that a statutory provision such as s. 9(2)(g) should be constructed in a manner which enables the Court to impose conditions which, in appropriate cases, may ensure some degree of protection to members of the community in respect of their longstanding fundamental rights.*[60]

The judgment provides an important and valuable analysis of the legislation with which, with respect, the SIM agrees. The decision has been accepted by the Chief Commissioner and the Chief Examiner and was not subject to appeal.

54.4.2 Condition relating to the *Charter of Human Rights and Responsibilities Act* 2006

During one application for a CPO in the period under review, His Honour Justice Bongiorno raised the possible conflict between s. 25(2)(k) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and s. 39 of the MCIP Act. The application concerned a person who was already charged by police for the offences the subject of the application for the coercive powers order. His Honour expressed concern that Victoria Police sought to summon that person to attend for examination and therefore be compelled to testify against himself/herself or to confess guilt contrary to s. 25(2)(k) of the Charter. Accordingly, His Honour sought written submissions on the matter and adjourned the application for the coercive powers order until resolution of the potential conflict.

59 Ibid., p.20.
60 Ibid., p. 20-21.

Subsequent to this application for a CPO before Justice Bongiorno, a further two applications for a CPO and an application for an extension of a current CPO were made before His Honour Justice Cummins. The two applications for a CPO were adjourned on the grounds that the same issue as that raised by Justice Bongiorno applied. In respect of the application for an extension of a current CPO, His Honour Justice Cummins imposed a condition in the following terms:

> *"Any person who has been charged with any offence linked to the organised crime offence – the subject of the CPO – will not be summoned to give evidence (at an examination) until resolution of the issue with respect to s. 25(2)(k) of the Charter of Human Rights and Responsibilities Act 2006."*

The Chief Examiner has advised the SIM that on the instructions of the Chief Commissioner of Police, written submissions, to which the Solicitor General has contributed, have now been compiled by the Victorian Government Solicitor's Office and submitted to His Honour Justice Bongiorno for consideration. Important issues are involved which are yet to be determined by the Supreme Court.

54.5 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 2005-2006 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 Office 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.

54.6 Summonses for production of documents

Under the MCIP Act there is no power for the Chief Examiner or an Examiner to require a person summoned to give evidence at an examination hearing to produce a document or other thing in the absence of a summons requiring production. In one examination hearing conducted in the period under review, the Examiner had directed the witness, who had been summoned to give evidence and to produce documents, to produce certain documents at the adjourned examination hearing date. Whilst it is clear from a review of the examination hearing that the Examiner considered the documents were within the scope of documents sought in the summons, this was not made explicit in the reasons of the examiner in requiring the witness to produce these documents. In the SIM's view, it would be prudent for the Chief Examiner or an Examiner conducting an examination hearing to state the reasons for directing a summoned witness to produce documents that he or she considers the documents being sought fall within the scope of the description of the documents required by the summons to be produced. In that way the record is clear as to the basis upon which the documents are required to be produced. The Chief Examiner agreed with this view and advised the SIM that in future instances where a direction is made for production of documents such a direction will clearly state the grounds upon which the direction is made, and if necessary provide relevant reasons for reaching that conclusion.

55 Reasonable And Personal Service Requirements

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.[61]

The SIM also notes that s. 17(1) of the MCIP Act requires a witness summons to a natural person to be served by delivering a copy of the summons to the person personally. The Chief Examiner advised the SIM that in respect of one witness summons issued by him in this reporting period personal service of the summons was not affected on the witness but the summons was left with a friend of the witness together with the confidentiality notice which had been issued to the witness. The police member effecting service of the summons and confidentiality notice in this instance therefore did not affect personal service as required by the MCIP Act. The Chief Examiner also expressed the view that by leaving the summons and the confidentiality notice with the friend of the witness rather than effecting personal service on the witness as required by the MCIP Act the police member arguably breached the terms of sub-section 20(5) of the MCIP Act which prohibits a person from disclosing, without reasonable excuse, certain matters concerning the summons. In respect of this issue, the Chief Examiner requested further enquiries to take place as to the circumstances relating to the service and advised the Chief Commissioner as to what had occurred in this instance.

