
Office of the **Special Investigations Monitor**

# Annual Report 2008–2009

## Contents

# Annual Report 2008–2009

## 1 Introduction

This is the annual report for the financial year ending 30 June 2009 of the Special Investigations Monitor (the SIM) pursuant to s. 126 of the *Police Integrity Act 2008* (Police Integrity Act) (formerly 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. 126 of the Police Integrity 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 the Special Investigations Monitor's (OSIM) functions under Part 5 of the Police Integrity Act, (formerly 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. Legislative changes have occurred in the current reporting period which are referred to throughout this report.

## 2 The Special Investigations Monitor

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

David Anthony Talbot Jones was originally appointed SIM by the Governor in Council on 14 December 2004 for a period of three years. He has been re-appointed until 13 December 2009. Mr Jones is an Australian lawyer of 45 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.

During Mr Jone's absence overseas Mr John Butler, formerly Crown Counsel, was acting SIM from 14 May to 8 June 2009. Mr Butler was also acting SIM in April and May 2008 when Mr Jones was overseas. Mr Butler's assistance as Acting SIM is greatly appreciated.

## 3 *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 originally 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.

As stated in the 2007-2008 Annual Report (page 11), the SIM reported to Parliament on 1 November 2007 on his review of the operation of Part IVA of the Police Regulation Act and the coercive powers conferred on the DPI (the s. 86ZM Report). Legislation has been passed by Parliament implementing Recommendations made in the Report.

Consequently, the Police Integrity Act was enacted. It substantially came into force on 5 December 2008. This Act consolidates into the one Act of Parliament all legislative provisions relating to the OPI. The legislative regime contained in the Police Regulation Act continues in the new Act subject to changes that implement recommendations in the section 86ZM Report. This Report will identify where the position has changed in relation to the OPI.

Appendix A is a table comparing the Police Integrity Act and Police Regulation Act provisions relating to the role and function of the SIM.

## 4 *Major Crime (Investigative Powers) Act 2004*

This Act conferred further powers on 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 are now contained in the Police Integrity Act.

The provisions conferring further powers on Victoria Police had not commenced operation during the period covered by the 2004–2005 Annual Report. However, they commenced operation on 1 July 2005, were the subject of monitoring during the current period and are the subject of review in this report. They were reviewed in the previous three annual reports.

## 5 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 and now the Police Integrity Act extend 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 DPI is empowered 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 DPI, his staff and persons engaged by him are empowered 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
- the DPI or an authorised staff member may commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation. This power commenced on 5 December 2008 (s. 51A Police Integrity Act).

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

This role is set out in s. 114 of the Police Integrity Act (formerly 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 persons engaged by the DPI
- assess the questioning of persons attending the DPI in the course of an investigation under Part 3 and 4 of the Police Integrity 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 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 Part 5 of the Police Integrity Act (formerly Division 4 of Part IVA of the Police Regulation Act)
- formulate recommendations and make reports as a result of performing the above functions.

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

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

- to report the issue of summonses to the SIM – s. 115 (formerly s. 86ZB of the Police Regulation Act)
- to report the issue of arrest warrants to the SIM – s. 116 (formerly s. 86ZC of the Police Regulation Act)
- 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 – s. 117 (formerly s. 86ZD of the Police Regulation Act).

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. 118, 119 and 120 (formerly ss. 86ZE, 86ZF and 86ZG of the Police Regulation Act).

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. 121, 122, 123 and 124 of the Police Integrity Act (formerly ss. 86ZH, 86ZI, 86ZJ and 86ZK of the Police Regulation Act).

## 8 Annual Report Of The Special Investigations Monitor To Parliament

Section 126 of the Police Integrity Act (formerly s. 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 5 of the Act (formerly Part IVA of the Police Regulation 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, members of his staff and persons engaged by the DPI
- 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 or a person to whom a direction has been given under Division 5 of Part 2 of the Police Integrity Act or Division 4A of Part IV of the Police Regulation Act or the nature of any ongoing investigation or any ongoing investigation by Victoria Police or members of Victoria Police.

Section 105L of the Whistleblowers Protection Act imposes the same requirements as s. 126 of the Police Integrity Act (formerly s. 86ZL of the Police Regulation Act).

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

The purposes of this Act are:

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

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

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

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

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

The 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 under the Police Integrity Act (see section 6 of this report).

The obligations of the DPI to the SIM under the Whistleblowers Protection Act are the same as under the Police Integrity 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 Integrity Act (see section 8 of this report).

The SIM will continue to combine reports under s. 126 of the Act and under s. 105L of the Whistleblowers Protection Act in the one report.

There were no matters reported by the DPI 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 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. A review of the operation of the legislation as it relates to the Chief Examiner and Victoria Police was carried out by the SIM pursuant to s.62 of the MCIP Act and a report tabled in Parliament in June 2008 (s. 62 Report).

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 a witness summons.

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.

Recommendations were made in the s. 62 Report of changes to the legislation. Amendments have been enacted but apart from one have not come into force at the time of reporting. Reference will be made later to these amendments.

## 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 that:

- the Chief Examiner must report witness summonses and orders to the SIM – s. 52
- the Chief Examiner must report matters relating to the coercive questioning by the Chief Examiner – s. 53
- the 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
- the Chief Commissioner must report in writing to the SIM every six months on prescribed matters and on any other matters the SIM considers appropriate for inclusion in the report – s. 66.

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

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

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

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

This annual report is made pursuant to that provision.

Briefly the report must include details of the following:

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

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

## 14 Oversight In Relation To The Use Of Surveillance Devices, Telecommunications Interceptions And Controlled Operations

The SIM exercises oversight responsibilities with respect to telecommunications interceptions, surveillance devices and controlled operations.

The use of controlled operations by State law enforcement agencies under the provisions of the *Crimes (Controlled Operations) Act 2004* (the CO Act) became the SIM's responsibility when the legislation came into force on 2 November 2008.

The SIM's responsibilities with respect to telecommunication interception, use of surveillance devices by law enforcement agencies and controlled operations involves the inspection of records and monitoring compliance with the legislation.

### 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 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 such 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. The Commonwealth Minister subsequently made a declaration under s. 34 the TIA Act in respect of the OPI and, with effect from 19 December 2006, the OPI became the second Victorian State agency permitted to use the provisions of the TIA Act to conduct telecommunications interception.

The SIM is required under the State TI Act to inspect the records of Victoria Police and the 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 Minister.

The SIM has reported to the Minister in accordance with the State TI Act.

### 14.2 Surveillance Devices

From 1 July 2006 the SIM assumed responsibility under the state *Surveillance Devices Act 1999* (SD Act) for inspection of Victorian agencies authorised to use surveillance devices. This Act is based on national model surveillance device legislation cooperatively developed by States, Territories and the Commonwealth and it provides, 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 Victorian agencies 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 inspections to each House of the Parliament as soon as practicable after 1 January and 1 July of each year. A copy of the report must be provided to the Minister (Attorney General) at the time it is transmitted to the Parliament. The Act requires that a report submitted to the Parliament be tabled in each House on the day on which it is received or 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 2008–2009 year the SIM conducted two inspections and submitted the required reports. Those reports, once tabled in Parliament, are publicly available on the SIM's website.

### 14.3 Controlled Operations

State legislation to permit and regulate controlled operations was enacted in 2004. It is based on national model legislation developed by a Joint Working Group established by the Standing Committee of Attorneys-General and the Australasian Police Ministers Council (now the Ministerial Council for Police and Emergency Management). The national model legislation initiative came out of a summit on terrorism and multi-jurisdictional crime held in April 2002 and attended by the Prime Minister and the leaders of the States and Territories. Jurisdictional issues relating to Commonwealth agencies delayed commencement of the legislation, but following amendment in 2008 it was proclaimed and came into effect (with the exception of s. 52) on 2 November 2008.

The CO Act established controlled operations provisions for Victoria Police and the OPI. It also inserted new (but more limited) provisions for controlled operations into the *Fisheries Act 1995* and the *Wildlife Act 1975* for use by law enforcement groups within the Department of Primary Industries (Fisheries) and the Department of Sustainability and Environment (Wildlife). Some previous indemnity provisions covering law enforcement officers across the four agencies were repealed.

A controlled operation is a covert investigation method used by law enforcement agencies. It involves a participant (usually a law enforcement officer but sometimes a civilian) working 'undercover' in order to associate with people suspected of criminal activity and, thereby, in order to obtain evidence that may be used to support a prosecution for an offence. During the operation the participant may need to engage in unlawful conduct, but only under strict guidelines and controls. A controlled operations authority therefore provides indemnity for the participant when engaging in conduct that would otherwise be unlawful.

The role of the SIM under the controlled operations legislation is to inspect the records and documents of each law enforcement agency using the CO Act; to receive six-monthly reports from the chief officer of each agency; and to report to the Attorney-General and Parliament after the end of each financial year. The SIM's report is to cover the work and activities under the Act by each agency and to report on inspections and compliance with the legislation.

The SIM has undertaken one full inspection of agency records under the CO Act and has received reports from the chief officer of each of the four agencies. The SIM's report, due as soon as practicable after 30 June 2009, will be available on the SIM's website after it has been tabled in the Parliament.

### 14.4 Co-operation and Compliance

The SIM's reports under the SD Act and the CO Act are publicly available once tabled in Parliament and can be accessed on the SIM's website.

Reports under the State TI Act are not publicly available and are provided only to the relevant agency chief officers, the State Attorney-General and the Minister of Police and Emergency Services who then forwards a copy to the Commonwealth Attorney-General as being the Minister responsible for the TIA Act.

The SIM is pleased to again report that all agencies inspected were fully co-operative and provided all possible assistance to the SIM in the performance of his functions.

### 14.5 Inspection Staff

Following the commencement of the controlled operations legislation an additional SIM Officer has been engaged for inspection duties.

## 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 five staff. Until January 2009 temporary assistance has also been provided from time to time by other officers from the Department of Justice portfolio in relation to the conduct of compliance inspections. This assistance was appreciated and gave the OSIM flexibility in staff resources which is important. However, the assistance is no longer required because, as noted, a second inspections officer has now been employed as part of the OSIM. The SIM acknowledges and greatly appreciates the commitment and quality of work of staff of the OSIM.

## 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 which, initially housed within the Police Regulation Act are now exercised under the provisions of the Police Integrity Act. 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 Integrity Act gives the DPI the power to regulate the procedure by which he conducts an investigation as he thinks fit. 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 rules of evidence that apply in a court of law do not apply to an investigative body such as the OPI. This is because the function of an investigation is not to prove an allegation but to elucidate facts or matters that may assist an investigation.

For this reason, relevance has to be understood in a far broader context than when applied in a court of law. When applied to an inquisitorial process, relevance should not be narrowly defined[1] and includes information which can be directly or indirectly relevant to the investigation.[2] 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).[3] 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.

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

In undertaking the function of 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."[4] 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.

1 *Melbourne Home of Ford Pty Ltd v Trade Police Regulation Practices Commission* (No. 3) (1980) 47 FLR 163 at 173.
2 *Ross and Anor v Costigan (1982)* 41 ALR 319 at 355 per Ellicott J.
3 (1982) 41 ALR 337 at 351 per Fox, Toohey and Morling JJ.
4 *ibid*.

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

## 17 Section 115 Reports

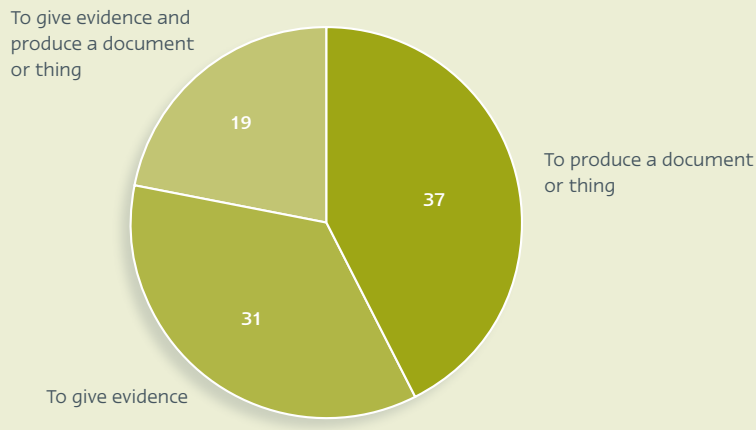
Section 115 of the Police Integrity Act (formerly s. 86ZB of the Police Regulation Act) requires the DPI to provide the SIM with a written report within three days following the issue of a summons. This requirement has enabled the SIM to keep track of the number and nature of summonses issued.

Following recommendations from the SIM in the s. 86ZM Report, specific provisions were included in the Police Integrity Act relating to witness summonses (Part 4 Division 2). Section 54 now specifies the content and form of a witness summons which includes that it must state the general nature of the matters about which the person is to be questioned except to the extent the DPI considers that statement would prejudice the conduct of the investigation (ss. (2)). To monitor compliance with this provision the s. 115 report now contains additional information including a copy of the summons.

### 17.1 Overview of section 115 reports received by the Special Investigations Monitor

A total of 87 s. 115 and s. 86ZB of the Police Regulation Act reports were received by the SIM in the 2008-2009 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.

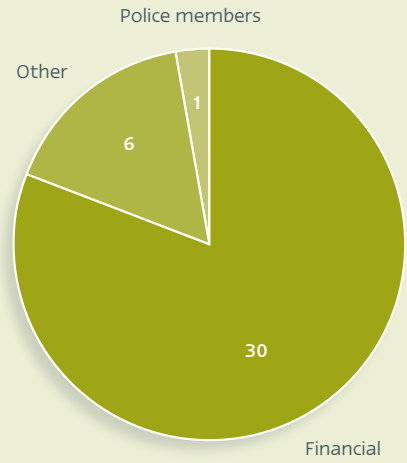
Summonses Issued by OPI



### 17.2 Summons to produce a document or thing

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

Types of Institutions Summoned to Produce 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 (e.g. loan, savings, cheque accounts etc) held 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 allegations of misconduct, 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 is the best evidence to establish unexplained wealth. This is because the evidence is in documentary or electronic form and does not necessarily rely on the truthfulness or otherwise of answers given by a witness.

The summonses served on financial institutions by the OPI in the current reporting period 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 the OPI. Some examples include details of betting accounts held by gaming institutions, travel documentation and video images.

### 17.5 Police members

One police member was served with a summons to produce a document or thing relevant to the subject matter and period under investigation.

## 18 Interviews Involving The Use Of Section 47

Interviews involving the use of s. 47 of the Police Integrity Act (formerly s. 86Q of the Police Regulation Act) were discussed in section 18 of the 2006-2007 Annual Report. There were no interviews conducted under s. 47 or s. 86Q in this reporting period and consequently no 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

Fifty seven reports pursuant to s. 117 of the Police Integrity Act and s. 86ZD of the Police Regulation Act were provided to the SIM between 1 July 2008 and 30 June 2009. Ten of the reports provided to the SIM related to coercive examinations conducted in the previous reporting period.

Transcripts were provided for the great majority of examinations. All hearings were accompanied by recordings.

## 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.[5]

The DPI did not apply for any warrants during the current reporting period.

## 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.

An issue arose in this reporting period as to whether a witness should have been coercively examined. This is discussed later in this report when reviewing issues arising from examinations.

The SIM continues 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',[6] 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.

As discussed in the 2007-2008 Annual Report (section 42.5), the introduction of the Delegates' Manual is an important initiative. It is understood however that work on the original manual was suspended following the introduction of the Police Integrity Act. To the extent that the new legislation necessitated a revision of earlier policies, procedures and guidelines, the DPI has advised the SIM that work is currently being undertaken in drafting a revised document the completion of which is anticipated during the next reporting period.

