Office of the **Special Investigations Monitor**

Annual Report 2009–2010

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1 Introduction

This is the annual report for the financial year ending 30 June 2010 of the Special Investigations Monitor (the SIM) pursuant to s. 126 of the *Police Integrity Act 2008* (Police Integrity 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 functions of the Office of the Special Investigations Monitor under Part 5 of the Police Integrity 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* (SIM Act) which commenced operation on 16 November 2004.

On 15 December 2009 Leslie Charles Ross was appointed the SIM by the Governor-in-Council for an initial period of two years. The appointment of Mr Ross followed that of David Anthony Talbot Jones who was first appointed SIM on 14 December 2004 and who retired on 14 December 2009. Mr Ross is a lawyer of 49 years standing. He was appointed Queens Counsel in 1986 and appointed to the County Court in 1988. He served as a Judge of that court until December 2009 when appointed to the position of SIM.

This report is bound to acknowledge the contribution made by Mr David Jones to the development of the OSIM. The office was created in 2004 and Mr Jones inaugurated and refined the procedures required to oversight the various bodies for which the SIM is responsible. Further, his recommendation to Government as part of the s. 86ZM Report resulted in the introduction of legislation, the effect of which was to separate the Office of the Ombudsman from the DPI and to establish the Office of Police Integrity.

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 which established the DPI and OPI commenced operation on 16 November 2004 and were originally inserted into the *Police Regulation Act 1958* (Police Regulation Act) alongside the existing provisions dealing with the relevant functions and powers. The 2004-2005 Annual Report covers the background to the establishment of OPI and other aspects of the legislation.

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).

A Bill was subsequently introduced into the Victorian Parliament to implement the recommendations made in the s. 86ZM Report. This resulted in the Police Integrity Act, the substantial provisions of which came into force on 5 December 2008. This statute, which consolidated into the one Act of Parliament all the legislative provisions relating to the OPI, continued the legislative regime founded in the Police Regulation Act subject to those changes which resulted from implementing the recommendations made in the s. 86ZM Report.

4 *Major Crime (Investigative Powers) Act 2004*

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

The provisions amending the Police Regulation Act and the Whistleblowers Protection Act to confer further powers on the DPI commenced operation on 16 November 2004 and are now contained in the Police Integrity Act.

The provisions conferring further powers on the Victoria Police commenced operation on 1 July 2005 and, having been monitored during the current reporting period, are reviewed in this report.

5 Director, Police Integrity – Coercive Questioning Powers

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

As detailed in the 2004-2005 Annual Report, the 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. 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
- 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
- to report the issue of arrest warrants to the SIM – s. 116
- 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.

The Act provides for complaints to be made to and procedures to be followed by the SIM with respect to such complaints – ss. 118, 119 and 120.

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.

8 Annual Report Of The Special Investigations Monitor To Parliament

Section 126 of the Police Integrity 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.

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 under the Police Integrity Act 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 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 that 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 that 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 the Victoria Police. As already stated, those powers commenced operation on 1 July 2005 and are exercised through the Chief Examiner which office was established by the legislation.

These powers and the role of the Chief Examiner were reviewed in the 2005-2006 Annual Report and need only be referred to briefly in this report. A review of the operation of the legislation as it related 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 these powers is an order of the Supreme Court called a Coercive Powers Order (CPO). Section 4 of the Act provides that a CPO authorises the use of such powers in accordance with and for the purposes of investigating the organised crime offence in respect of which the order is made. The nature and definition of an "organised crime offence" is discussed later in this report (section 40).

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.

Assuming a CPO is in force, the Act provides that on application the Supreme Court or the Chief Examiner may issue a witness summons requiring, for example, the attendance of the person before the Chief Examiner to give evidence and/or produce documents.

Part 4 of the Act covers myriad issues relating to the conduct of a coercive examination by the Chief Examiner in relation to an organised crime offence.

Recommendations for legislative change were made in the s. 62 Report and the amendments which were subsequently enacted have all commenced operation and are referred to later in this report.

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 into 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 to the SIM. Briefly, they are that:

- the Chief Examiner must report the making of witness summonses and orders to the SIM – s. 52
- the Chief Examiner must report matters relating to the coercive questioning of a person – s. 53
- the Chief Commissioner must ensure that certain prescribed records are kept on a comuputerised register and that the 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 – ss. 54, 55 and 56.

In empowering the SIM to make recommendations to the Chief Examiner and the Chief Commissioner (s. 57), the Act also requires each to provide assistance to the SIM, (s. 58), gives the SIM powers of entry and access to the offices and records of the Chief Examiner and Victoria Police and authorises the SIM to require the Chief Examiner or a member of the police force to answer questions and/or produce documents (s.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 the accountability of the 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 (for 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.

During the current reporting period a number of definitional and procedural amendments were made to the State TI Act by the *Justice Legislation Miscellaneous Amendment Act 2009*. Designed to ensure consistency with the TIA Act, these changes came into effect on 16 December 2009.

The SIM reports to the Minister annually in compliance with the provisions of 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 a 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 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 2009-2010 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 resulted from 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 earlier 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, in so doing, 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.

Whilst all relevant agencies are required to report to the SIM every six months, an anomaly in the reporting dates resulted in OPI, Victoria Police, Fisheries and Wildlife having to do so in March and September. This was notwithstanding the SIM's reporting obligation to Parliament being "as soon as practicable after the end of each financial year." In the circumstances, the *Crimes Legislation Amendment Act 2010* was introduced and changed agency reporting obligations under the CO Act, the *Fisheries Act 1995* and the *Wildlife Act 1975* by replacing "March" and "September" with "June" and "December", thereby ensuring the SIM is better placed to meet his statutory reporting obligations. These changes came into effect on 17 March 2010.

The SIM has undertaken two full inspections 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 receipt of the chief officers' reports, 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 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 for Police and Emergency Services who then forwards a copy to the Commonwealth Attorney-General (as the Minister responsible for the TIA Act).

Reports under the CO Act once tabled in Parliament are publicly available.

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.

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.

The OSIM continues to operate from premises in the central business district of Melbourne. Following the appointment of a second legal officer in April 2010, the OSIM now consists of six staff whose commitment and quality of work is acknowledged and greatly appreciated by the SIM.

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 utilised under the provisions of the Police Integrity Act. Whilst there is no need to repeat all that material, it is important to highlight some of the more significant matters to which reference is made.

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 as it applies to an investigative process.

The Police Integrity Act gives the DPI the power to regulate the conduct of an examination 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 elicit 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 used in an inquisitorial setting, relevance is not to 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 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. 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; equally important is the SIM's duty to scrutinise the exercise of such powers. Such scrutiny protects against an investigative body exceeding its statutory warrant. Such a situation may arise where coercive questioning is used as a means of fishing for information not related to the investigation at hand. In other words, to further another agenda not the subject of the investigation.

Maintaining the integrity of the 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 not abused, but are being used for the intended purpose and therefore in the public interest.