61 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.

Although the subject witness attended on the date of the examination as set out in the summons, the Chief Examiner took the view that the witness should be discharged and that no examination hearing should take place because of the requirements of personal service in the context of the coercive powers. The SIM agrees with the view taken by the Chief Examiner given the nature of coercive powers which are used to compel a witness to give evidence. In addition, the SIM agrees with the further view taken by the Chief Examiner that it would not have been appropriate to allow personal service on the witness on the day of the examination hearing where the witness was unrepresented even if the witness had no objection. In the SIM's view, the use of coercive powers means that the requirements in the MCIP Act must be adhered to in order to ensure that there has been a valid and appropriate exercise of those powers.

56 Contents Of Each Summons

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

- A direction to the person to attend at a specific place on a specific date at a specific time.
- That the person's attendance is ongoing until excused or released.
- The purpose of the attendance. That is, to give evidence or produce documents or other things or both.
- The general nature of the matters about which the person is to be questioned unless this information may prejudice the conduct of the investigation.
- That a CPO has been made and the date on which the order was made.
- A statement that if a person is under 16 years of age at the date of issue of the summons, he or she is not required to comply. A person in this situation must give written notice and proof of age.[62]

The Chief Examiner is only required to give a general description of the proposed subject-matter of the investigation.

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.

In relation to summonses which require only production of documents, the Chief Examiner has taken the view that the requirement in s. 15(10) for a summons to state the general nature of the matters about which a person is to be questioned does not apply. This is because the person is not being summoned to answer questions in an examination but only to produce documents. The SIM agrees with this view.

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

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

A person being held in prison or a police gaol can be compelled under s. 18 of the Act, to attend before the Chief Examiner if a CPO is in force. In such a situation a member of the police force can apply to the Supreme Court or the Chief Examiner for an

order, 'that the person be delivered into the custody of the member for the purpose of bringing the person before the Chief Examiner to give evidence at an examination'.

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

The SIM received notification from the Chief Examiner of 5 s. 18 [63] orders being made for the 2007-2008 reporting period in respect of which s. 53 reports were received. All orders were made by the Chief Examiner.

In relation to one custody order the Chief Examiner noted that the witness had attended on a particular day for examination pursuant to a previous custody order issued, and that after that examination it was necessary to adjourn his attendance for the continuation of the examination to another day. Accordingly, this application was being made to ensure that the witness was in attendance on the adjourned date.

In acceding to the application the Chief Examiner noted that s.15(7) allows a summons to continue to operate from day to day until the witness is excused. As there is no such provision for custody orders, it is necessary to issue a further custody order if a witness is required to further attend so that an examination hearing can continue on the adjourned date. The Chief Examiner considered it appropriate for the witness to further attend and therefore signed a further custody order as required by s. 18 of the Act setting out the grounds on which the order is made. In the circumstances, the grounds on which the custody order was made were the same as those relied upon in respect of the original custody order.

During the course of the application the Chief Examiner had inquired of the police applicant whether a system could be implemented to ensure that investigators are made aware of the fact that a witness who is proposed to be examined is in custody. In this case, investigators were not aware that the witness was in custody resulting in a summons being issued in the first instance. The Chief Examiner was concerned about the delay and the waste of resources involved. The SIM agrees with this.

The SIM also notes and agrees with the practice adopted by the Chief Examiner in relation to giving notice to persons who are compelled to attend for examination pursuant to a s. 18 custody order. That is, a witness should be notified of the proposed date of execution of the custody order, being the date that he/she will be taken from prison to the examination hearing. This is so that he/she has the opportunity to obtain legal advice and also for the prison to arrange for the prisoner to be brought before the Chief Examiner on that day.

63 Three of these s. 18 orders were issued in respect of one witness, as there had been two adjournments of the examination hearing.

Another issue which has arisen in relation to applications for s. 18 custody orders is whether it is necessary for the Chief Examiner to provide a second s. 52 report for the same witness in circumstances where it was necessary to issue subsequent custody orders to ensure the witness' attendance on adjourned examination dates.