5 Police Integrity Act s. 84(1) (formerly Police Regulation Act (Vic) s. 86PD(1)).

6 This is the delegates' manual which was provided to the SIM in the 2006-2007 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 Appendix B. These descriptions, although intentionally general give an understanding of the types of investigations involved in the reporting period while ensuring compliance with s. 126(4)(c) of the Police Integrity Act (formerly s. 86ZL(4) of the Police Regulation Act), not to identify any ongoing investigations. A description of investigations conducted by the DPI where coercive powers were used is also contained in the s. 86ZM Report.

To ensure that the descriptions contained in Appendix B could not detrimentally affect any investigation, the SIM provided a draft to OPI and Victoria Police for their consideration and implemented any requests they made for change.

The table below displays the types of investigations generated by the DPI during the current reporting period.

| Investigation Type | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | 2004–2005[7] | Total |
|---|---|---|---|---|---|---|
| **Own motion investigation s. 44 (formerly s. 86NA of the Police Regulation Act)** | 11 | 13 | 11 | 6 | 4 | **45** |
| **Complaint generated investigation s. 40 (formerly s. 86N of the Police Regulation Act)** | 1 | 1 | 2 | 2 | 1 | **7** |
| **Further investigation conducted by the DPI s. 48 (formerly s. 86R of the Police Regulation Act)** | 1 | 0 | 1 | 1 | 0 | **3** |

A total of 48 witnesses were examined in the reporting period. Four were examined twice (and one was examined in relation to separate investigations). This can be compared with the total of 53 witnesses for the period 2007-2008. Of the 48 witnesses 20 are serving police members and 28 are civilians.

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

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

The table below provides an overall summary of the total incoming material from the OPI during the current and previous reporting periods that relates to s. 115, s. 117 and s. 47 reports under the Police Integrity Act and s. 86ZB, s. 86ZD and s. 86Q reports under the Police Regulation Act.

| Police Integrity Act 2008 & Police Regulation Act 1958 | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | 2004–2005[8] | Total |
|---|---|---|---|---|---|---|
| **s. 115 and s. 86ZB Director must report summonses** | 87 | 143 | 106 | 202 | 84 | **622** |
| **s. 117 and s. 86ZD Director must report other matters** | 57 | 63 | 44 | 60 | 30 | **254** |
| **s. 47 and s. 86Q Power to require answers etc. of a member of the force** | 0 | 0 | 4 | 24 | 7 | **35** |

## 25 Issues Arising Out Of Examinations

The following issues arose out of the SIM's review of examinations conducted during the current reporting period.

### 25.1 Manner in which the naming of third parties is handled in the course of an OPI public examination

Section 38 of the 2007-2008 Annual Report discusses the issue of publicly released information in the course of OPI public hearings. Of particular importance is the release of information about third parties who are not themselves the subject of examination or the investigation but where there is a potential to damage the reputation of such parties.

In the last reporting period, the OPI conducted public hearings in relation to an investigation into the alleged involvement of serving/former members of Victoria Police into the murders of a Victoria Police informer and his wife. In the period under review and resulting from one of these examination hearings, the SIM received a complaint on behalf of two third parties (A and B), whose names had been raised in the course of those public hearings. The complaint, made on behalf of A and B, was that their names had been released publicly in the course of a witness being questioned by the OPI examiner, despite neither being the subject of any examination nor the investigation itself. In the circumstances, it was submitted on behalf of A and B that the failure of the delegate to make an order suppressing their names was unfair and that as a result of the release of this information both they and their families had suffered distress and embarrassment.

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

The SIM wrote to the DPI and enclosed a copy of the complaint for the DPI's consideration and comment. The DPI responded to the SIM suggesting that although the subject matter of the complaint did not fall within the jurisdiction of the SIM he would, in the spirit of cooperation, offer a response to the matters raised. Whilst accepting that the public airing of the details of the incident and the naming of A and B caused embarrassment to them and their families, the DPI did not accept that they should not have been named or that a non-publication order should have been made. Accordingly, the DPI suggested that not only was the line of questioning by the OPI examiner relevant to the subject-matter of the inquiry, but that the making of even a temporary suppression order (i.e. to enable submissions to be made at a later date), would have been "overly cautious" given his stated view that the public revelation of the names was appropriate.

Whilst acknowledging the spirit of cooperation, the SIM did not accept that these issues fell outside his monitoring jurisdiction and by letter so advised the DPI. In this context, the SIM noted that the issues not only concerned a coercive examination held in public but, significantly, also related to whether that part of the examination in issue was in fact relevant to the investigation and, consequently, the need or otherwise for there to be public disclosure.

The SIM reviewed the relevant examination in which A and B were identified in the course of the public hearings. In light of the matters referred to by the DPI and having regard to the wide view of relevance that has to be applied in these proceedings (and which has been discussed in previous annual reports), the SIM accepts that the examination was relevant.

In relation to the question of whether it was necessary to elicit the names of A and B and, if so, for them to be published, the SIM is of the view that it was not. In accepting that publication not only caused upset and embarrassment to A and B and to their families, the SIM notes that it could also damage their reputations. In the view of the SIM, if it was necessary for their names to be elicited in the examination, which he does not accept it was, then fairness required that they be given notice and an opportunity to answer the allegations made or provide an explanation about them. It is also required that they be heard on whether there should be publication and if so any explanation they wished to make to be taken into account in the form of publication. This did not occur and in the SIM's view it should have. The SIM advised both the DPI and the complainant (on behalf of A and B) of these views.

The DPI acknowledged the view of the SIM. In accepting that the role of the SIM included assessment of evidence given at the OPI hearings concerning relevance and appropriateness, the DPI did not seek to add anything further. Whilst noting a divergence on some issues, the DPI further acknowledged the importance of the statutory function carried out by the SIM and expressed a preparedness to be guided by his views concerning this matter.

The SIM has nothing to add to the views expressed, but reiterates the importance of this issue in the context of public hearings.

### 25.2 Manner of questioning witnesses – A question of fairness

In respect of the same public hearing examination (discussed 25.1 above), the witness was played a number of lawfully intercepted telephone conversations which were said to be relevant to the subject-matter under investigation. In relation to one of these calls the OPI examiner questioned the witness about the identity of the person. The witness was unable to identify him/her. At the conclusion of questioning by the OPI examiner, counsel representing the witness was invited to raise with his/her client any matters arising. In so doing and having asked that the call be replayed, counsel asked the witness whether he/she could identify the person concerned.

The witness was still unable to do so. In then requesting that the OPI investigators provide such information as would identify the person, counsel submitted to the delegate that this information, in case it be considered selective, should have been made available to the witness. The delegate adjourned the matter to enable enquiries to be made. After the adjournment, the OPI examiner advised that the OPI investigators had a belief as to the identity of the person, but could not say he/she was the person who was a party to the call. In the circumstances, counsel queried the delegate why this information had not been provided to the witness at the time he/she was first questioned about it by the OPI examiner. The delegate informed counsel that what was critical was that the information had now been provided and as such counsel could properly continue with the re-examination of his/her client.

Whilst it may have been preferable for the OPI examiner to have made the material available at first instance, it was subsequently provided to the witness who, through his/her counsel, was then given an opportunity to respond in light of the further information. In the circumstances, the SIM agrees with the approach taken by the delegate in this matter.

### 25.3 Manner in which the use of lawfully intercepted information was handled in the course of an OPI coercive examination

In the course of an examination reviewed, the witness was asked to listen to and was questioned about a number of lawfully intercepted telephone calls. In the course of questioning, the OPI examiner invited the witness to listen to a particular call after which it was proposed to question the witness about it. Before doing so, however, the DPI interceded and stated that in fairness to the witness a prior call should be played first. Counsel for the witness then raised a concern not only about an even earlier call, but about whether all relevant telephone conversations between the parties would be played. In this context, counsel suggested that the witness ought not be questioned upon the basis of calls which are selectively put. Whilst the OPI examiner responded that the calls had been selected for relevance and that the witness would be given an opportunity to comment on each, counsel for the witness maintained his/her concern.

In this situation the DPI decided to adjourn the matter in order that enquiries may be made of the OPI investigators. Upon resuming, the DPI stated his determination to ensure that the examination was conducted fairly and that in making enquiries about the transcription of recorded conversations between the witness and others, the OPI investigators had informed him that there may well be relevant conversations which were not transcribed. In the circumstances, the DPI decided that the examination could proceed, but only on the basis that it was clearly understood that insofar as the recordings played may not represent the totality of the relevant conversations between the witness and others, the contrary would not be suggested. Accordingly, the DPI directed that the examination could continue under careful monitoring to ensure that the witness was not prejudiced by reason of the absence or possible absence of material.

In the interests of transparency and as a means of ensuring fairness to the witness and preserving the integrity of the examination, the SIM agrees with the approach taken by the DPI.

### 25.4 Manner in which the issue of marital privilege was handled in the course of an OPI coercive examination

In the course of an examination reviewed, the OPI examiner advised the witness that having to answer certain questions would necessarily require him/her to have recourse to spousal communications. In pointing out, however, that marital privilege does apply to OPI examination hearings, the OPI examiner provided the witness and his/her counsel with a copy of the relevant statutory provision. The DPI having then further explained the legal operation of the marital communications privilege, adjourned the examination hearing in order to give counsel an opportunity to confer with the witness to ensure that he/she understood his/her rights, including when the right not to answer questions operated and when it did not.

In the interests of transparency and as a means of ensuring fairness to the witness and that the witness understands his/her rights, the SIM agrees with the approach taken by the DPI.

### 25.5 Manner in which earlier advice provided to a witness by OPI Examiner was handled in the course of a coercive examination

In reviewing an examination it was noted that prior to the commencement of the hearing the OPI examiner had given the witness certain advice in relation to his/her legal rights under the *Evidence Act 1958*. At the hearing before the DPI, but before formal questioning had commenced, the OPI examiner repeated the advice and in so doing asked the witness to confirm his/her understanding of that which had been earlier discussed.

In repeating a prior communication with or advice provided to a witness as a means of ensuring its capture as part of the hearing record, the SIM agrees with the approach taken by the OPI examiner as an example of promoting transparency, ensuring fairness to the witness and facilitating the SIM's monitoring of the examination.

### 25.6 Length of time in custody before commencement of coercive questioning

In another matter reviewed by the SIM, an issue arose concerning the length of time two witnesses were held by police before being served with a 'forthwith' summons which required their attendance at the OPI and then on the DPI to be coercively questioned.

Having reviewed the material provided, the SIM wrote to the DPI seeking a response to a number of matters. By way of background, the SIM understood that both witnesses had been arrested following the execution of search warrants by the Australian Crime Commission (ACC). These warrants were apparently executed at the home of each witness and in the presence of Victoria Police. In particular, the SIM noted that the OPI investigators determined a need for both witnesses to attend (at the OPI) 'forthwith.' The SIM was advised by the DPI that this determination was founded in the belief that to have done otherwise would have been to risk collusion and the loss of evidence and information.

In the circumstances, it was the view of the SIM that the earlier ACC raids, the arrests and the subsequent service of 'forthwith' summonses, gave rise to an inference that for all intents and purposes, both witnesses had been in custody for many hours prior to first attending the OPI and to their participation, some hours later, in the hearing process. Just how long was not clear, hence the SIM's letter to the DPI seeking further information. Whilst the SIM understood that the examination of witness A commenced at 8.40pm and concluded at 9.27pm, the hearing of witness B apparently commenced at 6.45pm before being adjourned at 7.19pm.

This earlier examination of witness B then recommenced at 7.30pm and concluded at 8.22pm. At one stage, however, witness B complained that "I've been in custody since 6.30 in the morning and then I've been hit with this. It feels like I'm in the Twilight Zone...I don't even know what the hell is going on here." Although witness B was then advised "You're not...in custody at the moment", this did not preclude a later complaint that "I've been up since 5.00 – 5 o'clock this morning – 5.30 this morning."

Given the unusual, if not exceptional, circumstances which apparently preceded the 'forthwith' requirement to attend the OPI, the SIM considered that his ability to better contextualise and assess the questioning of these witnesses would be significantly assisted by the provision of further information, more particularly a chronology. Commencing with the approximate time of execution of the ACC search warrants, the SIM's letter to the DPI noted that it would be helpful if such additional information included not only the times and places to which both witnesses were subsequently conveyed/required to attend by Commonwealth and/or state law enforcement officers, but also whether either or both were formally questioned (and if so, over what period), prior to their arrival at the OPI. In this context, the SIM further noted that whilst both witnesses were served a 'forthwith' summons mid-afternoon, witness A subsequently attended OPI at 6.26pm, whilst witness B attended at 4.00pm.

In subsequently providing the SIM with the chronology requested, the DPI advised that the OPI was aware of the fact that the witnesses had already spent some time in the custody of Victoria Police and had taken this into account. Indeed, it was said that prior to the commencement of the examination hearings both witnesses were offered a meal and each had access to a legal representative.

Nevertheless, the SIM identified a number of further matters arising from the length of time in which both witnesses were apparently held prior to their examination hearing. As with earlier concerns, these were raised in writing with the DPI who intimated that as some of the information sought by the SIM was not within the knowledge of the OPI, but of Victoria Police, there may be some delay in responding.

This proved to the case. Delivered late in the current reporting period, the SIM considered that the written response received from the OPI required further clarification and consideration before it would be possible to make an informed assessment of the matters relevant to the exercise of coercive powers and the SIM's role with respect to them.

Accordingly, the SIM will be seeking further information from the DPI. Such is the importance of the issues identified that the SIM intends to make further reference to these matters in the next annual report.

### 25.7 Length of attendance

Among many important issues which must be addressed by the DPI in the s. 117 report is the period spent by a person attending an examination.

It is important for the SIM to know the time at which witnesses attend at the OPI in response to a witness summons, as well as when the examination commenced, if it was stood down and when it ultimately concluded.

The reports received by the SIM during the period under review regularly contained this information. Sometimes, however, a discrepancy was noted between that information and the time stated for the duration of the person's attendance on the DPI. For example, one report recorded that the witness attended the OPI in response to a witness summons at 12.15pm and the examination, which commenced at 12.42pm, was adjourned at 13.38pm. The duration was stated as 56 minutes.

In reviewing this matter, however, it appeared to the SIM that the time recorded was the duration of the examination, not the duration of the time the witness attended in answer to the summons. As the SIM considers that the duration stated in the report should be the total time the witness attended, a letter was forwarded to the DPI requesting his views on the matter. In reply, the DPI noted that the reports appeared to contain the relevant information, but acknowledged the preference of the SIM that the calculation of the total time be expressed in all cases as from the time of initial attendance. The SIM appreciates the DPI's cooperation and confirmation that the OPI reports will be amended to avoid any future discrepancy.

### 25.8 Video link

From time to time the DPI and Chief Examiner have occasion to coercively examine persons who are held within a correctional facility. That this was again the case during the current reporting period, served to bring into sharp focus the strongly held view of the SIM that the security of the person is and must remain the paramount consideration. In this context, the SIM is aware that this view is fully endorsed by both the DPI and the Chief Examiner and supported by their respective members of staff.

In relation to this issue, one s. 117 report received by the SIM referred to an OPI coercive examination having being conducted via a video link with an inmate of a correctional facility.

In reviewing the relevant examination hearing, the SIM was concerned to ascertain the DPI's reason(s) for deciding to conduct the examination 'on-site', instead of issuing a written direction under s. 57 of the Police Integrity Act which would have enabled the witness to have been examined away from the prison.

In view of the examination being conducted in this way, the SIM wrote to the DPI requesting his response to this important issue. In a written reply, the DPI affirmed the primacy of witness security, acknowledged the associated risks and emphasised that whilst examination by video link is not necessarily an ideal course, it is not something undertaken for mere convenience. In further noting that any examination of a prisoner, be it in prison or elsewhere, brings with it particular risks, the DPI confirmed that the ultimate decision is a product of case-by-case assessment. In these circumstances it was said that the OPI will continue to adopt whichever course offers the best balance between risk and effectiveness.