17 Section 115 Reports

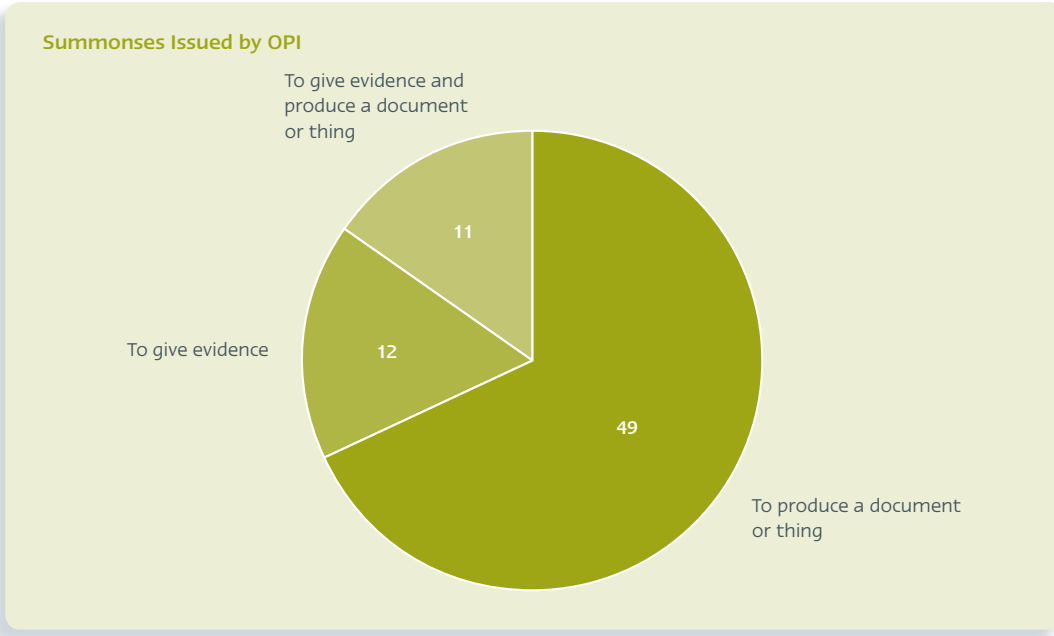
Section 115 of the Police Integrity Act requires the DPI to provide the SIM with a written report within three days following the issue of a summons. This requirement has enabled the SIM to keep track of the number and nature of summonses issued.

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 (subsection 54(2)). To monitor compliance with this provision the s. 115 Report now contains additional information including a copy of the summons.

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.

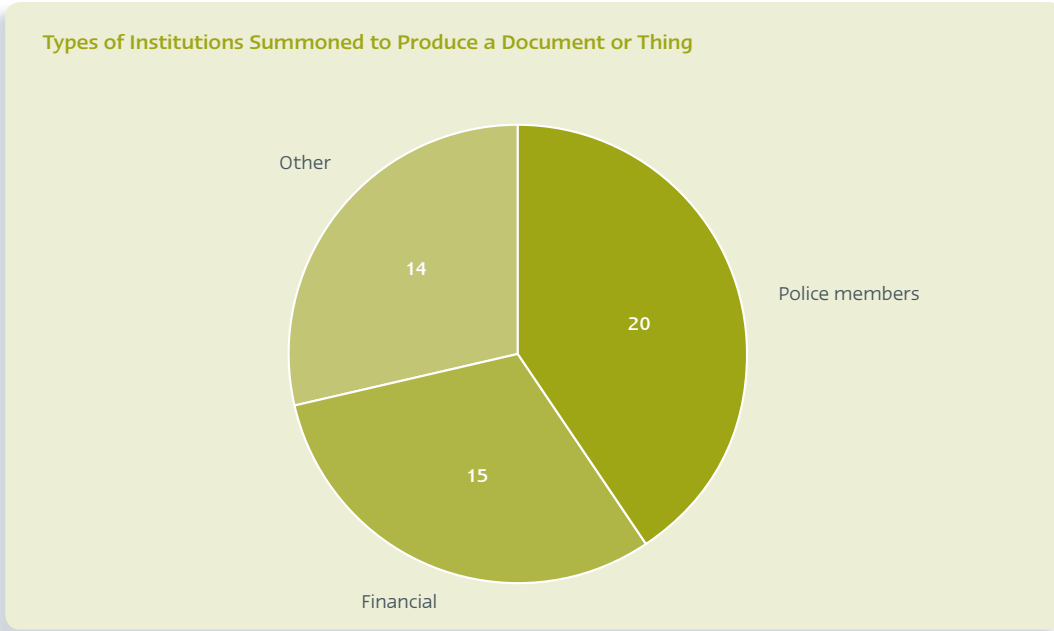
17.1 Overview of section 115 reports received by the Special Investigations Monitor

A total of 72 s. 115 reports were received by the SIM in the 2009-2010 reporting period. All reports were received within the required time frame. The following chart displays the breakdown of the types of summonses issued by the DPI.



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.



17.3 Financial institutions

Financial records sought and produced included names of bank account holders, bank accounts (e.g. loan, savings, cheque accounts etc) 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 questionable 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 to ascertain whether there 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 serious misconduct, improper associations, assault, fraud, attempts to pervert the course of justice 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 to give 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, insurance and investment portfolio documentation and motor vehicle purchases.

17.5 Police members

Twenty police members were 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. No reports referable to the use of s. 47 of the Police Integrity Act were received by the SIM during the current reporting period.

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 unwilling 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 producing 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 production.

20 Coercive Examinations Reported To The Special Investigations Monitor

Eighteen reports pursuant to s. 117 of the Police Integrity Act were provided to the SIM between 1 July 2009 and 30 June 2010. One of the reports provided to the SIM related to a coercive examination conducted in the previous reporting period.

Transcripts were provided for all 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.[4]

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.

4 *Police Integrity Act s. 84(1).*

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.

The SIM continues to monitor the application of the DPI's policy on the use of coercive powers which is contained in OPI's 'Guidelines for Delegate'[5] 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.

23 OPI: General Description Of Investigations Conducted Utilising Coercive Powers

Based on information compiled from OPI reports and received by the SIM during the period under review, the DPI conducted a number of own motion investigations into a range of allegations against members of Victoria Police. These included unlawful disclosure of confidential information, serious assault, perverting the course of justice, bribery and corruption.

At the time of reporting, the status of these matters varies from those still under investigation, to others which have been finalised and which are subject to further action, including the laying of criminal charges.

A description of investigations conducted by the DPI where coercive powers were used is also contained in the s. 86ZM Report.

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

Investigation Type	09-10	08-09	07-08	06-07	05-06	04-05[6]	Total
Own motion investigation s. 44 (formerly s. 86NA of the Police Regulation Act)	**7**	11	13	11	6	4	52
Complaint generated investigation s. 40 (formerly s. 86N of the Police Regulation Act)	**0**	1	1	2	2	1	7
Further investigation conducted by the DPI s. 48 (formerly s. 86R of the Police Regulation Act)	**0**	1	0	1	1	0	3

A total of 17 witnesses were examined in the reporting period. Two were examined twice and one was examined in relation to separate investigations. This can be compared with the total of 48 witnesses for the period 2008-2009. Of the 17 witnesses, 14 are serving police members and 3 are civilians.