Whilst the Chief Examiner had provided a second s. 52 report in relation to the case referred to above, he subsequently advised that he did not consider that it was necessary to do so for the reasons set out below. Accordingly, when he issued the third custody order to this same witness, he did not provide a s. 52 report. His reasons, with which the SIM agrees, are set out as follows:

> *"Apart from the requirements of the gaol authorities, who require an order on each examination hearing date, s. 15(7) of the Act requiring a witness served with a summons to attend for examination "....from day to day unless excused or released from further attendance" does not apply to s. 18(4) of the Act, so that the Act requires a new custody order for each appearance of the witness.*
>
> *I have taken the view that in the aforementioned circumstances it is unnecessary to provide s. 52 reports for each occasion when the examination hearing is adjourned part heard to a further examination date. This is because the further custody orders are made only to facilitate the further appearance of the witness and involves no further consideration of the requirements of s. 18(4) and 15(4) of the Act."*

58 Confidentiality Notices: Section 20

Like the DPI, both the Supreme Court and the Chief Examiner may issue a confidentiality notice that can be served with a witness summons or s. 18 order. A written notice can be given to the 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.[64] 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.

64 The penalty for disclosing the existence of 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).

The Chief Examiner amended the form of the original notice which he had drafted and implemented a change 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.

59 When Confidentiality Notices May Or Must Be Issued

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

- the safety or reputation of a person
- 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 Supreme 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). Consideration is given in the s. 62 Report to the cessation of effect of confidentiality notices (pages 109-110). Recommendations are made as to amendments to the legalisation to provide for the cessation of effect of confidentiality notices.

60 Powers That Can Be Exercised By The Chief Examiner

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

(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 or produce specified documents or things or do 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.65
- 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.[66] 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.

65 Section 49 *Major Crime (Investigative Powers) Act 2004*.
66 The penalty for breach of this section is level six imprisonment (five years maximum).

In the period under review the SIM was notified of two instances where witnesses were charged with the offence under s. 38 of giving false evidence at their respective examinations. In respect of those two witnesses, the Chief Examiner had rescinded the s. 43 directions that he had made at those examination hearings and the witnesses were notified accordingly. As the confidentiality notices given to the witnesses were made by Supreme Court, an application was also made on behalf of the Chief Examiner for rescission of those notices.

There were no instances notified to the SIM where a witness was in breach of ss. 37(1) or 44 of the Act.

61 Contempt Of The Chief Examiner

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

A person is guilty of contempt of the Chief Examiner if the person, when attending before the Chief Examiner:

- Fails, without reasonable excuse, to produce any document or other thing required under a summons.
- 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 not notified of any contempt proceedings in the period under review.

The legislation provides for the contempt power to cease to have effect after 1 January 2009. This is considered in the s. 62 Report (Pages 111 & 112). It is recommended that the sunset provision be repealed before it takes effect.

62 The Conduct Of Examinations By The Chief Examiner

The Chief Examiner, like the DPI, is not bound by the rules of evidence when conducting a coercive examination or compelling production of a document of thing 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. In respect of one examination hearing, the Chief Examiner refused an adjournment sought by the summoned witness on the basis that his lawyer was not available until the following week. Prior to this application for an adjournment, the solicitors for the witness had made an application to the Supreme Court seeking to adjourn the examination of the witness to a date convenient to his barrister. This application, which was due to be heard later on the day that the witness appeared before the Chief Examiner seeking an adjournment, was made after the Chief Examiner refused a written request by those solicitors for an adjournment. The result of the Supreme Court application was that the examination of the witness was directed to proceed and a date, being within five days, was fixed for that examination to proceed. The basis upon which the Chief Examiner had refused the adjournment sought by the witness, pending the outcome of the Supreme Court application later on that day, can be summarised as follows:

- There were issues of conflict of interest that arose in relation to whether the barrister chosen by the witness should represent the witness in this examination. That barrister had previously represented another witness who had been examined and who was alleged to be involved in various murders the subject of the organised crime offences in the CPO. The witness was also alleged to have some involvement in those murders and the barrister proposed by the witness was also representing a person charged with involvement in those murders in committal proceedings which had been pending at that time.