As further acknowledgement of its importance, the DPI requested two senior OPI members of staff to meet with the SIM and the OSIM Senior Legal Policy Officer to discuss this issue. A helpful discussion followed in which the OPI representatives, having agreed with the SIM that the security of the person is paramount, noted this to be the reason why a video-link was preferred in the case then under review.

The SIM recognises that it is for the OPI to decide how an examination of a person in custody should be conducted. The security of the person is paramount which the DPI accepts. The question is how can that best be achieved. The SIM will continue to monitor closely the coercive examinations of persons in custody and the circumstances surrounding them in view of the vulnerable position such persons are in.

### 25.9 Use of coercive examination as a last resort

In one matter reviewed during the current reporting period, a witness was summonsed and coercively examined on the basis that he/she could give relevant evidence following a trip interstate.

However, contrary to this assertion, the examination made it clear that the witness concerned was at 'home' at all relevant times. Consequently, the SIM raised the matter with the DPI. Of particular concern to the SIM was whether the attendance of the witness could have been avoided by ensuring that he/she had in fact travelled interstate before being compelled to attend the OPI and being subjected to a coercive examination in which, as it turned out, the witness could give no relevant evidence. In this context, the use of a coercive power should be a last resort.

The DPI responded stating that whilst it was regrettable that the witness was summonsed unnecessarily, the information received by the OPI investigators when combined with the sensitivity and seriousness of the particular matter under investigation, meant that there was a reasonable basis for believing that the witness may have been able to assist and that, in the circumstances, all reasonable steps were taken to ensure that the summons was justified.

Although appreciating the response provided by the DPI, the SIM remained concerned that a witness had been subjected to the coercive process, notwithstanding the fact that he/she could not provide any relevant information. In so informing the DPI, the SIM nevertheless noted that in the end the issue of whether, without compromising the investigation, anything more could have reasonably been done to ascertain the true position beforehand required a negative conclusion.

### 25.10 Request to disclose DPI documentation setting out the grounds for investigation

Before the commencement of any formal questioning at an examination, the witness's legal representative made application to the DPI's delegate for permission to inspect the DPI's "own motion" document(ation) referable to the investigation in which his/her client was about to be coercively examined. In opposing the application, the OPI examiner noted that whilst the DPI's reasons had, in this particular instance, been reduced to writing, there was no statutory obligation to do so, nor was there any statutory entitlement for this documentation to be disclosed.

In acceding to the submission made by the OPI examiner, the DPI's delegate said that whilst the application had clearly been made with a view to better understanding the nature / scope of the OPI's enquiry and, therefore, relevance, this was a matter which the witness's legal representative, if considered appropriate, could raise further during the course of the examination.

On reviewing the examination the SIM agrees with the decision made by the DPI's delegate.

### 25.11 Method and manner of questioning by OPI Examiner

After careful consideration of an examination, the SIM had some concern about aspects of the manner in which it was conducted. In the course of raising these concerns in writing with the DPI, the SIM readily acknowledged that the purpose of and the processes employed by the OPI operate to clearly distinguish the manner in which it conducts a hearing from that of a court. Nevertheless, the SIM considered that the exercise of coercive power ought not mean the absence of any boundaries, nor otherwise abrogate any requirement for a witness to be treated fairly and with some respect.

In this context, the SIM was concerned with the following aspects arising out of the examination review:

- in adopting a "theme" to underpin the coercive examination, the OPI examiner constantly returned to it through repeated questioning of the witness
- the OPI examiner making what to the SIM appeared to be gratuitous comments about the witness telling the truth; and
- the manner in which the OPI examiner questioned the witness about his/her giving of prior evidence in court.

Moreover, whilst alert to the fact that coercive examinations sometimes require "robust" questioning, the SIM further noted that a fine line can exist between what is considered appropriate questioning and what is not. In light of these concerns, the DPI was invited to review the examination hearing and to advise the SIM accordingly.

The DPI responded in writing to the SIM. In referring to the hearing and to the alleged serious criminality which the OPI was investigating, the DPI emphasised the fact that at the time the examination was conducted the OPI was in possession of detailed, highly credible information relating to a witness considered (by the OPI) as someone who was being less than candid. Whilst acknowledging that at various points of the coercive examination, the questioning may have strained the limits of robustness, the DPI said that the circumstances of the case supported and justified the approach taken by the OPI examiner. On the other hand, in accepting that a greater level of restraint should generally be demonstrated at the OPI hearings than in cross-examination at trial, the DPI confirmed that this message will continue to be conveyed to delegates, legal practitioners assisting and the OPI staff.

The SIM appreciates the position and action taken by the DPI and is unable to conclude in this case that the OPI examiner crossed the fine line that separates appropriate questioning from that which is not. This is an important aspect of coercive examinations that the SIM monitors closely.

### 25.12 Content of summons / preliminary requirements

As stated earlier, since 5 December 2008 the content and form of a witness summons is governed by s. 54 of the Police Integrity Act. As there were no such requirements under the Police Regulation Act, in order to monitor compliance with s. 54 the SIM wrote to the DPI and requested that a copy of each witness summons issued accompany the report provided pursuant to s. 115 (previously s. 86ZB of the Police Regulation Act). Moreover, in those cases where the DPI considered the s. 54(2) exemption ought apply (i.e. there is no requirement for a summons to state the general nature of the matters about which the witness is to be questioned if to do so would prejudice the investigation), the SIM further requested that this fact also be included in the s. 115 report.

In response, the DPI wrote to the SIM and further to agreeing to the request to provide a copy of each summons issued, confirmed that insofar as s. 54 had changed the requirements concerning the issue of summonses, OPI procedures had been reviewed and amended accordingly.

In addition, s. 62 of the Police Integrity Act deals with the preliminary requirements which the DPI must address before any question is asked of (or any document is produced by) a witness at a coercive examination. In this context, s. 62(2) provides a similar exemption to that under s. 54(2) by removing the (s. 62(1)(c)) presumptive requirement that a witness be informed of the general scope and purpose of the examination if the DPI considers that to do so might prejudice the investigation or otherwise be contrary to the public interest.

Accordingly, in the course of reviewing an examination which was conducted shortly after commencement of the Police Integrity Act, it was noted that the witness's legal representative highlighted a lack of information in the summons. At that stage (i.e. prior to commencement of formal questioning and before the witness was sworn), no information had been given to the witness pursuant to s. 62(1)(c), although after the matter was raised such information was provided. The SIM wrote to the DPI and sought an explanation why the s. 62(1)(c) information was only offered after a request from the witness's legal representative.

In providing a detailed response to the SIM, the DPI set out the background in relation to both the issuance of the witness summons and to the circumstances in which the s. 62 preliminary requirements were identified and addressed at the hearing. With respect to the issue of timing (i.e. at what point the witness is to be informed of the general scope and purpose of the investigation), the DPI confirmed an OPI practice direction that this is to take place almost at the outset of the examination hearing.

Having noted and considered the comments of the DPI in relation to the issue of providing information at an examination, the SIM remained of the view that such information should have been provided earlier. However, the SIM is satisfied that this was a 'one-off' situation and monitoring of examinations confirms that the requirements of s. 62 are being carried out.

### 25.13 Provision of copy exhibits by OPI

In the course of reviewing an examination, it was noted that although the relevant transcript and the s. 117 report both referred to the tendering of a particular exhibit, a copy was not provided to the SIM. Whilst the contextualisation and task of assessing an examination is greatly assisted by the provision of copy exhibits, it is not the expectation of the SIM that copies of all exhibited material ought be provided following every hearing. This is obviously a matter of practicality and common sense to be determined on a case-by-case basis. Nevertheless, in relation to the conduct of those hearings where only a limited number of exhibits are received, the inclusion of such material as an attachment to the s. 117 is certainly of assistance to the SIM.

In the circumstances, the SIM wrote to the DPI with a request that this matter be given further consideration. In a written response and on behalf of the DPI, the Assistant Director Police Integrity, Legal & Compliance not only provided the SIM with a copy of the particular exhibit requested, but noted that whenever it is convenient and practical to do so, the OPI would include copy exhibits as an attachment to the s. 117 reports. Moreover, where this is not possible (e.g the exhibited material is not capable of being readily copied or reproduced or where the exhibits are voluminous), an explanation is to be included in all future s. 117 reports. In this context, however, the OPI Assistant Director nevertheless confirmed that all exhibits are and will continue to remain open for inspection by the SIM. The SIM appreciates this assistance and cooperation from the OPI.

## 26 Legal Representation

### 26.1 Legal representation and witnesses appearing before the DPI

As discussed in the 2005-2006 Annual Report (section 26.1) the DPI or his delegate regulates the role played by legal representatives pursuant to his power under s. 86P(1)(d) of the Police Regulation Act. Following recommendations in the s. 86ZM Report, s. 64 of the Police Integrity Act entitles a witness to be represented by a legal practitioner at an examination. It also deals with other matters relating to representation.

### 26.2 Who was represented and who was not

Where leave was required under the Police Regulation Act, the DPI or his delegate granted leave to all witnesses who applied to be legally represented.

The table below displays a breakdown of legal representation for the current and previous reporting periods.

| Legal Representation | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | 2004–2005 | Total |
|---|---|---|---|---|---|---|
| Police witnesses legally represented during examination | 18 | 34 | 25 | 38 | 9 | **124** |
| Police witnesses not legally represented during examination | 2 | 8 | 1 | 9 | 1 | **21** |
| Former police members legally represented during examination | 0 | 4 | 1 | 0 | 0 | **5** |
| Former police members not legally represented during examination | 0 | 0 | 0 | 2 | 0 | **2** |
| Civilian witnesses represented during examination | 18 | 12 | 3 | 2 | 2 | **37** |
| Civilian witnesses not represented during examination | 10 | 4 | 2 | 8 | 3 | **27** |

## 27 Mental Impairment

The measures to be taken by the DPI or his delegate under s. 64(4) of the Police Integrity Act (formerly 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 report this information to the SIM in the s. 86ZD report.

Section 29 of the 2005-2006 Annual Report (p. 21) refers to the requirements imposed by r. 4(g) of the Police Regulations 2005. Those requirements are continued by r. 22(g) of Police Integrity Regulations 2009.

All s. 117 and 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.

## 28 Witnesses In Custody

The power of the DPI under s. 57(2) of the Police Integrity Act (formerly 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 either the current or previous legislation.

However, a witness was examined in custody by video link thus not requiring a s. 57(2) direction. Issues relating to this examination are discussed earlier in this report.

## 29 Explanation Of The Complaints Procedure

As referred to in section 31 of the 2005-2006 Annual Report, the SIM considered that persons who are being coercively examined should be informed of their right to complain even though the Police Regulation Act did not explicitly require this.

Prior to the commencement of the Police Integrity Act even though there was no legislative requirement, persons have nevertheless 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.[9] This document, entitled 'Information to Assist Summoned Witnesses' contained 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 during this period were reminded of their right to complain to the SIM at the end of their respective examinations.

9 This is explained in section 32 of the previous annual report.

Following a recommendation in the s. 86ZM Report (Recommendation 10), s. 62 of the Police Integrity Act imposes preliminary requirements on the DPI with respect to a witness the subject of coercive powers. In essence, the purpose of s. 62 is to ensure that witnesses are informed of their rights before being coercively examined or required to produce documents. As recommended, the provision allows for written notification in advance of a witness's rights in lieu of oral notification where the witness is legally represented and the legal practitioner informs the DPI the document has been explained to the witness.

Section 62 is an important safeguard for witnesses and compliance with it is monitored by the SIM. The DPI follows the practice of written notification in advance which is appropriate. The SIM is satisfied that there has been compliance with s. 62 which includes, subject to an exception, informing the witness of the general scope and purpose of the investigation to which the examination relates. An issue relating to such notification has been discussed earlier (section 25.12).

## 30 The Use Of Derivative Information

It was stated in section 32 of the 2005-2006 Annual Report that the protection afforded to a witness who had 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.

Following a recommendation in the s. 86ZM Report, (Recommendation 8), the certificate procedure no longer applies and s. 69 of the Police Integrity Act abrogates the privilege against self-incrimination and provides a use immunity (s. 69(3)).

No issues were raised about the use of derivative information during the examinations conducted in this reporting period.

The SIM has proceeded on the basis that the use immunity provided by s. 69(3) of the Police Integrity Act does not extend to the use of derivative information.

However, that may no longer be the case in the light of the decision of the Supreme Court in *DAS v Victorian Human Rights & Equal Opportunity Commission* (Warren CJ) handed down on 7 September 2009 (2009 VSC 381).

The decision concerns the coercive powers exercised by the Chief Examiner in particular the extent of the use immunity provided by s. 39 of the Major Crime (Investigative Powers) Act. Those powers are essentially the same as the powers exercised by the DPI.

Further reference to this decision is made later in this report, however it would appear that it has implications for the use immunity applicable to the powers exercised by the DPI.

## 31 Certificates

The certification procedure under s. 86PA of the Police Regulation and its operation has been the subject of previous annual reports (eg: Sections 34, 35 & 36 of 2007-2008 Annual Report). It has been replaced during this reporting period by the abrogation of the privilege against self incrimination (s. 69 of Police Integrity Act).

This has removed uncertainty and confusion which arose under the certification procedure and replaced it with a clear and effective legislative pronouncement which has resulted in no issues.

## 32 Complaints

The SIM's jurisdiction under s. 118 of the Police Integrity Act (formerly s. 86ZE of the Police Regulation Act) in relation to complaints was discussed in previous annual reports. 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. 118. However, the complaint is limited in its subject-matter to a complaint that the person was not afforded adequate opportunity to convey his/her appreciation of the relevant facts to the DPI or his delegate.

Section 118 of the Police Integrity Act now specifies that a complaint must be made by a person within 90 days after the person is excused from attendance by the DPI or his delegate[10]. A complaint can be oral or written. If the complaint is made orally, the SIM may require the person making it to confirm the complaint in writing.

The SIM is not required to investigate every complaint received. Section 119 of the Police Integrity Act 2008 (formerly s. 86ZF of the Police Regulation Act) 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 five complaints in this reporting period. A brief summary follows of each:

(a) Initially received on 28 June 2008 via e-mail. The complaint referred to an article in 'The Age' newspaper which the complainant alleged indicated a breach of confidentiality by the OPI of information provided at a private hearing.

The SIM informed the complainant that whilst jurisdiction extends to monitoring compliance with the confidentiality obligations in the Police Regulation Act 1958, before the SIM would be able to deal with the matter raised it would be necessary for the complainant to provide evidence that there was a leak from the OPI. No such evidence was provided and the matter did not proceed further.

(b) The complaint was initially received by letter in which the complainant alleged misconduct and/or serious misconduct by members of the Victoria Police Force which had apparently been the subject of enquiry and investigation by other agencies. The complainant requested the SIM to review a decision by the DPI not to investigate the matters complained of. The SIM informed the complainant that the jurisdictional constraints imposed by the legislation basically preclude the SIM from investigating such a complaint which was not the subject of any use of coercive powers by the DPI. In this context, the SIM did not have jurisdiction under the legislation to review a discretionary decision by the DPI not to investigate.

(c) This complaint, relating to the naming of third parties, is reviewed earlier as an issue arising out of an examination (section 25).

10 Formerly s. 86ZE(e) of the Police Regulation Act which provided that a complaint must be made within 3 days.

(d) This complaint was initially received via e-mail. The complaint was made on behalf of a member of Victoria Police who alleged that it was only through a family member (via the media) that he/she learned of recommendations made by the OPI, notwithstanding that they were contained in a report tabled in Parliament. In this context, the issue centred on what was said to be the failure of the OPI to make, or attempt to make, any contact with the person concerned before the report was made public (i.e. tabled). The complainant was advised that in the circumstances the OPI was under no obligation to provide such notice and consequently the SIM was unable to assist further.

(e) This complaint was initially received by letter. The complaint concerned an investigative decision made by the OPI. The complainant was advised that the SIM does not have jurisdiction to monitor investigative decisions by the OPI, nor the manner in which it conducts or responds to such matters. In the circumstances, the SIM was unable to assist further.