5 This refers to the delegates' manual which was provided in draft form to the SIM during the 2006-2007 reporting period. The SIM understands that the manual is in the process of being developed further.

6 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 (i.e. s. 86ZB, s. 86ZD and s. 86Q Reports under the Police Regulation Act).

Police Integrity Act & Police Regulation Act	09-10	08-09	07-08	06-07	05-06	04-05[7]	Total
s. 115 and s. 86ZB Director must report summonses	**72**	87	143	106	202	84	694
s. 117 and s. 86ZD Director must report other matters	**18**	57	63	44	60	30	272
s. 47 and s. 86Q Power to require answers etc. of a member of the force	**0**	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 The conduct and handling of a lengthy coercive examination

In one matter reviewed, the SIM noted the coercive examination to have extended over a period of two days. This unusually lengthy hearing was certainly influenced by an apparent need to introduce a large number of exhibits, which not only included the transcript referable to lawfully intercepted information, but the playing (and, on occasion, the replaying) of this evidential material. In the result, this generated further questioning, discussion and when considered appropriate, additional adjournments.

The SIM considers that the challenges presented by this lengthy hearing were met by the Director's Delegate in a fair, objective and transparent manner and which extended every opportunity to the witnesses to initiate and/or respond to matters relevant to the enquiry.

25.2 Questioning a witness – a fine line

In the 2008-2009 Annual Report, the SIM reviewed an examination in which some concern was expressed in relation to the method and manner of the questioning adopted by the OPI Examiner (section 25.11). On that occasion the previous SIM observed that the "robust" approach which is sometimes required in questioning certain witnesses, ought not be misinterpreted as meaning the absence of any boundaries or the extinguishment of the right of a witness to expect to be treated fairly and with some respect. In highlighting its importance, the SIM stated that this aspect of coercive examinations would continue to be monitored closely.

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

In this context it was having reviewed a particular coercive examination that the SIM identified an issue concerning the relevance or otherwise of a matter asked of the witness at the hearing.

As discussed earlier in this report (section 16.1), the meaning of "relevance" depends on context i.e. there can be a significant difference when comparing its meaning and use by a non-decision making investigative body such as OPI and, for example, that which is relied upon and understood by the courts in determining the potential admissibility of evidence in an adversarial (trial) setting.

Mindful of this distinction, it is in relation to persons attending an examination before the DPI that the SIM has a statutory obligation to assess the relevance of the questioning and its appropriateness in relation to the purpose of the investigation.

In the matter under review, although the witness had earlier nominated persons with whom he admitted to having a physical relationship, it was later in the hearing that the OPI Examiner named a number of persons and proceeded to ask the witness whether each was known to him/her and whether there had been any physical relationship. The witness answered each question. In the circumstances, the SIM considered these questions to be relevant. However, shortly before the hearing concluded, the OPI Examiner then asked the witness "Are you having any other extramarital sexual relationships?" The witness did not respond directly to the question and was clearly taken aback. At that point the DPI intervened and, having stated that he had some concerns with the question, temporarily adjourned the proceedings. Upon resuming, the DPI directed the OPI Examiner not to persist with the particular question. This direction was given because the DPI considered that it might involve an unwarranted invasion of the witness's privacy.

Having reviewed all the available material, including the purpose of the investigation and the reasons for the witness being summonsed to attend, the SIM was concerned that the OPI Examiner had not only failed to contextualise the enquiry, but had also neglected to demonstrate, however remotely, that such a question had any nexus with the investigation.

In the circumstances, the SIM wrote to the DPI querying the propriety of and the basis upon which the question was put to the witness. In a written response received from the Assistant Director, Police Integrity, Legal & Compliance (the Assistant Director), it was said that the context of the question and its nexus with the investigation was not founded on any moral or ethical judgement, but solely on operational considerations.

In a subsequent meeting arranged as part of an ongoing dialogue between the SIM and the DPI and their respective staff, this matter was discussed further.

In the result, whilst the SIM considered the overall conduct of the examination to have been well handled, the obligation when taking evidence at an examination is to ask only those questions considered relevant and appropriate to the purpose of the examination. Accordingly, insofar as the SIM considered the question posed by the OPI Examiner to be irrelevant and an unwarranted intrusion, it is to be observed that upon resumption of the proceedings it was at the direction of the DPI that no further attempt was made by the OPI Examiner to pursue the matter. The SIM agrees with and supports the approach taken and the direction given by the DPI.

25.3 Length of attendance

As discussed in the 2008-2009 Annual Report (section 25.7), it is important for the SIM to be informed not just of the time taken to examine the witness, but also of the total time spent by the witness at OPI (or elsewhere) in response to the summons to give evidence and/or produce documents or other things. As noted in the last report, it was in this context that the DPI acknowledged and confirmed the SIM's preference that calculation of time spent would, in all future OPI reports, be expressed as from the time of initial attendance.

This calculation was generally, but not always, reflected in the OPI reports reviewed by the SIM during the current reporting period. In the circumstances, the OSIM Senior Legal Officer liaised with the (then) OPI Managing Lawyer, who confirmed that processes had been put in place to ensure that the calculation would be expressed in accordance with the agreed understanding.

The SIM appreciates the DPI's cooperation and confirmation concerning the additional processes and will continue to monitor the situation during the next reporting period.

25.4 Service of witness summons

Since the 2005-2006 Annual Report in which the issue of "reasonable service" was addressed in some detail (section 37.1), the SIM recommended (Recommendation 5 of the s. 86ZM Report) that subject to the DPI having the power to issue a summons requiring a person's immediate attendance (as was then available to the Chief Examiner), there ought to be a "reasonable time" between the service of a witness summons and the attendance date. These recommendations were accepted and subsequently implemented in the Police Integrity Act (s. 56 and, in particular, subsection 56(3)).

Whilst the provisions of subsection 56(4) of the Police Integrity Act set out the circumstance(s) which must exist before the DPI is justified in issuing a "forthwith" summons, it is clear that service of such a summons amounts to what is referred to as "short service" and is something which may be objected to by a witness who claims he/she has not been afforded adequate ("reasonable") opportunity to prepare for the attendance (e.g. inadequate time to obtain legal representation, locate required documentation, make alternate workplace arrangements etc).

In one examination reviewed by the SIM, the witness was served with a summons the day before (i.e. less than 24 hours before the scheduled hearing time) and which required him/her to attend the next morning to give evidence before the DPI and to produce specified documents.

The SIM observes that because the summons required the witness to attend the next day, it was not a "forthwith" summons (within the meaning of subsection 56(4)), but a "usual" summons which therefore had to be served a reasonable time before the date for attendance (subsection 56(3)).