- Whilst a witness should be allowed to be represented by a legal practitioner of his choice in the normal course of events, the Chief Examiner has the power to exclude a particular legal practitioner from representing a witness if he can conclude on reasonable grounds and in good faith that to allow the representation either will or may prejudice the investigation the subject of the CPO, and at this stage it was the Chief Examiner's view that there are grounds upon which he could take that view.

- Adjournment applications need to be looked at in the context of the limited nature of the time involved for the operation of CPOs (s. 9(ii)(f) requires the CPO to specify the duration of the order, being for a period not exceeding 12 months);

- There is a limited role played by legal practitioners in these inquisitorial coercive powers processes.

- The witness has had ample opportunity to obtain alternative legal representation. The witness has refused to answer questions in relation to his knowledge as to the availability of his preferred barrister and as to when he sought legal advice after the service of the summons. The Chief Examiner drew the inference that based upon the fact that that barrister is currently representing a person in committal proceedings involving an allegation of murder that it would have been clear to the witness and to his legal representatives shortly after the service of the summons that the barrister would be unavailable. There has been no explanation offered as to when the witness became aware of the barrister's unavailability and what efforts have been made to obtain alternative representation.

- The two days offered as being those on which the barrister is available did not suit the OCE as other examinations were scheduled for those dates, which meant that the next practical time for this examination would be in the week commencing about six weeks later.
- There were no reasonable grounds for the application and it was refused.

In the result, given the Supreme Court direction, the examination was adjourned to the date directed by the Supreme Court being five days from the date of the application for an adjournment. In the SIM's view, the reasons of the Chief Examiner for not granting the adjournment are sound.

62.1 Presence of other persons at examination hearings

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.[67] 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 examination from a remote location (in some 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.

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.

67 Section 35 *Major Crime (investigative Powers) Act 2004*. This section states that legal representatives, interpreters and independent persons or guardians can be present and a direction excluding them cannot be made.

The Chief Examiner has continued the practice of generally allowing one or two investigators to be present in the remote location to provide assistance during the course of the examination hearing unless there is some reason for more than two investigators to be present.

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.

An issue arose during the reporting period concerning the construction and operation of s. 30(2) of the MCIP Act which provides that an examination must not be conducted at a police station or police goal. The matter is reviewed in detail in the s. 62 Report (pages 72-75) and a Recommendation made. There is no need to go over what is contained in that report.

63 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 2006-2007 reporting period (at section 64), 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.

64 Legal Representation

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

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

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

In the 2005–2006 reporting period, the Chief Examiner provided the SIM with a copy of the procedural guidelines he has adopted applicable to legal representation.[68] 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 2005-2006 Annual Report).

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

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 had sought legal advice or spoken to a lawyer but decided not to engage legal representation.
- 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 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 has been addressed and is available for witnesses attending before the DPI and Chief Examiner, as explained in section 27 of this report.

65 Who Was Represented And Who Was Not

The witnesses examined by the Chief Examiner in this period were all civilian witnesses. A total of 24 examinations have been reported to the SIM being a decrease of 26 from the previous reporting period. Of the 24 witnesses examined, 12 were legally represented.

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 it became apparent during the course of questioning that counsel representing a witness in an examination hearing had been approached to give an opinion on the strength of evidence for a forthcoming committal hearing of another witness who had been examined in respect of the same organised crime offence the subject of the relevant CPO. The Chief Examiner considered that as questioning of the witness then under examination had gone too far down the track it was not practical for counsel to withdraw because of what he had heard. However, he pointed out to counsel that his defence of the other witness in the forthcoming committal proceedings may possibly be hampered because he had knowledge of things which he cannot speak about to that witness because of the confidentiality obligations applying. Counsel noted this but said that there was nothing which has been aired thus far in the examination hearing of the present witness which is new to him.

The issue of possible conflict of interest arising as a result of a legal representative advising more than one witness in the investigation also arose in the matter referred to in section 62 of this report.

66 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.

In the period under review there were no examinations in which mental impairment of the witness was raised.

67 Privilege Against Self-Incrimination

This matter is reviewed in the 2005 - 2006 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 *Confiscation 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 2005-2006 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.