The fact the SIM could not assist some complainants is a reflection of the very narrow jurisdiction given to the SIM under the Police Integrity Act. The basis of any complaint that can be investigated by the SIM is clearly circumscribed by the current legislation, as was the case under the Police Regulation Act. Otherwise, the Ombudsman may have jurisdiction under his general jurisdiction with respect to the OPI.

## 33 Search Warrants

The powers of the DPI and staff with respect to searches under the Police Regulation Act have been reviewed in previous annual reports. There is no need to go over that ground again.

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 search warrant provisions and those relating to the power to search public authority premises have also been analysed in the SIM's s. 86ZM Report and the SIM's opinion on the operation of these provisions is set out in section 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 Part 4 of the Police Integrity Act.

## 34 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 .

The 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 addition to the above, the OSIM continues to provide a report to the DPI detailing the number of statutory 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 the OPI and signed to confirm that they are accurate before they are returned to the SIM.

## 35 Compliance With The Act

### 35.1 Section 115 of the Police Integrity Act and section 86ZB of the Police Regulation Act reports

Section 115 of the Police Integrity Act (formerly s. 86ZB of the Police Regulation Act) provides that the DPI must give a written report to the SIM within three days after the issue of a summons.

All s. 115 and 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. 115 of the Police Integrity Act and s. 86ZB of the Police Regulation Act in relation to the delivery of reports in the period under review.

### 35.2 Section 117 of the Police Integrity Act and section 86ZD of the Police Regulation Act reports

All s. 86ZD and s. 117 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 the 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. 115 reports (formerly s. 86ZB reports).

### 35.3 Other matters

The SIM has not exercised any powers of entry or access pursuant to s. 123 of the Police Integrity Act (formerly s. 86ZJ of the Police Regulation Act).

The SIM has not made any written requirement to answer questions or produce documents pursuant to s. 124 of the Police Integrity Act (formerly s. 86ZK of the Police Regulation Act).

### 35.4 Relevance

Subject to what has already been said, the SIM is satisfied that overall the questioning 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 were relevant and appropriate to the purpose of the investigation in relation to which the requests were made.

## 36 Comprehensiveness And Adequacy Of Reports

Generally, there have been no issues in relation to the comprehensiveness and adequacy of reports. As stated in previous annual reports, this has been as the result of an ongoing consultation process between the SIM and the DPI.

### 36.1 Section 115 and section 86ZB reports

As requested by the SIM in the 2005-2006 reporting period, the DPI has continued to provide additional information in these 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.

As stated earlier, a copy of the summons accompanies a s. 115 report.

### 36.2 Section 117 and section 86ZD reports

Generally s. 117 and 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 most cases the transcript to assess the questioning of persons concerning its relevance and appropriateness in relation to the purpose of the investigation. The reports have complied with the legislation which sets out a number of matters that must be incorporated, including 'the reasons the person attended.'

Whilst, as in the previous year, there have been reports which have provided a very general reason for 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 2006-2007 Annual Report, the SIM considers that as much information should be included in the s. 117 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. 115 reports and own motion determinations, it is important for the s. 117 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 so far as relevant and appropriate in respect of the witness being examined should be sufficiently set out in s. 117 reports. This has generally been the case in relation to s. 117 and s. 86ZD reports received in the period under review.

Overall, the SIM is satisfied with the comprehensive information provided in the s. 117 and s. 86ZD reports received in the period under review. The SIM will continue to monitor the comprehensiveness and adequacy of these reports, in particular in relation to the reasons for witness attendance and the nature of the investigation.

### 36.3 Remaining issues

The practice noted in the SIM's previous two annual reports whereby transcripts for some examination hearings are not provided has continued in this reporting period. This has not caused any significant issue 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.

## 37 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. 121 of the Police Integrity Act (formerly s. 86ZH of the Police Regulation Act).

However, the SIM has followed up with the DPI a recommendation that was foreshadowed in the 2007–2008 Annual Report (section 43) relating to the implementation of new provisions relating to public hearings.

As discussed in the 2007–2008 Annual Report (section 43), under s. 65 of the Police Integrity Act, the starting point is that examinations are all conducted in private unless the criteria for conducting an examination in public are satisfied. This is substantially different to (and in effect reverses) the position which applied to the conduct of public hearings by the OPI under the Police Regulation Act and the Evidence Act. In this context it was noted in the report that the SIM considered it important that any decision by the DPI to conduct a public hearing should be recorded and documented appropriately and that following consultation with the DPI, consideration would be given to the making of such a recommendation.

Consequently, in writing to the DPI and reiterating his view concerning the importance of recording and documenting the reasons for a public examination, the SIM invited the DPI to consider this matter and to advise him accordingly. In response, the DPI by letter confirmed that the OPI's practice of not opening an examination to the public until such time as interested parties have been given the opportunity to make submissions on the issue would continue under the Police Integrity Act. The DPI noted that any such decision and the reasons for it would then be documented in the form of a video recording and a written report (as required by the statute).

In acknowledging this, the SIM corresponded further with the DPI and submitted that it could be said that the interests of transparency required that the initial decision to hold a public examination should also be documented. Given its importance and the SIM's view that the initial decision should be recorded, together with reasons, the DPI was invited to consider the matter further. In so doing, the SIM made reference to the Practice Guidelines issued by the New South Wales Police Integrity Commission (discussed at pages 73-74 of the 86ZM Report). They acknowledge that the Commissions decision as to whether a hearing should be public or private is necessarily made prior to the hearing. Persons appearing at a public hearing may at the relevant time make application for the hearing or part of it to be held in private.

Although acknowledging the SIM's comments, the DPI replied that in his view no decision can be said to be made pursuant to s. 65 of the Police Integrity Act until such time as interested parties have had an opportunity to make submissions. Until then it is the opinion of the DPI that whatever is done (if anything) to further a possible OPI public examination only reflects what, at its highest, may best be described as a provisional view as distinct from the reason for a "decision" (under s. 65). The DPI concluded by confirming that any s. 65 decision and the reasons for it would be (audio and visually) recorded and provided to the SIM.

The SIM, however, remains of the view that as s. 65 of the Police Integrity Act now provides a statutory presumption against public examinations, anything done which militates against that presumption and which seeks to open an examination to the public constitutes a "decision" for which, in the interests of transparency and accountability, reasons ought be recorded. This enables an informed, independent assessment to be made of the basis on which Parliament's presumptive intention was not followed in the particular case under review. The decision to conduct a public examination, in particular the consequences of that decision, is a matter of great importance.

The SIM remains of the view that what is stated in the PIC guidelines correctly reflects the position under s. 65. A decision to hold an examination in public will necessarily in nearly all cases be made before the examination is held so that the appropriate arrangements and preparation take place. For example, whether a confidentiality notice should accompany a summons to witness and that the summons should indicate that the attendance is for a public examination. The mere fact of being summonsed to a public examination can, of itself, create prejudice.

There has been no public examination at the time of reporting under s. 65. All examinations have been in private. The SIM has decided at this stage not to follow up the correspondence with the DPI with a recommendation pursuant to s. 121. Rather, the SIM will further consider the position in the light of the documented process that is followed by the DPI with respect to any public examination conducted pursuant to s. 65.

## 38 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 many issues. However, as previously referred to, the oversight of the OPI by the SIM is a limited one. Although expansion of that oversight was recommended in the s. 86ZM Report (Recommendation 23), that recommendation was not implemented in the Police Integrity Act. There is no need to refer further to that recommendation.

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.

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

The background relating to the legislation and its operation are set out in the 2005-2006 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".[11] 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's background has been set out in previous Annual Reports. There is no need to repeat it. He is well qualified for the position of Chief Examiner. 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 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. Unless otherwise stated, a reference in this Report to the 'Chief Examiner' also includes the Examiner.

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 the 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.

11 Section 1(a) Major Crime (Investigative Powers) Act.

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[12] and academics about the undermining of traditional rights of citizens and the use of coercive powers.[13] A review of these concerns and the government's response is contained at section 44 of the 2005-2006 Annual Report. There is no need to repeat that review. They are also referred to in the s. 62 Report.

## 40 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 MCIP 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.

The Major Crime Legislation Amendment Act 2009 extends the fourth limb of the definition by including the purpose of obtaining sexual gratification where the victim is a child. At the time of reporting this amendment had not come into effect.

## 41 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 of the MCIP Act. 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.[14] Section 7 of the MCIP Act prohibits the publication or reporting of an application for a CPO unless the court otherwise orders if it considers publication appropriate.[15]

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 his/her delegate.[16] 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."[17]

12 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.
13 Corns, C., "Combating Organised Crime in Victoria: Old Problems and New Solutions", *Criminal Law Journal*, Vol. 29, 205, pp. 154 – 168.
14 Section 5(8) Major Crime (Investigative Powers) Act.
15 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).
16 Section 5(2) Major Crime (Investigative Powers) Act.
17 *supra.*, s. 5(1).

Sub-section 5(3) of the MCIP Act provides that an application must be in writing and that it must contain the following information:

(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 (which cannot exceed 12 months).

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

The MCIP Act also provides a procedure under sub-section 5(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.[18]

### 41.1 The circumstances under which a CPO can be granted

Due to the invasive and unprecedented nature of the powers authorised under the MCIP 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.

Accordingly, in making its determination the Court must be satisfied that the belief that an organised crime offence is, has or is about to be committed is well founded. Additionally, the court must be satisfied that the making of the order is in the public interest having 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.

This second 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.

18 *supra*., 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; and
(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.

The legislation allows for orders to be extended, varied and revoked.[19]

### 41.1.1 Revocation of a CPO

In the 2007-2008 Annual Report reference is made to a decision by the Supreme Court on who may apply for the revocation of a CPO. The Court held that any person whose rights are affected directly or indirectly by a CPO 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).

The *Major Crime Legislation Amendment Act 2009* (Major Crime Legislation Amendment Act) establishes procedures for the Court to follow in hearing an application for the revocation of a coercive powers order, based upon provisions of the Police Integrity Act 2008 (regarding the determination of objections by protected persons to a subpoena issued during the course of criminal proceedings for the production of documents or other things).

In this context, if the Chief Commissioner of Police objects to the disclosure or production of sensitive information at a hearing for the revocation of a coercive powers order, he/she may apply before the hearing to the Supreme Court to determine the revocation application by way of confidential affidavit or, in closed court or, at a hearing in the absence of one or more of the parties or by a combination of these methods. A number of express matters are to be taken into account in determining the most appropriate method for the hearing of the application, including the public interest in protecting the confidentiality of intelligence, the likelihood of the identity of individuals being revealed and their safety being placed at risk and the likelihood of an ongoing investigation being placed at risk.

These amendments had not come into force at the time of reporting.

### 41.1.2 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 of the MCIP Act. A CPO can be extended or varied more than once.

19 *supra.*, ss. 10 and 11.

There were a number of applications for extensions of CPOs in the period under review. The extension applications were made in respect of four CPOs, two of which were made in previous reporting periods. Whilst some of the extension orders nominated the date to which the extension was granted, others referred only to the duration (which in most cases was for a period of six months). As stated in section 47.1 of the SIM's 2006-2007 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 2006-2007 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 | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | Total |
|---|---|---|---|---|---|
| **Number of CPO's Issued by the Supreme Court** | 2 | 1[20] | 6 | 4 | **13** |
| **Duration of Orders** | 6 months[21] | 6 months | 6 months[22] | 6 months | – |
| **Number of Orders with Conditions Attached** | 2[23] | 1[24] | 6 | 1 | **10** |

### 41.2 Summary of Organised Crime Offences

A very general summary of organised crime offences that were investigated utilising coercive powers is attached as Appendix C to this report.

## 42 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 MCIP Act and are set out at section 11 of this report.

## 43 Reporting Requirements of the Chief Examiner

### 43.1 Section 52 reports

The reporting requirements on the Chief Examiner are similar to those that apply to the DPI. Section 52 of the MCIP Act required the Chief Examiner to give a written report to the SIM within three days after the issue of a witness summons or in the case of a person held in a prison or police gaol, the making of a s. 18 order.

20 This CPO was extended once for a further 6 month period.
21 In two cases an extension being granted for 12 months.
22 In three cases an extension being granted for six months, one of which was initially extended for 14 days and then for six months.
23 There was also one extension order made in respect of a CPO issued in the previous reporting period.
24 However there were also two extension orders made in respect of two CPOs issued in a previous reporting period which were subject to conditions.

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 MCIP 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 under s. 15 or the making of custody orders under s. 18 of the MCIP Act. The Chief Examiner 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.

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.

### 43.2 Section 52 reports received

A total of 73 s. 52 reports were received for the 2008–2009 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 the summons/making of the s. 18 order.

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

As already referred to, the SIM does not receive s. 52 reports for summonses issued by the Supreme Court.

### 43.3 Section 53 reports

A written report must be provided to the SIM under s. 53 of the MCIP Act, 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.[25]

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

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

In relation to confidentiality notices and the content of s. 53 reports, the Chief Examiner has continued to include in each report the additional information requested by the SIM in the 2005-2006 reporting period. This further information assists the SIM in reviewing the use of the discretionary power available to the Chief Examiner to issue such notices.

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

### 43.4 Section 53 reports received

The SIM received 50 s. 53 reports relating to 5 CPOs for the 2008-2009 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 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 examinations provided to the SIM were able to be played on the DVD player at the SIM's office.

The table below displays the breakdown of reports received by the SIM relating to s. 52 and s. 53 of the MCIP Act.

| MCIP Act | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | Total |
|---|---|---|---|---|---|
| **s. 52 - Chief Examiner must report witness summonses** | 73 | 36 | 10[26] | 14 | **133** |
| **s. 53 - Chief Examiner must report other matters** | 50 | 25 | 50 | 16 | **141** |

## 44 Complaints: Section 54

Section 54 of the MCIP Act 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. The Chief Examiner is obliged to inform a witness of the right to make a complaint and has done so in all examinations during the reporting period.

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. 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 of the MCIP Act if the subject-matter of the complaint is considered to be trivial or the complaint is frivolous, vexatious or not made in good faith.

26 Some reports included information for two or more witnesses.

If the SIM determines that a complaint is to be investigated, s. 56 of the MCIP Act 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.

The SIM received no complaints in the period under review.

## 45 Recommendations And Other Powers Of The Special Investigations Monitor

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 of the MCIP Act. This power is identical to that contained in the Police Integrity Act (formerly 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.

## 46 Assistance To Be Provided To The Special Investigations Monitor

The MCIP Act, like the Police Integrity 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.[27]

Section 59 of the MCIP Act 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.[28] It is an indictable offence, 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.[29]

27 Section 58 Major Crime (Investigative Powers) Act.
28 *supra*., s. 60.
29 The penalty for breach of these requirements is level six imprisonment (five years maximum)(sub-section 60(4) of the Major Crimes (Investigative Powers) Act.

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.

## 47 Annual Report

Under s. 61, of the MCIP Act 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.

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.

## 48 The Power To Summons Witnesses

Both the Supreme Court and the Chief Examiner have the power to issue the following summonses requiring 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 concerning which 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, namely evidence being lost or destroyed, the commission of an offence, the escape of an offender or serious prejudice to the conduct of the investigation of the organised crime offence.[30]

### 48.1 Types of summonses issued

In the reporting period 1 July 2008 to 30 June 2009 a total of 79 summonses were issued.[31] Of these, 63 summonses were to give evidence, 9 were to give evidence and to produce documents or other things and seven were to produce specified documents or other things. There were no summonses for immediate attendance during this period.

30 Section 14(10) and 15(9) Major Crime (Investigative Powers) Act.
31 This number includes summonses issued but either rescinded or unable to be served on the subject witness and new custody orders made consequent upon rescission, adjournments (e.g. to seek legal advice / representation) and part heard examinations.