Given the important distinction between subsections 56(3) and (4) of the Police Integrity Act, it is the SIM's view that the latter subsection (i.e. 56(4)) is only intended to apply when circumstances and operational exigencies are such as to lead the DPI to believe that the "short service" of a "forthwith" summons is justifiable. In expressing this view, the SIM wrote to the DPI requesting his further consideration and response. In reply, the Assistant Director wrote to the SIM and

agreed that although the matter under review was not a "forthwith" summons within the meaning of the Police integrity Act, OPI nevertheless considered the "short service" to be reasonable in circumstances where the security of the investigation needed to be protected. Further reference was made by the Assistant Director to the 2005-2006 Annual Report, in which the (then) SIM observed *inter alia* that what is said to be reasonable service may vary from case to case and that "a very short time" may nevertheless be considered reasonable in all the circumstances. The Assistant Director also noted that in relation to the matter under review, the witness still had sufficient time to obtain legal advice and representation and to locate the documents which he/she was required to produce.

By way of response, it was during a subsequent meeting with the Assistant Director, that the SIM (accompanied by the OSIM Senior Legal Officer) in agreeing with the proposition that "reasonable service" is a question of fact to be decided on a case by case basis, observed that in the 2005-2006 period the governing legislation was not the Police Integrity Act, but the Police Regulation Act which empowered the DPI to issue a witness summons pursuant to s. 17 of the (then) *Evidence Act 1958*, but which did not specify any time for service. Indeed, in the 2005-2006 Annual Report the former SIM not only emphasised the need for service to accord with procedural fairness and be effected a reasonable time before the attendance date (section 25.1), but recommended that a DPI "Summons Issue Procedures" document state that a summons must be served a reasonable time before the date on which the person is required to attend. The DPI agreed to adopt this recommendation. In addition, the previous SIM expressed the view (Recommendation 5 of the s. 86ZM Report which now appears, albeit in a somewhat expanded form, as subsection 56(4) of the Police Integrity Act), that:

> "[s]hort service is appropriate in certain circumstances where evidence may be lost or the safety of a witness or other persons may be compromised. However, where these circumstances do not apply, a witness must be served in reasonable time."[8]

The SIM endorses these comments, as well as those expressed by the former DPI who, as part of an ongoing exchange of correspondence with the then SIM, said of s. 17 of the *Evidence Act 1958* (but concerning which the SIM interpolates is equally relevant to Police Integrity Act):

> "[A]s your letter noted, the witness's counsel did not seek an adjournment on the basis of short service, or object to the Delegate regarding that issue, something which I would have expected any competent counsel to do if he or his client considered the period unreasonable or unfair. This does not, as you have observed, convert something which is unreasonable into being reasonable."

In the final analysis and based on the reasoning proffered (i.e. the need to protect the security of the investigation), the SIM is unable to identify a basis for OPI not electing to utilise a statutory provision which, absent the very circumstances of this matter, has no other discernable purpose.

8 2005-2006 Annual Report (section 25.8 at p. 19).

Accordingly, as the legal process issued is not a summons requiring the witness to attend "forthwith", the SIM considers that subsection 56(3) of the Police Integrity Act applies and although there may be circumstance under which "short service" could be considered reasonable, they were not present in this matter.

25.5 Production of documents

25.5.1 As discussed elsewhere in this report, the DPI has the power to compel the production of documents and other things pursuant to the following provisions of the Police Integrity Act:

(i) subsection 53(b) – by issuing a summons to produce (see sections 19 and 22 of this report)

(ii) s. 65A – even if a summons to produce has not been served, if the person is present at an examination and is physically possessed of the document(s), he/she can still be required to produce (see section 54[9] of this report where the Chief Examiner has a similar power).

In one examination reviewed by the SIM, the legally represented witness was summonsed to give evidence and to produce specified documents at an examination. Given, however, that this coercive hearing was held at a time before the commencement of s. 65A of the Police Integrity Act, the only power to compel production of documents was that provided by subsection 53(b) (witness summons). In this context the witness was required to produce documentation in compliance with a "between dates" time period as specified in a schedule which formed part of the summons.

Upon carefully reviewing the examination transcript and attendant documentation, the SIM identified certain procedural anomalies which made the task of assessing the relevance of the requirement to produce and its appropriateness in relation to the purpose of the investigation, somewhat problematic.

In these circumstances, the matter was dealt with by way of a mutual exchange of correspondence between the SIM and the DPI/Assistant Director and was also the subject of a very constructive meeting which produced a shared understanding between the SIM and the Assistant Director.

Accordingly, in relation to a hearing which the SIM considers to be otherwise well handled, it is intended during the next reporting period to closely monitor the production and handling of documents and other things during the course of coercive examinations.

25.5.2 In another examination reviewed, a further issue dealing with the production of documents was considered by the SIM, albeit in somewhat different circumstances. Unlike the previous example (where the witness was not only summonsed to give evidence and to produce documents, but was also legally represented), in the matter under review the unrepresented witness was required to attend to give evidence only.

9 FN 45 at p. 53.

However, in the course of the examination hearing an issue arose concerning the availability of certain documentation which, although not physically in the possession of the witness, was said to be easily assessable by him/her. Later in the hearing, the Director's delegate then referred to and sought confirmation from the witness that he/she was still agreeable to producing the documentation on a "voluntary" basis after the coercive examination had concluded. The witness replied in the affirmative.

On the material available, the SIM is concerned that an unrepresented witness was, without a summons to produce having been served, "requested" to produce certain documentation in circumstances where there was nothing to suggest that the witness had at least been alerted to the possibility that he/she may wish to obtain legal advice before committing to the production of the documentation. Having written to the DPI, the SIM received a response in which the Assistant Director confirmed that it was the understanding of OPI that following the conclusion of the examination, the witness "voluntarily" provided the documents to OPI investigators who had attended his/her place of work for that purpose.

Of particular concern to the SIM is that the statutory protection provided by s. 23 of the Police Integrity Act (which operates to protect unlawful disclosure of *inter alia* anything said or produced by a witness during his/her attendance before the DPI), was not available to a witness such as this who, after the coercive examination had concluded, nevertheless proceeded to "voluntarily" provide documentation which had been "requested" during an earlier hearing. In this context, the letter from the Assistant Director to the SIM concluded as follows:

> "[I]n retrospect, while there were legitimate investigative reasons not to require the production of documents from the witness under the [same] summons requiring him/her to attend, it would have been better practice for a summons for production of the documents requiring forthwith compliance to be issued following the examination. This could have been served on the witness at [his/her] business premises that afternoon since he/she had compiled the documents already, and it would have afforded him/her all the necessary protections under s. 23 of the Police Integrity Act."

The SIM agrees with and appreciates the position taken by and the response received from the DPI/Assistant Director.