68 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.[69]

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

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

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

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

68.1 Rescinding of non-publication directions and cessation of confidentiality notices

In this reporting period the Chief Examiner had made three directions rescinding a s. 43 direction which had been made in the course of the examination of a summoned witness. One of those directions was rescinded to enable the video recording of the witness' examination hearing to be used as a proof of evidence for that witness who had been called as a witness in committal proceedings against a person charged with murder. Prior to the rescission the witness was given the opportunity of making submissions on the proposed rescission, but did not do so. In relation to the confidentiality notice which had been issued in respect of this witness, the Chief Examiner noted that it was issued by the Supreme Court and therefore he considered that s. 20(7) of the MCIP Act did not apply and he therefore had no power to rescind it. In those circumstances, the Chief Examiner correctly instructed his staff to apply to the Supreme Court for rescission of the confidentiality notice.

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

In respect of one investigation, the last of the alleged offenders named in the coercive powers order had been convicted and sentenced. In those circumstances the Chief Examiner considered that the confidentiality notices which had been issued to the witnesses who had been coercively examined under the subject coercive powers order had ceased to have effect because of the operation of s. 20(7)(d)(i) of the Act, that is because criminal proceedings had been commenced against all persons in respect of whom there was evidence that they had committed the offences the subject of the coercive powers order. Accordingly the Chief Examiner wrote to each of the witnesses pursuant to s. 20(8) of the MCIP Act giving them notice that the confidentiality notices issued to them ceased to have effect.

The other two s. 43 directions were rescinded by the Chief Examiner in circumstances where the two witnesses subject to the directions were charged with the offence of giving false evidence at their respective examinations. The witnesses had been duly notified of the rescission of the s. 43 directions for this purpose. As the confidentiality notices relating to these two witnesses were issued by the Supreme Court, an application was also made to the court for rescission of those notices.

The SIM agrees with the approach taken by the Chief Examiner in rescinding the s. 43 directions and confidentiality notices in the above cases.

69 The Use Of Derivative Information

The use of derivatively obtained information in the context of examinations conducted by the DPI was discussed in the 2005-2006 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 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 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.

As stated in section 70 of the previous annual report, 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.

70 Legal Professional Privilege

This privilege was reviewed at section 69 of the 2005-2006 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 not notified of any claim for LPP in respect of documents.

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.

Consideration is given to legal professional privilege in the s. 62 Report (Pages 110-111). The SIM recommends that such claims be determined by the County Court or the Supreme Court (Recommendation 7).

71 Warrant For Arrest Of Recalcitrant Witness

Section 46 of the MICP Act provides for the arrest of a person in relation to whom a witness summons has been issued if there are reasonable grounds to believe the person:

- Has absconded or is likely to abscond.
- Is otherwise attempting, or likely to attempt to evade service of the summons.
- Has failed to attend as required by the summons or failed to attend from day to day unless excused from further attendance by the Chief Examiner, in breach of s. 37(1) of the Act.

The Supreme Court is authorised by this provision to issue a warrant for the arrest of the person upon application by a member of the police force if satisfied that there are reasonable grounds to believe any of the grounds set out above.

In the period under review, there were two warrants issued for the arrest of two witnesses who had failed to attend an examination hearing as required by the summonses served on those witnesses. This was the first occasion when resort was had to s. 46 warrant applications by the police and hence the first two arrest warrants issued by the Supreme Court.

The two witnesses concerned were arrested and bailed to appear. One of those witnesses was subsequently examined by the Chief Examiner. The other witness sought an adjournment of the examination in order to enable, inter alia, the witness to present an application seeking revocation of the relevant CPO. The witness also sought and obtained an injunction to restrain the Chief Examiner from examining the witness under the summons until resolution of the application seeking revocation of the CPO. This matter was discussed at para 47.1 of this report.

The power to arrest is reviewed in the s. 62 Report (pages 100-105). It was submitted that the Chief Examiner should have the power to issue arrest warrants in respect of summonses issued by him. The SIM does not recommend that he have this power but recommends that in such a case an application should be able to be made to the County Court as well as the Supreme Court.

72 Authorisation For The Retention Of Documents By A Police Member

This matter is reviewed at section 70 of the 2005-2006 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 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 required to be produced by summons.