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

| Types of Summonses Issued | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | Total |
|---|---|---|---|---|---|
| To produce a specified document or other thing | 7 | 3 | 1 | 0 | **11** |
| To give evidence | 63 | 20 | 46 | 17 | **146** |
| To give evidence & produce documents or other things | 9 | 5 | 4 | 1 | **19** |

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.[32]

### 48.2 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.[33]

Every application to the Supreme Court must be in writing and must include the information specified in ss. 14(a)-(f) of the MCIP Act 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.[34] The Chief Examiner has implemented a procedure for such applications which is contained in a 'Procedural Guidelines' handbook.

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

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

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 power to issue a summons.

32 Section 16 Major Crime (Investigative Powers) Act.
33 *supra.*, s. 14(3).
34 *supra.*, s. 15(3).

### 48.3 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.[35] 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 the questioning proposed; if the member submits that such information should not be in the summons, the reason for this
- the reason's for whether or not a confidentiality notice should be served with the summons
- 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
- in relation to a s. 18 order, the custody details of the prisoner and the arrangements that will be made to bring the person before the Chief Examiner.

The procedure employed by the Chief Examiner in every application made to him by a police member for a summons or s. 18 order is both thorough and very informative. The Chief Examiner explores in detail the basis for the police member's application and how the proposed witness 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 reads the material relating to the investigation and is, therefore, 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. An issue did arise with respect to two summonses issued by the Chief Examiner. This is discussed later in this report.

A summons or s. 18 order issued by the Chief Examiner attracts additional reporting requirements because the exercise of this discretion is not subject to scrutiny by a court. For this reason, s. 15(6) of the MCIP Act 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 why the Chief Examiner believes the person to be aged 16 years or above.

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

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

### 48.4 Conditions on the use of coercive powers

Section 9(2)(g) of the MCIP Act requires that a CPO order must specify any conditions on the use of coercive powers under the order. In this context, the Supreme Court has imposed two types of conditions in the coercive powers orders which it has made.

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 matter was discussed in detail in the 2007–2008 Annual Report (para 54.4.1). 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* (the Charter) and s. 39 of the MCIP Act which abrogates the privilege against self-incrimination. This is discussed further at paragraph 48.4.1 below.

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

The imposition of a condition as a consequence of the Charter and proceedings relating to that action are referred to in the 2007-2008 Annual Report (para 54.4.2).

The Supreme Court delivered judgement in this matter on 7 September 2009 shortly before this report was finalised – *DAS v Victoria Human Rights and Equal Opportunity Commission (Warren CJ) (2009 VSC 381).*

The judgement would appear to have important implications. It is not possible or appropriate to attempt an analysis of those implications in this Report or to refer to the judgement in detail.

However, it is apparent that the Supreme Court has decided that under s. 39 some derivative use immunity must be extended to a witness who is coercively examined. The Court stated:

> In interpreting s. 39...derivative use immunity must be extended to a witness interrogated pursuant to the terms of the Act where the evidence elicited from the interrogation could not have been obtained, or the significance of which could not have been appreciated, but for the evidence of the witness. Derivative use of the evidence obtained pursuant to compelled testimony must not be admissible against any person affected by s. 39 of the Act unless the evidence is discoverable through alternative means (para 177).

The SIM will monitor developments in the light of this decision.

### 48.5 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 and followed 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 and continues to be followed. This ensures 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.

## 49 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 warranted by the circumstances. Although in a few cases the notice was short, the SIM considered that all summonses issued by the Chief Examiner within this reporting period were served within a reasonable time.[36]

In one hearing, the s. 53 report received by the SIM recorded a summons as having been served on the witness less than three days prior to the examination date. In reviewing the examination, the SIM had a concern about whether the delivery of the summons constituted "short service" i.e. whether the witness had been given insufficient time to prepare for the hearing. In this context, the SIM notes that a reasonable time is needed beforehand to allow those witnesses wishing to obtain legal advice and/or legal representation at the hearing, have an opportunity to do so. Additionally, sufficient time is needed to allow those witnesses engaged in paid employment to give notice of intended absence/make alternate arrangements. That this is also the case which confronts, for example, care givers and others with existing commitments, means that "time" remains an important issue and one which the SIM continues to monitor closely.

In this context, the SIM acknowledges that despite (sometimes repeated) attempts to ensure that service of a witness summons is effected within reasonable time before the examination hearing, this is not always possible e.g. a witness who intentionally seeks to avoid service by changing his/her address. Accordingly, whether service is "reasonable" is not something capable of a blanket answer, but is a question of fact which requires consideration and assessment by the SIM on a case by case basis.

36 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.

In the particular case under review, the SIM notes that having said that he/she had not intended seeking legal advice prior to the examination, the witness further declined an invitation from the Examiner to consult with a lawyer prior to the commencement of formal questioning. This was said to be done on the understanding that the witness would be granted an adjournment if at any time he/she wished to obtain legal advice.

Whilst therefore categorising the time period between the service of the witness summons and the examination date as being somewhat short, the SIM nevertheless considers that the circumstances, which include the Examiner's express willingness to grant an adjournment upon request, are such that the witness was not disadvantaged by the examination proceeding in the way that it did.

## 50 Contents Of Each Summons

The Act and the Regulations are very specific about the contents of each summons. Section 15(10) of the MCIP Act 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 i.e. 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.[37]

The summons need only state the general nature of the matters about which the witness is to be questioned, unless the Supreme Court / Chief Examiner considers that such disclosure would prejudice the conduct of the investigation of the organised crime offence.

## 51 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 MCIP 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 and the person to whom the order is directed can only be compelled for the purpose of giving evidence.

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

The SIM received notification from the Chief Examiner of nine s. 18[38] orders being made for the 2008–2009 reporting period in respect of which s. 53 reports were received. All orders were made by the Chief Examiner.

## 52 Confidentiality Notices: Section 20

The operation of this provision has been reviewed in previous annual reports.

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;[39] the circumstances under which disclosure may occur must be specified in the notice itself.

A reasonable excuse under sub-section 20(6)(a) of the MCIP Act includes seeking legal advice, obtaining information in order to comply with a summons or where the disclosure is made for the purpose of the administration of the Act. In these 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 he/she has a reasonable excuse.

As reported previously, 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. Such notices were also served with all s. 18 orders issued by the Chief Examiner. 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.

38 Eight s. 18 orders were issued in respect of two witnesses. This was the result of adjournments sought to obtain legal advice/representation, part heard examinations and the rescission of two orders.

39 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).

## 53 When Confidentiality Notices May Or Must Be Issued

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

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

Section 20(3) also empowers the 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 was given in the s. 62 Report to the cessation of effect of confidentiality notices (pages 109-110). Recommendations were made as to amendments to the legalisation to provide for the cessation of effect of confidentiality notices.

The amending Act (i.e. the Major Crime Legislation Act) makes three interrelated amendments regarding confidentiality notices. Provision is made for the cessation of confidentiality notices after five years, including provision for applications to be made to the Supreme Court to extend the operation of a confidentiality notice beyond five years if certain circumstances are satisfied. Also included is a process for the rescission of these notices by the issuer (the Supreme Court or Chief Examiner), where the basis upon which the original notice was given no longer applies. At the time of reporting these amendments had not come into effect.

## 54 Powers That Can Be Exercised By The Chief Examiner

Section 29 of the MCIP Act 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; or
   - the Chief Examiner has issued a summons; or
   - the Chief Examiner has received a s. 18 order; or
   - the Chief Examiner has made a s. 18 order.

Once a summons or s. 18 order has been issued by the Chief Examiner or the Supreme Court, the Chief Examiner can exercise the following coercive powers:

- compel a witness to answer questions at an examination
- compel the production of documents or other things from a witness that are not subject to legal professional privilege
- 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
- 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 discussed further below[40]
- 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 of the MCIP Act makes it an offence for a person who served with a summons under the Act and without reasonable excuse fails to attend an examination as required, refuses or fails to answer a question as required or refuses or fails to produce a document or thing as required.[41] 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, or 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 of the Act 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 of the Act 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. If a person is found guilty of this offence the penalty, is 10 penalty units, imprisonment for 12 months or both.

There were no instances notified to the SIM where a witness was in breach of ss.37(1), 38 or 44 of the Act.

## 55 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 MCIP Act.

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

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

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

The Supreme Court deals with any contempt of the Chief Examiner. In the period under review the SIM was advised of one matter in which the Chief Examiner certified the contempt of a witness who refused to be sworn or to make an affirmation when requested to do so.

In light of the witness's continual refusal to be sworn or to make an affirmation, the Chief Examiner certified the contempt and issued a Certificate of Charge and an Arrest Warrant as required by s. 49 of the Act. The witness was then taken before the Supreme Court at which time the contempt proceedings were adjourned to another day.

In the result, the SIM understands that a subsequent decision not to pursue the contempt was apparently based on Senior Counsel's advice that there was no reasonable prospect of conviction. In this context, s. 49(1) of the Act provides that:

"A person attending before the Chief Examiner in answer to a witness summons is guilty of a contempt of the Chief Examiner if the person-

(a)...

(b) being called or examined as a witness at an examination, refuses to be sworn or to make an affirmation...".

In the present matter, therefore, although the witness appeared before the Chief Examiner, he/she did not do so in answer to a witness summons, but pursuant to a written (custody) order issued under s.18 of the Act, being a document not currently included within the (s. 3 of the Act) definition of "witness summons." Moreover, Senior Counsel was apparently not dissuaded by the operation of s. 18(4) of the Act, which provides that for the purpose of ensuring that a person is brought before the Chief Examiner to give evidence at an examination, the issuance of an "order" is to be read as if it was a reference to a "summons."

Whilst, therefore, evidencing a legislative intention that the contempt provisions of the Act apply regardless of the process by which the person comes to appear before the Chief Examiner (i.e. whether by summons or written order), the actual language employed in drafting the current statutory provisions may be considered ambiguous and not free of doubt.

The Chief Examiner subsequently notified the SIM that further proceedings had been taken against the witness and that he/she had since been charged with the substantive offence of refusing to take an oath or make an affirmation (being an indictable offence contrary to s. 36 of the Act) following a refusal after being served with a further s. 18 order.

In relation to this issue and by way of contrast, the SIM notes the operation of the Police Integrity Act. Under this legislation, the DPI may (as can the Chief Examiner):

"[g]ive a written direction that the person be delivered into the custody of a member of Victoria Police for the purpose of bringing the person before the Director to provide information, produce a document or thing or to give evidence as required by the summons" [s. 57(2)].

In this context, however, whilst the contempt provisions in the Police Integrity Act reflect the language which is also employed in the MCIP Act (i.e. both refer to a person "who in answer to a witness summons...fails without reasonable excuse..."), the SIM notes a critical procedural difference between the two. This stems from a legislative framework in which a person held in custody cannot be directed to appear before the DPI for the purposes of an investigation until after a witness summons has first been issued and served on the person. This differs from the statutory framework in which the Chief Examiner currently operates and where, subject to otherwise being satisfied that it is reasonable in the circumstances to require the person's attendance, a coercive powers order (and not a witness summons) is the only pre-condition to the making of an order by the Chief Examiner that a detained person be brought before him for the purpose of giving evidence at an examination.

To the extent that it is considered a drafting issue only, the SIM notes that it is open to categorise the dichotomy referred to above as an unintended consequence. It is understood that appropriate amendment to the legislation is being considered.

The sunset of 1 January 2009 on the contempt provision was repealed.

## 56 The Conduct Of Examinations By The Chief Examiner

A review now follows of issues arising from examinations during the reporting period.

### 56.1 Presence of other persons at examination hearings

This matter is reviewed in the 2007-2008 Annual Report.

Section 35 of the MCIP Act requires every examination to be conducted in private and only those persons given leave by the Chief Examiner may be present.[42] 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).

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

42 However this section states that a legal representative, interpreter, independent person or guardian otherwise entitled to be present at an examination cannot be excluded.

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. Whilst in all the examinations reviewed by the SIM in this reporting period, it has generally been police members only who were allowed to watch an examination from a remote location, in some cases those with a demonstrated need to be present (e.g. an officer from another investigative agency or an unsworn member of staff from the Office of the Chief Examiner) were also permitted to do so. Once the Chief Examiner made a direction to allow persons to watch remotely, their names (and in the case of police members, their rank) were read out for the purposes of both the transcript and 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.

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 and recorded. 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.

### 56.2 Prohibition on coercive questioning at a police station or gaol

An issue arose during the previous 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.

The Major Crime Legislation Amendment Act 2009 clarifies that coercive questioning cannot be undertaken at a police station, defined for the purposes of the MCIP Act as having a public counter service. This will not preclude questioning occurring at other, non-public, facilities that may be shared with Victoria Police. This amendment is in force.

### 56.3 Example of an issue raising what is fair and appropriate questioning

In the course of an examination hearing, a witness asserted the questioning by the Chief Examiner was unfair and improper because it assumed the existence of something of which the witness claimed he/she had no knowledge.

Whilst there are clear boundaries beyond which coercive questioning ought properly be characterised as unfair and oppressive, in reviewing the examination the SIM agrees with the approach taken by the Chief Examiner as being one in which the questioner was legitimately entitled to pursue the subject matter of the investigation by "testing" the answers provided by the witness.

### 56.4 Good example of fair and transparent handling by Chief Examiner of a witness

The summons served on the witness first required his/her attendance in December 2008 when the proceedings were adjourned to enable the witness to obtain legal advice and possibly legal representation. On the adjourned date (early January 09), the proceedings were further adjourned on the application of the witness because of pressing but otherwise unforeseen personal reasons.

On the second adjourned date (late January 09), the witness appeared unrepresented and in the course of giving instructions to the witness it became clear to the Chief Examiner that the witness was having difficulty understanding the concepts which were being discussed to the extent that the Chief Examiner was satisfied that the witness would be advantaged by having legal representation. The witness agreed and indicated that he/she proposed to seek legal representation on the adjourned date. In the circumstances, the proceedings were further adjourned and re-listed.

On the third adjourned date (February 09), the witness appeared with legal representation and the examination hearing proceeded. Given not only the absence of legal representation in the earlier proceedings, but also the conceptual difficulties which the witness was experiencing, the SIM agrees with and commends the approach taken by the Chief Examiner who, in granting successive adjournments, emphasised the importance of conducting a coercive examination hearing which was fair and transparent.

### 56.5 A good example of the way in which an issue was handled right through not only in relation to the conduct of the examination but the issue of the summons

In another matter, before the witness (who suffered from a mental impairment) was brought into the hearing room, the Examiner carefully explained both the nature of the proceedings and the law to the proposed independent third person. This explanation took place in the presence of the witness's legal representative and incorporated the role of the independent third person to include checking any perceived unfairness or oppressive behaviour on the part of the Examiner, offering assistance where the independent third person considered the witness to be timid, inarticulate, immature or inexperienced in the matters raised or where it was considered that the witness otherwise needed advice i.e. generally to protect the interests of the witness.

The Examiner then excused the independent third person and gave the witness's legal representative an opportunity to speak with his/her client about the desirability or otherwise of having the independent third party present during the examination hearing.

The witness was then brought into the examination room together with his/her legal representative and the independent third person. The Examiner asked the legal representative whether his/her client had decided whether he/she wanted the independent third party to be present. Answering in the affirmative, the Examiner authorised the presence of the independent third person before proceeding to explain all the preliminary matters to the witness and his/her legal representative, taking time to ensure that the witness fully understood the matters being discussed. The Examiner further noted that there was a discretion under the Act to either take evidence on oath or to receive information from the witness by way of a question and answer conversation. In forming the view that the latter course would be more appropriate, the Examiner then proceeded to invite the witness's legal representative to discuss the matter with his/her client. This having been done, it was then agreed that the witness would not be required to take an oath.

In reviewing this examination, the SIM notes that together, the information provided and the helpful explanations given by the Examiner to those present, particularly the witness and the independent third person, greatly assisted in facilitating the conduct of the examination hearing and is to be commended.