25.6 Delegation

In February 2010, Justice Osborn of the Supreme Court of Victoria handed down judgement in *R* v *Ashby* [2010] VSC 14. The accused had pleaded not guilty to 11 counts of perjury arising out of his earlier appearance as a witness at a coercive examination conducted before the (then) Director's delegate. The court found that at the time when the DPI purported to delegate his powers, the delegate was not a "relevant person" (as then defined under the *Police Regulation Act 1958*). Not being a relevant person, the Supreme Court held that the Director's delegate did not have the lawful authority to conduct the coercive examination which later gave rise to the 11 counts of perjury. In the result, the Director of Public Prosecutions elected not to proceed against the accused and the charges were withdrawn before trial.

In the circumstances and following discussion with the SIM, the DPI caused a review of past delegations to be undertaken. This was done as a matter of prudence to ensure that if there be any outstanding compliance issues, then same could be quickly identified and documented. Following the review, the DPI made the SIM aware of one further matter which was said to involve a case of inadvertent non-compliance with the statutory procedure required when a delegate is appointed to conduct a coercive examination. Upon receipt of this correspondence, the SIM revisited the relevant transcript and audio-visual recording of the examination. Having carefully reviewed this material, it was the SIM's opinion that no exception could be taken to the manner in which the hearing was conducted. Further, that the DPI confirmed that no proceedings had/would be preferred against the witness (whose file had been closed and endorsed with a direction prohibiting the use of the hearing transcript for any purpose), led the SIM to conclude that in the circumstances, no further action was necessary.

25.7 Length of time in custody before commencement of coercive questioning

In the 2008-2009 Annual Report, the previous SIM referred at some length to a matter in which two witness had at various times been in the custody of Commonwealth and State law enforcement officers. This period extended from early morning until their attendance at OPI much later that day where, after some hours and pursuant to a "forthwith" summons, each was coercively examined before being finally permitted to leave (section 25.6). The SIM does not intend to repeat the matters there canvassed, except to observe they were considered of such importance that after seeking additional information from the DPI, the SIM undertook to make further reference to these issues in the next (i.e. 2009-2010) Annual Report. In agreeing with the observations made by his predecessor, the SIM proposes to act on that undertaking in this report.

Accordingly and accompanied by a request for his considered response, it was during the period under review that a comprehensive, detailed document housing the specific concerns of the previous SIM was delivered to the DPI. The content of this paper precipitated a meeting between the (then) OPI Assistant Director, Police Integrity, Legal & compliance (the previous Assistant Director) and the OSIM Senior Legal Officer. At this time it was said that operational factors, more particularly the need to protect the security of the investigation, was OPI's only consideration in deciding whether to exercise any, and if so, what coercive power(s).

Given the stated need to protect investigative integrity, the OSIM Senior Legal Officer was further informed that it was necessary to coercively examine both witnesses and to do so pursuant to the service of a "forthwith" summons. It was said that immediate attendance was necessary to ensure that both witnesses were made subject to enforceable confidentiality obligations which would not only operate as a disincentive for the witnesses to collude with others, but also as between themselves.

In a subsequent letter to the DPI, the SIM responded to OPI's rational for the issuance and service of two "forthwith" summonses, by observing that:

> "[I]t is noted that after completion of the police questioning at the St. Kilda Road Complex (which culminated in both...being charged...), each was bailed and apparently informed that they were free to make their own way to OPI where they were to be coercively examined. It appears that each eventually choose to proceed to OPI in the company of police members.
>
> Given that the rational for the 'forthwith' attendance was to preclude collusion [between the witnesses and the witnesses and others], I observe in passing that if the witnesses had acted otherwise (and exercised the option given to them of making their own way to the examination), there would have been ample opportunity for them to have colluded about that which was at the very core of the OPI investigation, namely the source of the unauthorised disclosure of confidential Victoria Police documentation.
>
> In any event, subject to the OPI exercising its coercive powers in good faith (about which there is no issue) and in accordance with the provisions of the governing legislation, I recognise that it is for you, as the DPI, to determine if operational need is such as to require the immediate attendance of a witness. Indeed, it is noted that since these cases, s. 56(4) of the *Police Integrity Act 2008* now operates to clearly define the circumstances in which a 'forthwith' summons may be issued.
>
> Accordingly, in the end, the issue of whether without compromising the investigation anything else could have reasonably been done requires, in my opinion, a negative conclusion. Nevertheless, I remain concerned to monitor closely persons who are subject to a requirement to attend for immediate examination or who, as in these cases, are summonsed to attend 'forthwith' following the very lengthy period which [both witnesses] spent in police custody."

25.8 Provision of copy exhibits by OPI

This issue was discussed and considered to have been resolved through a shared understanding referred to in the 2008-2009 Annual Report (section 25.13). However, during the current reporting period the SIM observes that although there has been substantial compliance by OPI in attaching copy "Exhibit Lists" to the s. 117 Reports provided to the SIM, this has not been the case in relation to the provision of copy exhibits.

Accordingly, the SIM wrote to the DPI and reiterated the value of copy exhibits in assisting the task of reviewing and assessing an examination hearing. In so doing, the SIM again took the opportunity to emphasise that the expectation of such copy documentation being provided as an attachment, applies only to those matters involving the reception of a limited number of exhibits. Indeed, to endorse that which was said by the previous SIM, this matter is one of practicality and common sense to be determined on a case by case basis. Beyond this, the SIM notes and appreciates an earlier (ongoing) invitation to attend OPI and to inspect all exhibits in circumstances where it is not possible to include them as an attachment (e.g. where the exhibited material cannot be readily reproduced or is otherwise too voluminous).

In responding to the concerns expressed by the SIM, the Assistant Director acknowledged how the provision of copy exhibits and the exhibit list "where there are only a limited number" may assist in the review of coercive examinations. Although appreciative of this acknowledgement, in the absence of any copy exhibits being attached to the s. 117 reports provided by OPI during the current reporting period, the SIM considers it necessary to refer to that which was said by the previous Assistant Director, that "[w]henever it is convenient and practical to do so, the OPI would include copy exhibits as an attachment."[10]

In gratefully acknowledging the cooperation otherwise extended by the DPI/OPI, the SIM is hopeful that during the next reporting period this important matter will receive closer attention. The SIM will continue to closely monitor the situation.

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 (the then) s. 86P(1)(d) of the Police Regulation Act (now subsection 61(2) of the Police Integrity 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

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

Legal Representation	09-10	08-09	07-08	06-07	05-06	04-05	Total
Police witnesses legally represented during examination	**9**	18	34	25	38	9	133
Police witnesses not legally represented during examination	**5**	2	8	1	9	1	26
Former police members legally represented during examination	**0**	0	4	1	0	0	5
Former police members not legally represented during examination	**0**	0	0	0	2	0	2
Civilian witnesses represented during examination	**1**	18	12	3	2	2	38
Civilian witnesses not represented during examination	**2**	10	4	2	8	3	29

10 OSIM 2008-2009 Annual Report (section 25.13 at p. 32).

27 Mental Impairment

The measures to be taken by the DPI or his delegate under subsection 64(4) of the Police Integrity 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, this information must be included in the s. 117 report provided to the SIM.