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

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 the 2006-2007 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 the subject of the coercive power order is assessed. This is one of the primary functions of the SIM.

In the 2005-2006 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 relevant investigations.

In most cases, the Chief Examiner conducted the questioning of witnesses. Some were conducted by Mr Stephen McBurney, Examiner. The SIM was greatly assisted in determining relevance by the provision of transcript for every examination conducted by the Chief Examiner/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.

Most objections raised as to the relevance of questions in this reporting period were to questions about the witness' personal background and financial circumstances. In these instances, the Chief Examiner continued to provide the explanation that he had given in previous reporting periods regarding the relevance of such questions. In particular, the Chief Examiner considered evidence of the personal background and financial circumstances of a witness to be intrinsic to his understanding of the witness as a person and to be intrinsically linked with other evidence which the witness might give in relation to the particular organised crime offence. The SIM agrees that such evidence is relevant in so far as it assists the Chief Examiner in understanding the type of person the witness is and understanding the evidence given by the witness.

In one examination hearing counsel for the witness had objected to the relevance of questions relating to the financial affairs of the witness as he was concerned that it was going to be used in confiscation proceedings against his client, the summoned witness. Counsel had made this objection because there is an admissibility provision in the MCIP Act in respect of confiscation proceedings. That is, confiscation proceedings are an exception to the use immunity provided for under the MCIP Act. Counsel indicated that if that was the purpose of this hearing, then he wanted to be able to advise his client to commence proceedings seeking to quash the examination hearing as ultra vires. The Chief Examiner assured counsel that that was not the intention of the examination hearing. Further, that it was appropriate for him to ask questions about the witness' financial circumstances in order that he could obtain a full and complete understanding of the witness' financial position both in the relevant previous years and presently. In his view, whilst that evidence may not ultimately be relevant, it may also be particularly relevant if, for example, a witness' financial position is fully explained by that person's involvement in the criminal offence. The SIM agrees with the approach taken by the Chief Examiner in this matter and with the explanation given to counsel for the witness.

There were no other substantial objections made to relevance of questions in the course of examination hearings conducted in this reporting period.

74.2 Breach of confidentiality

The service of summonses in the presence of others was the subject of continuing discussions and monitoring in the 2005-2006 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 apart from the matter referred to earlier where a witness summons had not been served personally on the witness, having been left with a friend.

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 Other issues arising in examinations

In relation to the examination hearing of one witness,[70] who had been examined over the course of three days, the Chief Examiner was advised that between the date of the witness' first and second attendances before the Chief Examiner the witness had been interviewed by police under an order made by a Magistrate pursuant to s. 464B of the Crimes Act. Upon receiving this advice, the Chief Examiner made inquiries with the police involved as to why the witness had been interviewed between the 2 examination hearing dates given the importance of maintaining the substance and integrity of the use of coercive powers. The Chief Examiner was satisfied with the explanation received from investigating police, that the interview conducted under s. 464B was conducted in relation to alleged crimes which were unrelated to the organised crime offence the subject of the examination hearings and that the s. 464B order was in place before the investigating police were aware of the examination hearing arrangements. Whilst the SIM understands how this situation arose, he considers that it would have been problematic if the s. 464B interview had been conducted in relation to the organised crime offence the subject of the examination hearings. Overall, the SIM agrees with the Chief Examiner that it is unfortunate that this situation arose, but as explained by investigating police the s. 464B interview was scheduled for a date which fell after the witness' scheduled examination hearings before the Chief Examiner. However, it was subsequently necessary to adjourn the witness' second attendance before the Chief Examiner to a date after the scheduled s. 464B interview, and it was not possible to delay the s. 464B interview due to the security and other arrangements that were in place.

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.

70 This witness was required to attend for examination before the Chief Examiner pursuant to a custody order made under. s.18 of the MCIP Act.

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 [71] 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.

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

(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.

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 s. 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 s. 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.[72] The SIM was advised by the Chief Commissioner in the 2006-2007 reporting period that a SQL database for the recording of this information was being developed to replace the existing excel spreadsheet database. The Office of Chief Examiner is responsible for the development and design of the SQL database. That database was not established in this reporting period.