### 56.6 Presence of an "independent person"

Whilst the Chief Examiner is compelled under the Act to direct the presence of an independent person whenever a witness is believed to have a mental impairment, this does not derogate from the discretion to otherwise authorise the presence of a "support" person in circumstances where this is deemed appropriate. Accordingly, there are occasions when, although a witness is not mentally impaired (as defined within the inclusionary meaning of the MCIP Act), the Chief Examiner may consider that he/she needs the presence of a "support" person i.e. a person who can assist and offer counsel to the witness during the examination hearing.

In this context, the SIM notes that in one matter the emotional state, short-term memory problems and dependency of the witness on his/her partner were such that the Chief Examiner formed the view that the presence of a "support" person was necessary. In therefore acceding to the application of the witness by allowing the partner to attend the examination, the Chief Examiner directed and then explained how the obligation of confidentiality (i.e. a prohibition on publication or communication) applied equally to him/her as it did to the witness and others involved in the hearing process.

The SIM agrees with and supports the approach taken and the directions given by the Chief Examiner.

### 56.7 Whether use of coercive powers a last resort

As discussed in relation to the DPI whilst the availability of extraordinary examination powers is central to the ability of an investigative body to pursue its goals in the public interest, the use of these powers can generally be considered a matter of "last resort." In this context the SIM reviewed an examination in which the Chief Examiner adjourned the examination of a witness (who had been examined on earlier occasion), in order to give his/her legal counsel an opportunity to obtain instructions in relation to new evidence which had arisen.

In the circumstances, the witness having agreed to make a statement to police, the hearing was adjourned to a later date. The witness made a further statement. When the witness next appeared the Chief Examiner explained the deficiencies in the statement he/she had provided. The Chief Examiner then enquired of the witness whether he/she was prepared to assist investigators through providing information additional to that contained in the statement. The witness agreed to do this and the matter was once again adjourned.

By the time the examination hearing was ready to proceed (following another adjournment), the witness had made two statements addressing the evidence given at his/her previous examination. Nevertheless, the Chief Examiner explained that it was necessary to proceed with a coercive examination because the additional statements provided by the witness were still considered deficient in a number of important areas. That is to say, the witness had not engaged in full and frank disclosure.

In reviewing the examination, the SIM supports and agrees with the approach taken by the Chief Examiner, particularly the decision that these extraordinary powers be used only after attempting to progress the investigation by less intrusive means, which is what occurred in this case.

### 56.8 Potential conflict of interest of legal counsel

In any proceeding there is the potential for an actual or perceived conflict of interest to arise. In relation to one matter, the Examiner requested the witness (A) to leave the hearing room before the coercive examination commenced. This was to give the Examiner an opportunity to discuss with legal counsel his/her proposed representation of witness A in circumstances where counsel had previously appeared for witness B, being a person who had already been examined as part of the same investigation. In circumstances where witness B was subject to a confidentiality order, the issue for consideration concerned the risk to the investigation, more particularly whether it could be prejudiced or undermined by allowing legal counsel to represent more than witness.

The Examiner concluded that legal counsel was in a position to represent the witness without substantial risk to the investigation being undermined. Leave to appear was, therefore, granted.

In reviewing the examination, the SIM notes how the Examiner and legal counsel were able to satisfactorily resolve a difficult situation through their preparedness to engage in constructive dialogue and supports that approach.

### 56.9 Relevance

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 the OPI.

In relation to the issue of relevance, s. 36(1) of the MCIP Act provides that a witness may be questioned at an examination on any matter considered to be relevant to the investigation of the organised crime offence to which the examination relates.

This issue was raised by the legal representative of a witness in an examination hearing, which was reviewed by the SIM. The witness's legal representative took objection to certain questions put to the witness by the Examiner, being questions which insofar as they required the witness to speculate about what a third party may or may not have been thinking, were designed to test the credibility of that other person. Following further discussion with the witness's legal representative and in line with the objection taken, the Examiner agreed to rephrase the question.

As there was no ostensible nexus between the Examiner's initial questioning of the witness and the matters under investigation, the SIM considered it appropriate for the witness's legal representative to have raised this matter with the Examiner who, in acceding to the objection, then reformulated the question.

In another examination hearing, counsel for the witness objected to relevance on the basis that a particular line of questioning concerned a person who counsel contended had nothing to do with the subject-matter under investigation. In response, the Examiner whilst confirming a legal responsibility to only ask questions considered to be relevant , otherwise informed counsel that he/she does not have a right to object and that any complaint ought be forwarded to the SIM whose statutory role includes assessing the relevance of questions asked during an examination hearing. With recourse to all the investigative material, the Examiner judged the questions to be relevant and required the witness to answer. In this context, the Examiner further informed counsel that there would be an opportunity at the conclusion of the examination for him/her to put matters to the witness in order to clarify, amplify or correct anything that had been asked.

In reviewing the examination, the SIM accepts that the questions asked, when considered in the broader inquisitorial setting, were relevant. In addition, however, the SIM notes that if it had been possible (i.e. without prejudice to the effectiveness of the investigation), for the Examiner to have contextualised the questions asked, this may have assisted in facilitating the examination hearing.

### 56.10 Another issue relating to relevance

In one matter an objection was raised to the examination hearing continuing. In this context, the witness's legal representative emphasised the fact that whilst his/her client had previously been prosecuted for certain criminal offences, these proceedings had been finalised before the witness was served with the summons to appear before the Chief Examiner. The basis of the objection was that the finalisation of the earlier criminal proceedings now operated as a bar to the Chief Examiner coercively examining the witness. This was said to result from the fact that the information and material which the Chief Examiner now sought to use, was the same as that previously known to and in the possession of the prosecuting authority which could/ should have used it at the time. To the extent that it remained inextricably linked to the earlier prosecution, it was therefore submitted that any legal entitlement of the Chief Examiner to now utilise this 'old' information and material no longer existed i.e. it had been extinguished with the finalisation of the earlier criminal proceedings.

In considering the objection, the Chief Examiner responded by focusing on 'relevance' (as that term is understood in the broader investigative context). The issue of relevance was said by the Chief Examiner to be the key to the inquisitorial process and as such determined whether a particular use of coercive power was appropriate in the investigation of the organised crime offence(s). The Chief Examiner then referred to and found support in s. 36 of the Act, which provides that at an examination the Chief Examiner may question a witness on any matter considered to be relevant to the investigation of the organised crime offence to which the examination relates.

Upon reviewing the examination, the SIM agrees with the Chief Examiner that relevance was the determinant. In demonstrating an appropriate nexus with the organised crime offence the subject of the coercive powers order, the SIM considers the questioning to be relevant and agrees with the Chief Examiner's decision to overrule the objection and to proceed with the examination hearing.

### 56.11 Production of Documents

Comprising a number of constituent elements, an "organised crime offence" is an offence which is defined to include substantial planning and organisation and which forms part of systemic and continuing criminal activity (s. 3 of MCIP Act). In relation to what are, therefore, invariably complex myriad matters of fact, the use of coercive powers by the Chief Examiner in the investigation of these offence types does, from time to time, give rise to difficult legal and interpretative issues. That this should be so is not surprising given that unlike the courts, which possess certain inherent powers, the source of the Chief Examiner's power is only that which is derived (and which can necessarily be implied) from statute.

Accordingly and as has been the case during earlier reporting periods, the SIM and the Chief Examiner continue to engage in ongoing dialogue and purposeful consultation. That this process allows challenging issues to be promptly identified and readily addressed was again highlighted in the current reporting period during which, for example, the SIM and the OSIM Senior Legal Policy Officer met with the Chief Examiner and the Examiner to discuss the use of coercive powers to compel production of documents and other things at an examination hearing.

More particularly and with a view to producing an agreed understanding, the meeting identified and constructively addressed a number of possible situations in which the use, including the implied use, of coercive power to compel production may properly be considered permissible under statute. That the meeting produced a shared response to the complex issues raised is considered to have furthered the public interest, particularly when measured against legislation which is still relatively new and quite complex.

### 56.12 Video recording

In relation to another examination an issue arose after formal questioning had concluded. It was as the witness was leaving the hearing room that he/she asked his/her legal representative a question. In seeking clarification, the legal representative then raised the matter with the Examiner. The video recording operator had, however, ceased recording once the questioning had finished and this resulted in there being no visual record of the later exchange between the witness, the legal representative and the Examiner.

Whilst s. 45 of the MCIP Act provides that the Chief Examiner must ensure that the examination of a witness is video-recorded, in reviewing the relevant examination transcript the SIM is satisfied that no breach had occurred as the exchange arose after proceedings had been concluded and the witness formally discharged.

## 57 Preliminary Requirements Monitored By The Special Investigations Monitor

Section 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 any document or other thing or to 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 witness is also informed of the penalties which apply
- 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 made 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 noted in previous annual reports 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 are used by the Chief Examiner to illustrate to witnesses the application of these privileges. These are important matters and every witness should understand the ramifications of the privileges to their evidence before any is given, be it oral or documentary. Witnesses are 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 confirmation from the person.

## 58 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 MCIP 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.[43] The guidelines provide a thorough explanation of the requirements that exist under the Act and the procedures that are the appropriate to be applied in an examination (section 64 of the 2005–2006 Annual Report).

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

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

Where a witness is not represented, the Chief Examiner reiterates to the witness his/her right to obtain advice and representation. The witness is also told that the proceedings could be adjourned to allow the witness to organise representation. Furthermore, the Chief Examiner told such witnesses that it would be in his/her interests to obtain legal advice and confirms with every witness whether he/she has had sufficient time to seek such advice between being served with the summons and the date of the examination.

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

## 59 Mental Impairment

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

Reference has already been made to the presence and role of an independent person when reviewing examination issues.

In another examination, shortly after being sworn it became apparent to the Chief Examiner that the witness was suffering an illness. Upon further questioning, the Chief Examiner categorised the illness as a mental illness and, as such, concluded that it fell within the meaning of "mental impairment" as defined by s. 3 of the MCIP Act. In this context, the Chief Examiner advised the witness of his/her right to have an independent person present and to communicate with such person before giving any evidence at the examination.

The Chief Examiner then asked the witness if he/she understood his/her rights under the Act and, secondly, whether he/she wished an adjournment in order to consider his/her position. Having informed the Chief Examiner that his/her condition was being successfully managed through ongoing medication and other treatment which allowed the witness to continue to engage in full time employment, the witness said that he/she wished to proceed with the examination without the presence of an independent person. Taking into account the matters put the Chief Examiner, whilst acceding to the wishes of the witness, nevertheless emphasised how important it was to look to the particular facts and circumstances of each case before deciding upon the appropriateness or otherwise of proceeding with an examination in the absence of an independent person.

Further to the important public interest considerations which attach to the use of coercive powers generally, it is the view of the SIM that this case well illustrates the critical care and attention which must be taken when dealing with those who are found to be suffering from a mental condition which may impact on their ability to understand and to respond appropriately to the various, sometimes complex and often stressful aspects of a coercive examination hearing.

In reviewing the examination, the SIM agrees with and supports the careful and well considered approach taken by the Chief Examiner.

## 60 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 MCIP 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 39(3) of the MCIP Act 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 39(3), is admissible in proceedings for an offence against the MCIP 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 in that every witness must not only have explained to him/her what the privilege is, but that it does not apply to proceedings before the Chief Examiner and that there are exceptions.

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 full 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.

The above comments were prepared prior to the handing down of the judgement of the Supreme Court in *DAS v Victorian Human Rights and Equal Opportunity Commission* (supra) on 7 September 2009.

This judgement and its implications have been discussed earlier in this Report. As indicated it impacts upon s. 39 of the Act and in particular the extent of the use immunity.

The explanation given by the Chief Examiner in relation to the abrogation of the privilege against self incrimination has been discussed by the SIM with the Chief Examiner who has informed the SIM that the following direction will be given at the commencement of examinations conducted subsequent to the Supreme Court decision:

> *"By reason of the decision of the Honourable Justice Warren Chief Justice made by way of judgement delivered on Monday 7 September 2009 the immunity specified in subsection 39(3) of the Act is now extended in its meaning so as to include evidence elicited from the examination which could not have been obtained or the significance of which could not have been appreciated but for the evidence of person (witness)."*

The SIM supports this direction being given by the Chief Examiner

## 61 Who Was Represented And Who Was Not

The witnesses examined by the Chief Examiner in this period were all civilian witnesses. A total of 49 examinations have been reported to the SIM being an increase of 25 from the previous reporting period. Of the 49 witnesses examined, 19 were legally represented.

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

The following table sets out the number of witnesses examined by the Chief Examiner and the number of witnesses legally represented.

| Description | 2008–2009 | 2007–2008 | 2006–2007 | 2005–2006 | Total |
|---|---|---|---|---|---|
| **Witnesses examined** | 49 | 24 | 50 | 15 | **138** |
| **Witnesses legally represented** | 19 | 12 | 30 | 9 | **70** |

## 62 Legal Representation – Right To A Particular Practitioner

Although s.34(1) of the MCIP Act provides that a witness giving evidence at an examination may be represented by a legal practitioner, this provision is qualified by s.35 to the extent that no person is entitled to be present at an examination hearing unless he/she is directed or has otherwise been authorised by the Chief Examiner. Considered together, these statutory provisions therefore provide a witness at an examination hearing with the right to be legally represented, but not with the right to insist on any one legal practitioner.

However, concerning those persons wishing to be legally represented at an examination, the SIM has observed a preparedness on the part of the Chief Examiner to accede to the witness's nominated representative whenever it has been feasible to do so. That this is not always possible was highlighted in one examination reviewed by the SIM in which the witness's legal representative applied to the Examiner for leave to appear. In the course of this application (which was made before commencement of any formal questioning), counsel for the witness raised an issue of possible conflict.

In this context, counsel confirmed having previously appeared before the Examiner on behalf of another witness ("witness B") who had been coercively examined in respect of the same investigation. Additionally, counsel informed the Examiner that he/she had also been retained to represent a person who was then awaiting trial in relation to a very serious offence ("the accused"). Although the subject matter of the alleged offence and that of the proposed coercive examination were linked, counsel said that he/she was not aware of anything relating to the forthcoming trial which could give rise to a conflict. In adjourning the proceedings to consider the matter further, the Examiner then produced a written ruling in which leave for the witness to be represented by this particular counsel was refused.

The Examiner based his decision both on case law and the provisions of the MCIP Act. In looking to the authorities, the Examiner concluded that the relevant test to be applied in these circumstances was "[w]hether the examiner concludes on reasonable grounds and in good faith that to allow representation will, or may prejudice the investigation" (Bonan's Case).[44] With respect to the MCIP Act, the Examiner referred to ss.29(2) and s.43(2) of the Act. Whilst s.29(2) empowers the Chief Examiner to commence/continue an examination despite the fact that other proceedings are on foot, s.43(2) requires that a confidentiality direction (restricting the publication / communication of evidence given in an examination) be given if a failure to do so might, amongst other things, prejudice the fair trial of a person.

In therefore refusing counsel's application to appear, the Examiner's ruling referred to a number of salient matters, including:

- that the proposed questioning of this witness would inevitably canvass the same subject matter as that already covered in the earlier coercive examination of witness B
- a real risk that the evidence of this witness would not only be influenced by the evidence of witness B, but that consistent with his/her duty, counsel may unintentionally reveal matters to the accused which would prejudice the investigation
- the likelihood of inadvertent disclosure by counsel of evidence given by witness B which would potentially prejudice the investigation and which could amount to a contravention of the non-publication direction made at the coercive examination of witness B; and
- that the principles enunciated in Bonan's Case apply notwithstanding the absence of any suggestion that the legal representative would knowingly disclose confidential information (the Examiner emphasising that there was no suggestion that counsel would intentionally prejudice or otherwise deliberately frustrate the investigation).

In these circumstances, the Examiner adjourned the examination to a later date to provide counsel with an opportunity to consider his/her position and to otherwise allow the witness sufficient time to seek further legal advice and/or engage alternate representation.