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

All s. 117 reports received by the SIM in this reporting period stated that neither the DPI or his delegate had formed a belief that any of the witnesses subject to the exercise of coercive powers were 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 subsection 57(2) of the Police Integrity 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 such a direction.

29 Explanation Of The Complaints Procedure

As referred to in section 31 of the 2005-2006 Annual Report, the former SIM considered that persons who are being coercively examined should be informed of their right to complain even though the (then) 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 were nevertheless 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.[11] This document, entitled 'Information to Assist Summoned Witnesses' contains a comprehensive explanation of the rights and obligations of summoned witnesses in relation to an OPI coercive hearing, including the right to make a complaint to the SIM. All witnesses examined during the current reporting period were so advised and reminded of their right to complain to the SIM.

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 that the document has been explained to the witness.

11 This is explained in section 32 of the 2007-2008 annual report.

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 informing the witness of the general scope and purpose of the investigation to which the examination relates.

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 (then) 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 certification procedure no longer applies and s. 69 of the Police Integrity Act (which abrogates the privilege against self-incrimination), provides a use immunity (subsection 69(3)).

Whilst the SIM previously proceeded on the basis that the use immunity provided by subsection 69(3) of the Police Integrity Act did not extend to the use of derivative information, it was noted in the 2008-2009 Annual Report (section 30) that this may no longer be the case following the decision of the Supreme Court in *DAS v Victorian Human Rights & Equal Opportunity Commission* which was handed down by Warren CJ on 7 September 2009 (2009 VSC 381). As previously highlighted, although the decision is referable to the MCIP Act s. 39 "use immunity", the similarity between that statutory provision and s. 69 of the Police Integrity Act would suggest that it also has implications for the "use immunity" applicable to the powers exercised by the DPI.

Further reference to the Supreme Court decision is made later in this report (see section 64).

31 Certificates

The certification procedure under the earlier s. 86PA of the Police Regulation and its operation has been the subject of previous annual reports (e.g: Sections 34, 35 & 36 of 2007-2008 Annual Report). It has been replaced by the abrogation of the privilege against self incrimination (s. 69 of Police Integrity Act), which removed previous uncertainty and confusion.

32 Complaints

The SIM's jurisdiction under s. 118 of the Police Integrity Act in relation to complaints has been discussed in previous annual reports. As stated, the SIM can receive complaints from persons attending the DPI in the course of an investigation. Although a complaint can be made under s. 118, the complaint is limited in its subject-matter and is confined to that of the person not being 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.[12] 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.

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

The SIM is not required to investigate every complaint received. Section 119 of the Police Integrity 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 three complaints (two from the same complainant) in this reporting period. A brief summary of each follows:

(a) In a written complaint to the SIM, the stated grievance centred on the subsequent use made against the complainant of material originally obtained as a result of his/her coercive questioning at earlier hearings conducted by OPI. In citing the Police Integrity Act, the complainant alleged a breach of that which prohibited a witness's compelled testimony being used against him/her in later judicial proceedings and which, it was said, therefore made its use illegal and inadmissible.

The SIM responded to the complainant in writing. In referring to his specific statutory role and responsibilities, the SIM informed the complainant that the imposition of jurisdictional constraints made it necessary to draw a distinction between information and/or material obtained through the exercise of coercive power (which "investigative" use is monitored for statutory compliance by the SIM) and the application (or attempted use) of such information/material in later proceedings (which "evidential" use is not a matter about which the SIM has jurisdiction). Although the complainant was therefore informed of the jurisdictional inability of the SIM to assist, it was noted that depending on advice subsequently received, the complainant may consider his/her grievance to be a matter for argument and determination by a court in accordance with established legal principles.

Later and in response to a further letter from the complainant, the SIM reiterated that beyond reviewing the conduct of coercive examinations by OPI to assess statutory compliance, the subject matter of this complaint (i.e. evidential admissibility), did not come within the statutory function of the SIM, but was ultimately a matter for the courts.

(b) In the next matter, the complainant apparently aggrieved by the response received from OPI to his/her allegations, sent a lengthy but disjointed letter together with a series of emails to the SIM requesting assistance in relation to a myriad of alleged incidents which were said to involve *inter alia* members and ex-members of Victoria Police.

Having examined the voluminous material, but unable to identify any issue(s) about which the SIM had jurisdiction, the complainant was advised accordingly.

The fact the SIM could not assist some complainants is a reflection of the very narrow jurisdiction which is given under the Police Integrity Act. The basis of any complaint which 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 governing legislation have been reviewed in previous annual reports.

The SIM has been informed by the DPI that no warrants were executed by OPI during the current reporting period.

The search warrant provisions and those relating to the power to search public authority premises were analysed in the SIM's s. 86ZM Report. 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 the Police Integrity Act.

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

During the current reporting period, the SIM continued to meet with the DPI, as did their respective members of staff. The OSIM also followed earlier practice whereby reports and recordings relating to attendances by persons on the DPI were reviewed and any issues or other matters arising notified to the DPI by letter.

Such correspondence 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 to determine whether formal recommendations are necessary to achieve compliance.

In addition, the OSIM continues to provide a monthly report to the DPI detailing the number of statutory reports received by the SIM from the DPI. This procedure enables the OSIM to maintain an ongoing audit trail of materials received by the SIM. The reports are then checked by the OPI and signed to confirm accuracy before return to the SIM.

35 Compliance With The Act

35.1 Section 115 of the Police Integrity Act

Section 115 of the Police Integrity Act provides that the DPI must give a written report to the SIM within three days after the issue of a summons.

As all such reports received during this reporting period were prepared, signed by the DPI and delivered within time, the SIM is satisfied that the DPI and his staff complied with the requirements of s. 115 of the Police Integrity Act.

35.2 Section 117 of the Police Integrity Act

All 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.

35.3 Other matters

The SIM has not exercised any powers of entry or access pursuant to s. 123 of the Police Integrity Act.

The SIM has not made any written requirement to answer questions or produce documents pursuant to s. 124 of the Police Integrity Act.

35.4 Relevance

Subject to that referred to above, the SIM is satisfied that the overall questioning of persons and requirement to produce documents or other things was relevant and appropriate to the purpose of the investigation concerning which the questions were asked and the requests made.

36 Comprehensiveness And Adequacy Of Reports

That generally no issues have arisen in relation to the comprehensiveness and adequacy of reports is the result of an ongoing consultation process between the SIM and the DPI.

36.1 Section 115

In response to an initial request from the SIM in 2005-2006, the DPI has continued to provide additional information which was sought to assist in the management of s. 115 reports (see section 41.1 of the 2005-206 Annual Report for further details concerning reports under the then s. 86ZB of the Police Regulation Act). The provision of this additional information has enabled the SIM to make a more informed assessment of requests made by the DPI for the production of documents.