Accordingly, in this reporting period the Microsoft Excel spreadsheet database developed by the office of the Chief Examiner to store the register was inspected by the SIM.

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.
- Provision for details of exhibits taken before the Magistrate's Court and the directions given by the court (although there were no applications for exhibits to be taken before the Magistrate's Court under s. 47(3) of the MCIP Act).

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

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

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 2007 to 31 December 2007 and a written report covering the period 1 January 2008 to 30 June 2008. A written report was also received in relation to the previous reporting year for the period 1 January 2007 to 30 June 2007. Details of the information provided in reports by the Chief Commissioner to 31 December 2007 are contained at section 11.5 of the s. 62 Report.

81 Secrecy Provision

This provision is reviewed at section 81 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.

Consideration is given to the operation of ss. 68 and 28 of the MCIP Act with respect to un-sworn staff employed by Victoria Police in the operations of the Chief Examiner in the s. 62 Report (page 112). It is recommended (Recommendation 9) that the legislation be amended to ensure that they are subject to the secrecy requirements.

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.

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 no issues raised with the Chief Examiner by the SIM in relation to the information provided in s. 53 reports.

82.3 Section 66 reports and register

The SIM received two s. 66 reports from the Chief Commissioner for this reporting period in compliance with the Act and one report relating to the previous reporting period. The reports contained all the matters prescribed by s. 66.

The SIM was also satisfied with the register of prescribed matters kept by the Chief Commissioner in relation to documents or other things retained under s. 47 of the Act.

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 the 2006-2007 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.

An issue that arose in this reporting period was whether the MCIP Act requires the Chief Examiner to provide a s. 53 report in respect of a summons requiring production of documents or other things only, as opposed to a summons requiring attendance to give evidence. In respect of a witness who was summoned to produce documents only, the Chief Examiner provided the SIM with a s. 53 report of the 'examination'.[73] As part of this s. 53 report, the Chief Examiner also provided a video recording of the 'examination'. The issue, so far as the requirement to provide a s. 53 report is concerned, was whether there was an 'examination' in those circumstances such that a s. 53 report was required. Upon raising this issue with the Chief Examiner, it was agreed that if a witness attends to produce documents or other things only, then no examination has taken place requiring the provision of a s. 53 report. This is because a distinction is drawn in ss. 14(2) and 15(2) between a summons to 'attend an examination before the Chief Examiner to give evidence' and a summons to attend to 'produce specified documents or other things', which does not require attendance at an 'examination'.

The SIM acknowledges that although the provision of the s. 53 report in respect of the witness was not required by the MCIP Act, it was done as a matter of caution. In future, the SIM will not expect to receive a s. 53 report from the Chief Examiner in circumstances where a person has attended only to produce documents or other things. However, as the Chief Examiner accepts, it is still necessary to comply with the preliminary requirements set out in s. 31 before a witness 'produces a document or other thing'. Finally, the SIM notes that whilst s. 51(c) requires the SIM to assess the relevance of any requirement made by the Chief Examiner for a person to produce a document or other thing, the SIM is able to do so by consideration of the s. 52 report which is required to be provided in respect of the issue of a such a summons by the Chief Examiner.

84.3 Section 66 reports

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

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.

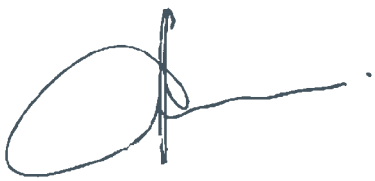
However, as already stated, all requests made to the Chief Examiner and the Chief Commissioner and their respective staff have been agreed to and acted upon accordingly.

73 It is noted that in respect of a previous summons for production of documents which was issued by the Supreme Court on 27 October 2006, there was no s. 53 report provided (there was also no s. 52 report provided in respect of this summons as it was issued by the Supreme Court). However, for the reasons stated above, the SIM does not consider that this was non-compliance with the legislation.

86 Generally

Full co-operation from the Chief Examiner and the Chief Commissioner and their staff members has continued during the reporting year and 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 relatively new and quite complex legislation. Difficult public interest considerations are involved. The SIM continues to be 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.



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