The Examiner's explanation for refusing the legal representative's application for leave to appear was contained in what the SIM considers to be a clear, carefully constructed and well reasoned ruling. Whilst Parliament deemed it appropriate to provide the Chief Examiner with a discretion to conduct a coercive examination notwithstanding the presence of concurrent legal proceedings (i.e. s.29(2)), the Chief Examiner is nevertheless obligated to take all reasonable steps to ensure that the examination does not prejudice those proceedings (i.e. s.29(3)). Accordingly, where those charged with the responsibility of conducting a coercive examination express concern that to proceed would risk prejudicing other proceedings, sub-section 29(3) imposes a clear obligation to take all reasonable steps to prevent that from happening.

44 *Bonan* v. *Hadgkiss* (2007) FCAFC 113

The SIM observes that the decision of the Examiner to refuse the application is soundly based. Whilst accepting counsel's bona fides, to have decided otherwise ignores a real risk of inadvertent disclosure involving potential prejudice to the investigation and contravention of an earlier non-publication order.

## 63 Restriction On The Publication Of Evidence

Section 43 of the MCIP Act 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 43(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.[45]

Only a court can over-ride a direction given by the Chief Examiner under sub-section 43(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 interest 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, it may give the Chief Examiner or the Chief Commissioner a certificate requiring the evidence to be made available to the court.

However, although sub-section 43(4) of the MCIP Act expressly provides that the issuance of certificate is a discretionary matter solely for the court, it is silent as to the means by which a court can receive that information which is considered relevant to the exercise of that discretion. It was this issue, together with the desirability of giving interested parties (including the Chief Examiner, the Chief Commissioner and any affected witness) a right to be heard on whether such evidence should be released, which formed part of the SIM's recommendations in the s. 62 Report (Recommendation 3).

The SIM's recommendation that s. 43 be amended to expressly provide interested parties with the right to be heard, was implemented as part of the Major Crime Legislation Amendment Act 2009.[46] However, at the time of reporting this amendment had not come into effect.

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

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. A person making a complaint to the SIM is not therefore in breach of a direction.

45 A contravention of a direction is an indictable offence which carries a penalty of level six imprisonment (five) years maximum.
46 Upon commencement, s. 10 of the Major Crime Legislation Amendment Act will amend the Major Crime (Investigative Powers) Act by inserting a new sub-section 43(4A).

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 43(2) was met and the directions were justified in the circumstances of each examination.

### 63.1 Rescinding of non-publication directions and cessation of confidentiality notices.

In this reporting period the Chief Examiner directed the rescission of seven earlier s. 43 directions relating to witnesses who had been summoned to an examination hearing. In addition, the Chief Examiner also part rescinded an earlier direction and varied a direction prohibiting publication or communication.

Of the rescinded directions, four followed an application by Victoria Police who were seeking to use the previous coercive examination evidence given by witnesses in support of ongoing murder and fraud related prosecutions. The confidentiality notice referable to each witness was also rescinded at this time.

Another rescission direction was to enable transcripts of the evidence given by the witness during his/her examination hearing to be provided to a person charged with offences related to the coercive powers order under which the witness was required to attend for examination. Prior to the rescission, the witness (who was legally represented), made submissions in the course of the proceedings and was then advised in writing of the rescission and of the directions made. In relation to the confidentiality notices which had been issued in respect of this witness, the Chief Examiner noted that as each had been issued by the Supreme Court, it was necessary to make application to that Court for the rescission orders.

Similarly and in respect of another investigation, the direction was rescinded following an order of the County Court that edited transcripts of the evidence given by the witness before the Chief Examiner be released to a person (and his/her legal representatives) charged with offences related to the coercive powers order under which the witness was required to attend for examination. In the circumstances, the Chief Examiner correctly noted that the order meant that the original direction was no longer of any utility and should be rescinded.

A further rescission direction followed an application on behalf of Victoria Police to use material produced at an earlier examination in a prosecution against the witness who had since been charged with refusing to take an oath or to make an affirmation when required to do so by the Chief Examiner. The confidentiality notices referable both to the witness and others, were also rescinded at this time.

The other direction related to a part rescission made by the Chief Examiner following an order of the County Court that all the evidence given during the examination hearing, with the exception of that identified by the Court, be released to a person charged and his/her legal representatives.

The final matter concerned a variation of direction which the Chief Examiner made to comply with a court direction that publication or communication of an edited transcript of the person's examination be permitted for the purposes of the proceedings on foot.

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

## 64 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.

The position with respect to the Chief Examiner was reviewed in section 69 of the 2007-2008 Annual Report.

There it was stated that in the context of evidence obtained from an examination conducted by the Chief Examiner, 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.

In the 2006-2007 and 2007-2008 Annual Reports the SIM has stated that he 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 information obtained by investigators and that there was no obligation under the Act for this to be explained to a witness.

That continued to be the view of the SIM until the handing down of the judgement of the Supreme Court in *DAS v Victoria Human Rights and Equal Opportunity Commission* (supra) on 7 September 2009.

Reference has been made to that decision earlier in this report and the apparent implications relating to the extent of the use immunity which will also impact on the explanation to be given to a witness by the Chief Examiner. These are matters that the SIM will take up with the Chief Examiner.

## 65 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 of the MCIP Act, 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.

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 MCIP 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 MCIP 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 of the Act. The person claiming the privilege is required to seal the document or thing and immediately give it to the Chief Examiner.

Sub-section 41(6) of the MCIP Act 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) where, bearing in mind the nature of the claims that might be involved, the SIM considered it appropriate that such claims be decided by a higher court.

In this context, the SIM's recommendation that these matters be determined by the County or the Supreme Court (Recommendation 7), has been implemented as part of the the Major Crime Legislation Amendment Act.[47] However, these amendments had not commenced operation at the time of this Report.

47 Upon commencement, s. 9 of the Major Crime Legislation Amendment Act will amend ss. 41 and 42 of the Major Crimes (Investigative Powers) Act.

## 66 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; or
- is otherwise attempting, or likely to attempt to evade service of the summons; or
- 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 above has taken or is likely to take place.

However, as noted by the SIM in the s. 62 Report (page 105), it is considered appropriate that in respect of summonses issued by the Chief Examiner, applications for arrest warrants should be able to be made to the County Court as well as to the Supreme Court. Although this change has been incorporated as part of the the Major Crime Legislation Amendment Act[48] these amendments had not commenced operation at the time of this Report.

## 67 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 retention by a police member. The Chief Examiner will authorise retention to allow any one or more of 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 is reasonably necessary for the purposes of the investigation or to enable evidence of an organised crime offence to be obtained.

Although the Chief Examiner may authorise a police member to retain the document or thing for as long as necessary to undertake any of the above, such retention cannot exceed seven days. If retained for a longer period, sub-section 47(3) of the MCIP Act requires that the police member bring the document or thing before the Magistrates' Court which, upon hearing the matter, may either allow continued retention or direct that the item(s) be returned.

48 Upon commencement, s. 11 of the Major Crime Legislation Amendment Act will amend s. 46 of the Major Crimes (Investigative Powers) Act.

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

The SIM has the responsibility of reviewing and inspecting records kept by the Chief Commissioner where coercive powers have 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 (the Regulations) came into force on 1 July 2005. The Regulations detail the prescribed matters (e.g. computerised records) which must be kept by the Chief Commissioner.

## 69 Obligations Of The Chief Commissioner Under Section 66 Of The MCIP Act

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

The obligations of the Chief Commissioner under s. 66 are to:

(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[49] of the MCIP 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.

## 70 Records To Be Kept By The Chief Commissioner: Section 66(a) Of The MCIP Act 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.

49 Upon commencement, s. 11 of the Major Crime Legislation Amendment Act will amend s. 46 of the Major Crimes (Investigative Powers) Act.

**(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 of the MCIP Act.

**(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 of the Act.**
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.**

## 71 Register For Retained Documents And Other Things

Sub- section 66(b) of the MCIP Act 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 67, 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.

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

The register must be available for inspection by the SIM.[50] The register 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 in August 2008 and March 2009. The SIM is satisfied that the data recorded in the register complies with the legislative requirements.

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

Sub-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 MCIP 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).

In the current reporting period, the Chief Commissioner provided the SIM with two written reports which covered the period 1 July 2008 to 31 December 2008 and 1 January 2009 to 30 June 2009.

50 Section 66(b) Major Crime (Investigative Powers) Act.

## 74 Secrecy Provision

This provision is reviewed at section 81 of the 2006-2007 Annual Report.

Section 68 of the MCIP Act imposes a strict requirement for secrecy on the Chief Examiner, an Examiner, the SIM and his staff and members 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 the MCIP 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, continues even after they cease to be persons to whom s. 68 applies.

Except for the express purposes referred to above, s. 68 of the Act proscribes all other disclosure. Therefore, the Chief Examiner, an Examiner, the SIM and his staff and members 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).

Subject to the exception noted below, sub-section 68(3) provides that any of the persons to whom the secrecy provision applies cannot be compelled by a court to produce documents that have come into their custody or 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.

The exception applies in circumstances where the Chief Examiner, an Examiner, the SIM or a member of the police force in his/her official capacity, is a party to a relevant proceeding or it is otherwise necessary for the purpose of:

(1) carrying into effect the provisions of the Act; or
(2) a prosecution instituted as a result of an investigation carried out by the police force into an organised crime offence.

In every examination reviewed by the SIM in this reporting period, the Chief Examiner informed all persons covered by the provisions of s. 68 of the requirement for secrecy and the penalties that apply if the requirement is breached.

That the operation of s. 68 (and s. 28 which deals with police members who assist the Chief Examiner), was considered in the s. 62 Report (page 112) and referred to in the previous annual report (section 81), arose from a concern raised by Victoria Police about whether the secrecy provisions of the MCIP Act in fact apply to un-sworn Victoria Police staff (i.e. Victoria Public Service members) who are involved in the operations of the Chief Examiner. The SIM, in acknowledging a clear need for the statutory obligations and protections to apply to all affected persons, recommended (Recommendation 9) legislative change to ensure that all persons involved in the operations of the Chief Examiner are subject to appropriate secrecy requirements. Although this change (which imposes the secrecy requirements on sworn members and unsworn staff alike) has been implemented as part of the Major Crime Legislation Amendment Act[51] the amendment had not commenced operation at the time of this Report.

51 Upon commencement, s. 13 of the Major Crime Legislation Amendment Act will amend s. 68 of the Major Crimes (Investigative Powers) Act.

## 75 Compliance With The Act

### 75.1 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.

### 75.2 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.

### 75.3 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. 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.

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.

## 76 Relevance

Specific issues relating to relevance have been discussed earlier. 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.

## 77 Comprehensiveness And Adequacy Of Reports

### 77.1 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.

### 77.2 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.

### 77.3 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.

## 78 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 of the MCIP Act. 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.

## 79 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 previous annual reports 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.

**David Jones**
Special Investigations Monitor
30 September 2009

# Appendix

# 80 Appendix A – Comparable Table Of *Police Regulation Act 1958* And *Police Integrity Act 2008* Provisions In Relation To The Role And Functions Of The SIM

| Topic | Police Regulation Act 1958 | s.86ZM Recommendation(s)<br>(Section references are to the *Police Regulation Act 1958* unless otherwise stated) | Comment | *Police Integrity Act 2008* |
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| **The structure of the OPI** | Formerly s.102A | In establishing the OPI, section 102A provided for the Director of OPI to be he same person as the person who holds office as Ombudsman.<br><br>Recommended that legislation be amended to separate the offices of DPI and Ombudsman so that a person could only hold one office.<br><br>That a qualification for the DPI be introduced to include that a person is qualified for appointment as the DPI if the person has served as, or is qualified for appointment as, a Judge of the Supreme Court of Victoria or another State or Territory, the High Court of Australia or the Federal Court of Australia.<br>**[Recommendation 20]** | Recommendation implemented. Amendments made to the Police Regulation Act subsequently included as part of the Police Integrity Act. | Divisions 1 and 2 of Part 2. |
| **Consolidation of disparate legislative provisions relating to OPI** | | Recommendation to consolidate into the one Act of Parliament all legislative provisions relating to the OPI.<br>**[Recommendation 22]** | Recommendation implemented with the introduction of the Police Integrity Act 2008 which re-established OPI and set out the functions of that Office and the DPI. | |
| **Objects, functions and powers of Director** | Formerly s.102BA | Recommendation to amend the objects of the DPI to give greater legislative emphasis to prevention of police corruption and serious misconduct.<br>**[Recommendation 21]** | Recommendation implemented in the Police Integrity Act to include an additional DPI statutory objective of educating members of Victoria Police and the general community regarding police corruption and serious misconduct. | Section 8 |

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| **Confidentiality requirements** | Formerly s.102G | Recommended that:<br>(1) s. 102G be amended to restrict its operation to the DPI and persons referred to in s. 102E (e.g. persons taken by OPI on secondment or engaged to provide services<br>(2) a confidentiality provision along the lines of s. 151of the *Corruption and Crime Commission Act 2003* (WA) be enacted.<br>**[Recommendation 2]** | Recommendations implemented in the Police Integrity Act with new confidentiality provisions applying to and distinguishing between OPI personal (e.g. the DPI, members of staff and secondees) and "others." | Section 17(1)<br>Section 22<br>Section 23 |
| **Confidentiality of witness summons** | Formerly s.86KA | Recommended that s. 86KA be replaced with a provision modelled on s. 20 of the MCIP Act and which also includes a time limit on the operation of the confidentiality notice (i.e. 5 years).<br>**[Recommendation 1]** | Recommendation implemented in the Police Integrity Act. | Section 58 |
| **Witness summons** | Formerly s.86PA | Recommended that reference to ss. 17 and 20A of the *Evidence Act 1958* in s. 86PA(1) be repealed and a new provision enacted to address a number of issues, including the circumstances in which the DPI may issue a summons and the content, form and requirements for service.<br>**[Recommendation 5]** | Recommendation implemented in the Police Integrity Act. | Sections 53–56 |
| **Failure of witness to attend** | | Recommendation that reference to ss. 19 and 20 of the Evidence Act in s. 86PA(1) be repealed and a new provision be enacted.<br>**[Recommendation 6]** | Recommendation implemented in the Police Integrity Act. | Section 68 |

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| **Power to examine on oath and to exclude the public** | | Recommendation that ss. 18 and 19B of the Evidence Act in s. 86PA(1) be repealed and a new provision be enacted to address a number of issues including:<br>(a) informing the witness of the general scope and purpose of the investigation<br>(b) DPI not to be bound by the rules of evidence and to regulate conduct of examination<br>(c) a statutory presumption against public examinations unless DPI considers that it is the public interest to do so<br>(d) the right of a witness to be legally represented; and<br>(e) the right of witness to have an interpreter.<br>**[Recommendation 7]** | Recommendation implemented in the Police Integrity Act. | (a) section 62(1)(c)<br>(b) section 61(2)<br>(c) sub-sections 65(1) and (2)<br>(d) section 64<br>(e) section 62(1)(h) |
| **Privilege against self incrimination** | Formerly s.86PA(4) | Recommended that, in its current form, s. 86PA(4) be repealed and replaced by a provision in the form of s. 39(1) of the MCIP Act.<br>**[Recommendation 8]** | Recommendation implemented. Section 86PA(4) repealed and privilege expressly abrogated in the Police Integrity Act. | Section 69 |
| **Legal Professional Privilege** | Formerly s.86VAE | Recommended that provisions be enacted based upon ss 40–42 of the MCIP Act, except that:<br>• the County Court or the Supreme Court to determine the claim rather than the Magistrates' Court<br>• express provision needs to be made if it is decided to exclude a public authority or public officer (in that capacity) from claiming legal professional privilege (LPP).<br>**[Recommendation 9]** | Recommendation implemented in the Police Integrity Act. | Sections 70–73 |

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| **Legal Professional Privilege and other objections to inspection, copying and seizing** | Formerly sub section 86VAE(3) | Except for LPP, no provision existed under Division 3 of Part IVA of the Act to override any secrecy obligation or other restriction on the disclosure of information applicable to a public authority or public officer. Recommended that if in the event that LPP does not apply to any privilege of a public authority or public officer in that capacity[52], it should not apply in relation to the OPI's power to enter public premises. **[Recommendation 15]** | Recommendations implemented. Amendment made to the Police Regulation Act (i.e. Introduction of (Division 2B of Part IVA - "Privileges and secrecy provisions"). Subsequently included as part of the Police Integrity Act (Division 4 of Part 4). | Sub-section 70(3); |
| | Formerly s. 86VAI | In relation to an investigation under Division 3 of Part IVA of the Act, public officials were entitled to decline to disclose information, or to produce any document or thing to the Director, by claiming an obligation to maintain secrecy or by claiming any privilege. Recommended that this entitlement be removed as it applies to the disclosure of information by public officials for the purposes of an investigation by the DPI under Part IV. **[Recommendation 16]** | Recommendation implemented. Amendments made to the Police Regulation Act (i.e. introduction of Division 2B of Part IVA – "Privileges and secrecy provisions") subsequently included as part of the Police Integrity Act (Division 4 of Part 4). | Section 74 |

52 In the result, sub-section (70(3) of the Police Integrity Act (formerly sub-section 86(VAE(3) of the Police Regulation Act), provides that LPP does not apply to any privilege of public authority or public officer in that capacity.