36.2 Section 117

When considered in conjunction with the video recording and transcript provided, the s. 117 reports received during the current reporting period were sufficiently comprehensive to assess the questioning of persons concerning its relevance and appropriateness to the purpose of the investigation. The reports complied with the legislative requirements which, importantly, include 'the reasons the person attended.'

Although some reports provided a very general reason for the witness' attendance, other information including the reason for the issue of the summons and the relevance of the attendance to the purpose of the investigation, has assisted the SIM to assess the relevance and appropriateness of questioning of persons attending before the DPI. As discussed in section 42.2 of the 2006-2007 Annual Report, as much information as possible should be included in these reports in order to assist the SIM assess the relevance and appropriateness of questioning.

In addition, the SIM endorses the view expressed in previous reports that the scope of the investigation, insofar as is relevant and appropriate, should be sufficiently set out in the s. 117 report. In this context, the SIM is satisfied with the s. 117 reports received in the current reporting period which have addressed the reasons for the witness' attendance and the nature of the investigation. Given the importance of these statutory reports, the SIM will continue to monitor comprehensiveness and adequacy, particularly the reasons for the witness' attendance and the nature of the investigation.

36.3 Remaining issues

The SIM observes that unlike the previous three reporting periods, OPI's practice of not providing the SIM with transcripts of all examination hearings was fully addressed in the period under review. The SIM is particularly grateful for this because although not an end in itself, it is as an aid to his monitoring function that transcribed proceedings are considered an extremely valuable reference.

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

The SIM made no recommendations in this reporting period pursuant to the SIM's power under s. 121 of the Police Integrity Act.

However, in the 2008-2009 Annual Report the issue of public hearings was discussed at some length (section 37). This included the provisions of s. 65 of the Police Integrity Act and in particular subsection 65(2), which makes provision for the DPI to conduct public examinations if, after taking into consideration various factors, he considers that it is in the public interest to do so. It is unnecessary to revisit the arguments there raised regarding the criteria and procedures which should precede any decision to conduct a public examination.

In the current reporting period there has been no public examination conducted by the DPI. It is to be noted, however, that in the review of Victoria's integrity and anti-corruption system conducted by Mr Peter Allen and Ms Elizabeth Proust, in making their recommendations with respect to the investigative powers to be vested in the proposed new Integrity and Anti-Corruption Commission, it was said that the powers of the body should not extend to holding public hearings, given the potential for significant reputation damage to witnesses.[13]

To that potential hazard should be added concern for the potential safety of witnesses. Coercive examinations conducted by the DPI or his delegate are essentially investigative procedures. No final determination is made at the hearing. Every witness is afforded evidentiary immunity, now arguably extending to derivative information and, in these circumstances, publication of evidence led at a coercive enquiry could potentially compromise that immunity.

There appears to the SIM to be no sound reason why witnesses summonsed to a coercive examination by the DPI ought not receive the same protection as witnesses summonsed before the Chief Examiner who is bound to hold his inquiries in private.

The SIM supports the recommendation of Allen and Proust with respect to the privacy of coercive examinations proposed to be conducted by these new investigative bodies.

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.

13 Review of Victoria's integrity and anti-corruption system (2010 4.3.4 at p. 29).

In relation to the current reporting period, the SIM considers that when the type and the total of matters identified upon review are juxtaposed with the nature and extent of the investigative activity undertaken by OPI, the issues referred to are not numerically significant. However, as previously noted, the oversight of the OPI by the SIM is a limited one.

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 therefore explain what has been done in that role.

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

The background relating to the legislation and its operation is set out in the 2005-2006 Annual Report (sections 44-46). The provisions in the MCIP Act giving further powers to Victoria Police came into operation on 1 July 2005.

As part of the Victorian Government's major crime legislative package the Act was designed to equip Victoria Police with the power to respond to organised crime and gangland murders. The legislation gives far reaching powers to Victoria Police for use in investigating 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".[14] 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 legislation does, however, place the police 'at arms length' from the examination hearing process through establishing the position of Chief Examiner under Part 3 of the Act. It is the Chief Examiner who controls and conducts the examination hearing. 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 initially appointed to the statutory office of Chief Examiner by the Governor in Council on 25 January 2005 and reappointed for a further period on 25 January 2010. Mr Maguire's background has been set out in previous Annual Reports. 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 conducted examination hearings under delegations made by the Chief Examiner pursuant to subsection 65(4) of the MCIP Act. Unless otherwise stated, a reference in this Report to the 'Chief Examiner' also includes the Examiner.

Subsection 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 the Act other than:

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

(b) the power of delegation.

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

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.

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[15] and academics about the undermining of traditional rights of citizens and the use of coercive powers.[16] A review of these concerns and the government's response is discussed in the 2005-2006 Annual Report (section 44) and 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 meaning of an organised crime offence as defined in 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) and which 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) have a purpose of obtaining profit, gain, power or influence.

The 2008-2009 Annual Report noted that at the time of reporting an amendment to the s. 3 definition of "organised crime offence" had been made, but had not yet commenced (section 40). The amendment, which extends the fourth limb of the definition by including a purpose of obtaining sexual gratification where the victim is a child, came into effect on 1 February 2010.[17]

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.[18] Section 7 of the MCIP Act prohibits the publication or reporting of an application for a CPO unless otherwise ordered by the court.[19]

15 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.

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

17 Section 3 of the *Major Crime Legislation Amendment Act 2009.*

18 Section 5(8) *Major Crime (Investigative Powers) Act 2004.*

19 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).

An application to the Supreme Court for a CPO may 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.[20] 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."[21]

Subsection 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

(2) the name and rank of the person who approved the application

(3) particulars of the organised crime offence

(4) the name of each alleged offender or a statement that these names are unknown

(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 subsection 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.[22]

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.

20 Section 5(2) *Major Crime (Investigative Powers) Act 2004*.
21 ibid., s. 5(1).
22 ibid., s. 6.

This second requirement adds a further protection for the community in that only investigations considered to be in the public interest benefit from the making of a CPO. The legislation is clear in requiring both tests to be met before the court can make such an order. The legislature has clearly stated that a well-founded suspicion on its own is insufficient to allow the use of such intrusive powers against members of the community.

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

(1) the organised crime offence for which it was made

(2) the name of each alleged offender or a statement that the names are unknown

(3) the name and rank of the applicant

(4) the name and rank of the person who approved the application

(5) the date on which the order is made

(6) the period for which the order remains in force

(7) any conditions on the use of the coercive powers under the order.

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

The legislation allows for orders to be extended, varied and revoked.[23]

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).

In addition, reference was made in the 2008-2009 Annual Report to the *Major Crime Legislation Amendment Act 2009* which amended the MCIP Act by introducing *inter alia* a number of significant procedural and process requirements to be followed by the court in hearing an application for the revocation of a coercive powers order (section 41.1.1). This amending legislation (which had not yet commenced), came into effect on 1 February 2010[24] such that if the Chief Commissioner of Police objects to the disclosure or production of sensitive information at a revocation hearing, he/she may apply before the hearing to the Supreme Court to determine the revocation application either by way of confidential affidavit, a closed court hearing or one conducted 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 compromised.