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| **Preliminary requirements** | None | The Act did not impose any preliminary requirements on the DPI before an examination commenced. Recommended that a provision be enacted along the lines of s. 31 of the MCIP Act which imposes such requirements on the Chief Examiner. **[Recommendation 10]** | Recommendation implemented in the Police Integrity Act to include an obligation on the DPI (subject to certain stated exceptions), to inform the witness before commencement of the examination of a number of matters, including the:<br>• general scope and purpose of the investigation<br>• abrogation of the privilege against self incrimination<br>• confidentiality requirements<br>• entitlement to claim legal professional privilege<br>• right to legal representation (and, if applicable) an interpreter and/or the presence of independent person<br>• right to complain to the SIM. | Section 62 |
| **Search Warrant Powers** | Formerly ss. 86VG – VJ | In the context of ss. 86W - 86Z, recommended that these provisions be amended to include:<br>(1) the use of reasonable force as provided in the *Police Integrity Commission Act 1996*, the *Independent Commission Against Corruption Act 1988* and the *Corruption and Crime Commission Act 2003*;<br>(2) a provision which deals with the situation where a search warrant is to be executed and there is no person present at the premises where the warrant is to be executed.<br>**[Recommendation 11]** | Recommendation implemented i.e. ss. 86W – 86Z repealed and substituted with ss 86VG – 86VJ sanctioning the use of reasonable force and permitting the execution of a warrant despite the absence of any person apparently over the age of 18 on the premises.<br>These provisions were subsequently included as part of the Police Integrity Act. | Section 93(4)<br>Section 94(4)–(6) |

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| **Assistance in executing search warrants** | Formerly ss. 86VK – 86VO | In the context of Division 3 of Part IVA of the Act and despite the likelihood that the execution of certain warrants would involve force/physical interference with people or property, OPI officials were precluded from seeking assistance (from police or others) in executing such warrants. Recommended that a provision explicitly enabling OPI officers to seek assistance be enacted. **[Recommendation 12]**<br><br>Absent any procedure to deal with claims for privilege made in the course of executing a search warrant, recommended that such a provision be enacted for determination by the County Court or the Supreme Court. **[Recommendation 13]** | Recommendations implemented i.e. Police Regulation Act amended to include ss. 86VK – 86VO which set out the procedures to be followed by persons requiring assistance when executing a search warrant and for determining claims of privilege raised in the course of execution. These provisions were subsequently included as part of the Police Integrity Act. | Sections 97–101 |
| **Power to enter public authority premises** | Formerly ss. 86VB – 86VC | In the context of Division 3 of Part IVA of the Act, there was no provision requiring a public authority or a public officer to facilitate the exercise of powers under ss. 86VB and 86VC. Recommended that a provision to be enacted which requires a person at the public authority premises to facilitate the exercise of powers under ss. 86VB and 86VC. **[Recommendation 14]** | Recommendation implemented i.e. amendment to the Police Regulation Act requiring that an authorised officer be given any assistance reasonably required. These provisions were subsequently included as part of the Police Integrity Act. | Sections 88–89 |
| **Whether a warrant should be required for the entry, search and seizure of public premises** | Formerly s. 86VB | The SIM considered it appropriate and necessary that the DPI should have the capacity to enter public authority premises without warrant for the purpose of searching and seizing documents and other things that are relevant to an investigation under Part IVA. In the result, the power to enter public premises without warrant remained in the Police Regulation Act and was subsequently incorporated as part of the Police Integrity Act. | | Section 88 |

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| **Judicial review** | Formerly s. 86KJ | Section 86J (later s.86KJ) provides protection to the DPI and his staff from civil or criminal liability for any act purported to be done pursuant to the legislation, unless it can be shown that the act was done in bad faith. The provision provides a very limited mechanism for a person to seek relief from the Supreme Court where coercive powers are used or are intended to be used. Recommended that protection be expanded to include excess of jurisdiction and denial of procedural fairness. The remedies available should include the prerogative writs of mandamus, certiorari and prohibition and injunctive and declaratory relief. **[Recommendation 17]** | Recommendation not followed. The protections previously offered have not only been retained but extended to OPI personnel for anything done/omitted to be done in the course of a "critical incident" e.g. an incident resulting in death, serious injury or involving the discharge of a firearm. | Sections 109–110 |
| **Legal Assistance** | Formerly ss. 86VAA – 86VAC | Noting that the provision of legal assistance to persons coercively examined in OPI investigations is necessary, it was recommended that this should be provided by the State. **[Recommendation 18]** | Recommendation implemented i.e. amendment to the Police Regulation Act authorising the Secretary (to the Department of Justice) to approve the provision of legal advice and representation to a person appearing as a witness in an OPI investigation. These provisions were subsequently included as part of the Police Integrity Act. | Sections 75–77 |

## 81 Appendix B – OPI General Description Of Investigations Conducted Utilising Coercive Powers

The information below was compiled from reports received by the SIM for the period 1 July 2008 to 30 June 2009. The outcome or current status as advised to the SIM is at 27 July 2009.

| Description of investigations where coercive examinations conducted | Outcome or current status |
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| **Improper use of position by police member for personal gain**<br><br>An own motion investigation was conducted into allegations that:<br>• without any official entitlement, the member used his/ her position to obtain information for the purpose of securing an outcome beneficial to himself/ herself or to those associated with him/her;<br>• the member improperly accepted gifts, gratuities or bribes, including money;<br>• without authorisation, the member disclosed confidential Victoria Police information and documents contrary to the Police Regulation Act;<br>• by maintaining inappropriate relationships with persons potentially engaged in criminal activities, the member engaged in serious misconduct. | **Pending**<br><br>• This matter has been referred to ESD with a recommendation that disciplinary action be taken and remains open pending the outcome. |
| **Disclosure of confidential Victoria Police information**<br><br>This own motion investigation was conducted into allegations that in disclosing confidential Victoria Police information to persons suspected of engaging in criminal activity, the police member engaged in serious misconduct.<br><br>The investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to deal with:<br>• conflicts of interest involving Victoria Police members; and<br>• improper associations between Victoria Police members and persons suspected of engaging in criminal activity. | **Concluded**<br><br>This matter has been referred to ESD with recommendations that:<br>• The future allocation of the member's duties be considered in the context of the investigation undertaken<br>• Upon being informed of the Chief Commissioner's instruction pertinent to this matter, the member be then directed to complete an "Association Assessment Report";<br>• The matter be referred to and considered by the Assistant Commissioner, ESD. |

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| **Allegations of criminality against police member**<br><br>This own motion investigation was conducted following allegations of serious misconduct arising from the member's alleged involvement in the commission of the following offences:<br>• assault;<br>• criminal damage;<br>• blackmail; and<br>• attempting to pervert the course of justice.<br><br>The investigation also considered the management and supervision of the member. | **Pending**<br><br>• criminal proceedings have been commenced against the police member;<br>• evidence concerning the conduct of two police witnesses called to give evidence has been referred to ESD with a recommendation that disciplinary action be taken;<br>• the matter remains open pending the outcome of the criminal charges. |
| **Investigation into allegations of drug and other offences**<br><br>This own motion investigation was conducted following allegations of serious misconduct arising from the member's alleged involvement in the commission of the following:<br>• offences involving drugs of dependence;<br>• theft;<br>• handling or supply of firearms; and<br>• developing relationships and/or engaging in conduct with persons involved in criminal activities, including illegal use of firearms, conduct endangering life and trafficking drugs of dependence.<br><br>In dealing with improper associations, the investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to prevent or inhibit such activity. | **Continuing** |
| **Allegations of criminal association between police members and persons involved in organised crime**<br><br>This own motion investigation was conducted following allegations arising from an alleged criminal association between police members and persons involved in organised crime, including:<br>• developing relationships with persons who engaged in criminal activity involving extortion, assault and drugs of dependence; and<br>• engaging in conduct or serious misconduct arising out of relationships with such persons.<br><br>In dealing with offender and informer management, the investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to prevent or inhibit such activity. | **Discontinued**<br><br>• the information collected has been retained as intelligence<br>• the investigation is now subject to conditional reactivation |

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| **Maintaining improper associations and unauthorised outside employment**<br><br>This own motion investigation was conducted following allegations that the police member engaged in:<br>• maintaining improper associations;<br>• duty failure;<br>• undertaking secondary employment without the requisite approval; and<br>• corrupting junior ranks.<br><br>The investigation also considered whether by such conduct the member has:<br>• behaved disgracefully and abused his/her power<br>• abused his/her power in a way that has undermined the interests of and diminished public confidence in Victoria Police; and<br>• brought Victoria Police into disrepute. | **Continuing** |
| **Allegations of corrupt behaviour**<br><br>This investigation was undertaken in response to complaints received alleging corrupt behaviour by the subject police members over their alleged association with and actions taken on behalf of a private business enterprise, including:<br>• using Victoria Police property to benefit the business;<br>• theft of Victoria Police property by those police members involved in the management and operation of the business;<br>• using confidential Victoria Police information in the operation of the business; and<br>• purporting to carry out official Victoria Police duties while carrying on the management and operation of the business. | **Continuing** |
| **Importation of prohibited imports**<br><br>This own motion investigation was conducted following allegations that the police member:<br>• imported prohibited imports (performance enhancing drugs);<br>• committed offences involving drugs of dependence; and<br>• used Victoria Police resources to commit criminal offences. | **Continuing** |

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| **Improper disclosure of confidential Victoria Police information**<br><br>This own motion investigation was conducted following an allegation that a serving member of Victoria Police unlawfully disclosed confidential Victoria Police information relating to an active murder investigation and that, therefore, his/her alleged conduct constituted:<br>• misconduct in public office; and<br>• an attempt to pervert the course of justice. | **Pending**<br><br>• This matter has been referred to ESD with a recommendation that disciplinary action be taken. |
| **Attempting to pervert the course of justice**<br><br>This own motion investigation was conducted following allegations of Victoria Police member(s) having:<br>• with others (not being members of Victoria Police), attempted to pervert the course of justice; and<br>• improperly interfered in Victoria Police recruitment processes, including the procurement of a false reference to support an employment application.<br><br>The investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to prevent or inhibit such activity. | **Continuing** |
| **Complaint that the former Chief Commissioner of Police improperly accepted a flight from Melbourne to Los Angeles**<br><br>This investigation was undertaken in response to a complaint alleging that in accepting an invitation to travel from Melbourne to Los Angeles to celebrate the inaugural Qantas Airways flight of the A380 Airbus, the then Chief Commissioner of Police failed to adhere to Victoria Police policies and procedures for the acceptance of gifts, donations and sponsorships. | **Concluded**<br><br>• A report by the DPI "Offers of Gifts and Benefits to Victoria Police Employees' was tabled in Parliament in June 2009.<br>• In addition to releasing a press statement acknowledging her error, the former Chief Commissioner of Police also made a monetary contribution to charity. |

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| **Allegations of misconduct in the unauthorised disclosure of confidential Victoria Police documentation**<br><br>This own motion investigation was instigated to determine whether any member of Victoria Police was guilty of misconduct as a result of being:<br><br>• either directly or indirectly responsible for the unauthorised disclosure of confidential Victoria Police documentation; and<br>• either directly or indirectly associated with the unauthorised disclosure of confidential Victoria Police documentation.<br><br>If such member(s) were involved, then in addition to determining by what means and with what assistance, the investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to prevent or inhibit such activity. | **Continuing** |
| **Allegations of bribery and corruption**<br><br>This own motion investigation was conducted following allegations that one or more members of Victoria Police:<br><br>• attempted to pervert the course of justice in the exercise of their lawful powers;<br>• committed further criminal offences, including misconduct in public office, bribery and corruption;<br>• omitted to do acts required by law; and<br>• were or still are involved in an improper association which interferes(ed) with their capacity to impartially exercise their official duties as sworn members of Victoria Police.<br><br>The investigation also considered whether:<br><br>• the policies, procedures or practices of Victoria Police are adequate to ensure that sworn members fulfil their lawful duties in exercising powers under the Road Traffic Act; and<br>• in relation to declarable associations, the policies, procedures or practices of Victoria Police were followed by one or more sworn members. | **Continuing** |
| **Allegations of serious assault**<br><br>This investigation was undertaken in response to a complaint of assault allegedly committed by police on a complainant shortly before his/her release from a police station. The injuries reported by the complainant later required hospitalisation. | **Continuing** |

| Conspiracy and unauthorised disclosure | Continuing |
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| This own motion investigation was conducted following allegations that the police members:<br>• disclosed confidential Victoria Police information, including information relating to a current Victoria Police investigation, to another member despite he/she being "a person of interest" in the investigation; and<br>• conspired to obtain confidential Victoria Police information for an illegal or improper purpose.<br>In addition to also enquiring into whether any Victoria Police member committed a criminal offence or a breach of discipline consequent upon the alleged misconduct, the investigation also considered whether the policies, procedures or practices of Victoria Police were adequate to prevent disclosure of the confidential information. | |

## 82 Appendix C – Chief Examiner General Description of Investigations Conducted Utilising Coercive Powers

A summary of the organised crime offences in respect of which CPO's were made or extended in this reporting period (1 July 2008 to 30 June 2009) is as follows:

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| 1 | 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, which was again extended on 12 May 2008 for a further 6 months, was subject to a condition that an application for a witness summons with respect to a particular witness who had already been coercively examined, was to be brought before the Supreme Court, which court would exercise supervision/discretion with respect to any other summons applications. |
| 2 | The original CPO issued by the Supreme on 13 February 2007 and extended by 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 again extended for a further period of six months on both 5 February 2008 and 5 August 2008, before being further extended for a twelve month period on 28 January 2009. |
| 3 | On 25 October 2007 the Supreme Court issued a CPO 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 (for a further six month period) and varied (to include a special condition) on 21 April 2008 and, subject to the same special condition, was again extended (for a further twelve month period) on 20 October 2008. |
| 4 | On 13 August 2008 the Supreme Court issued a CPO for a six month period in respect of an organised crime offence involving murder. A subsequent application to amend the CPO by adding certain particulars was granted by the Supreme Court on 26 September 2008. The CPO was extended for a further period of six months on 9 October 2008 and 10 February 2009. |
| 5 | On 20 October 2008 the Supreme Court issued a CPO for a six month period in respect of an organised crime offence involving the cultivation of a commercial quantity of cannabis. The CPO was issued subject a condition that any person charged with any offence linked to the organised crime offence will not be summonsed 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*. Subject to the same condition, this CPO was extended on 17 April 2009 for a further six month period. |