23 ibid., ss. 10 and 11

24 Section 4 of the Major Crime Legislation Amendment Act 2009.

41.1.2 Extension of CPOs

An extension of an original order can only be made for a period not exceeding 12 months from the day on which the CPO would expire. The procedure is the same as that which applies for an application under s. 5 of the MCIP Act. That a CPO can be extended or varied more than once was reflected in the period under review in which applications for further extensions were made.

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 (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	09-10	08-09	07-08	06-07	05-06	Total
Number of CPO's Issued by the Supreme Court	**5**	2	1[25]	6	4	18
Duration of Orders	**12 months**	6 months[26]	6 months	6 months [27]	6 months	-
Number of Orders with Conditions Attached	**4**	2[28]	1[29]	6	1	14

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 A to this report.

42 The Role Of The Special Investigations Monitor

The SIM plays an important role in oversighting the exercise of coercive powers by the Chief Examiner and the statutory obligations of the Chief Commissioner. Both are required to report specified 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.

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

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 requires the Chief Examiner to give a written report to the SIM within three days after the issue of a witness summons or the making of a s. 18 order.

Every s. 52 report must state the name of the person the subject of the summons or order and state 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 subsection 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 under s. 15 of the MCIP Act for the issue of summonses or the making of custody orders under s. 18 and has provided a copy of the video recording to the SIM with the s. 52 report on all applications made in the period under review.

During the current reporting period there were no issues raised by the SIM in relation to the information provided by the Chief Examiner in the s. 52 reports received. All reports indicated that, where applicable, the relevant CPO had been extended or varied. In addition, the Chief Examiner has continued to provide the SIM with copies of any extension orders as soon as they become available.

43.2 Section 52 reports received

A total of 55 s. 52 reports were received for the 2009-2010 reporting period. Every s. 52 report received by the SIM during this period was prepared and signed by the Chief Examiner or Mr McBurney, acting pursuant to a delegation from the Chief Examiner, within three days after the issue of a summons.

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

The SIM does not receive s. 52 reports for summonses issued by the Supreme Court. This is discussed further at section 48.4 of this report.

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.[30]

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

The prescribed matters include the date, 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 (and during the period under review, was) accompanied by a copy of a video recording of the examination and transcript (if prepared). In this context, it is noted that during this period the Chief Examiner ensured that transcript referable to each coercive examination was provided to the SIM with the s. 53 report.

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.

43.4 Section 53 reports received

The SIM received 59 s. 53 reports during the 2009-2010 reporting period.

All s. 53 reports so provided to the SIM 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.

As noted, 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	09-10	08-09	07-08	06-07	05-06	Total
s. 52 - Chief Examiner must report witness summonses	**55**	73	36	10[31]	14	188
s. 53 - Chief Examiner must report other matters	**59**	50	25	50	16	200

44 Complaints: Section 54

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

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

31 Some reports included information for two or more witnesses.

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.

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.

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.[32]

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 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.[33] 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.[34]

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.

32 Section 58 *Major Crime (Investigative Powers) Act 2004*.
33 ibid., s. 60.
34 The penalty for breach of these requirements is level six imprisonment (five years maximum)(subsection 60(4) of the *Major Crimes (Investigative Powers) Act 2004*).

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: 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.[35]

48.1 Types of Summonses Issued

In the reporting period 1 July 2009 to 30 June 2010 a total of 63 summonses were issued.[36] Of these, 58 summonses were to give evidence, 2 were to give evidence and to produce documents or other things and 3 were to produce specified documents or other things. There were no summonses for immediate attendance during this period.

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

Types of Summonses Issued	09-10	08-09	07-08	06-07	05-06	Total
To produce a specified document or other thing	**3**	7	3	1	0	14
To give evidence	**58**	63	20	46	17	204
To give evidence & produce documents or other things	**2**	9	5	4	1	21

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.[37]

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

36 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.

37 Section 16 *Major Crime (Investigative Powers) Act 2004*.

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.[38]

Every application to the Supreme Court must be in writing and must include the information specified in subsections 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.[39] 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 on 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.

48.2 Summons issue procedure

As noted, 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.

The recordings greatly assist the SIM in understanding why a summons or order has been issued 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 which address 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

38 ibid., s. 14(3).
39 ibid., s. 15(3).

- 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 reasons for this
- the reason 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 an order, the custody details of the prisoner and the arrangements to 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.

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

A summons or s. 18 order issued by the Chief Examiner attracts additional reporting requirements because the exercise of this discretion is not subject to scrutiny by a court. For this reason, subsection 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.

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 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 reasons must be recorded under subsection 15(6)(b) of the Act.

48.3 Conditions on the use of coercive powers

Section 9(2)(g) of the MCIP Act requires that a CPO 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, in certain circumstances, from issuing a witness summons 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 subsection 25(2)((k) of the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and s. 39 of the MCIP Act, which provision abrogates the privilege against self-incrimination. 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) and discussed further at section 64 of this report.

48.4 Procedure relating to summonses issued by the Supreme Court

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

This matter was discussed by the OSIM and Office of the Chief Examiner in the 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, 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 in ensuring that reports are accurate.

49 Reasonable And Personal Service Requirements

Subsections 14(9) and 15(8) of the MCIP Act specify that where a summons is issued either by the Supreme Court or the Chief Examiner, it must be served a reasonable time before the attendance date. The only exception 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 and, if considered appropriate, representation.

The SIM considered that all summonses issued by the Chief Examiner within this reporting period were served within a reasonable time.[40] That said, 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, as noted in earlier Annual Reports, whether service is "reasonable" is not something capable of a comprehensive answer, but is a question of fact which requires consideration and assessment by the SIM on a case by case basis.

50 Contents Of Each Summons

The Act and the Regulations are 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, that is to give evidence or produce documents or other things or both

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

- 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/she is not required to comply; a person in this situation must give written notice and proof of age.[41]

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 held in prison or a police gaol can be compelled under s. 18 of the MCIP Act to attend before the Chief Examiner. In these circumstances it is open to a member of the police force to 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 to that which applies to an application to the Supreme Court or the Chief Examiner for the issue of a summons. 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.

The SIM received notification from the Chief Examiner of seven s. 18[42] orders being made in the period under review.

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 which 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 must 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;[43] the circumstances under which disclosure may occur must be specified in the notice itself.

41 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.

42 Three s. 18 orders were issued in respect of one witness. This was the result of having to twice adjourn the lengthy examination proceedings.

43 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 subsection (9).

A reasonable excuse under subsection 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 previously reported, the Chief Examiner having amended the notice which he had originally drafted, implemented a further change which included a short explanation of 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 subsection 20(6) of the MCIP Act as to include seeking legal advice in relation to a summons or order.

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

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

Confidentiality is also protected by the Chief Examiner requiring legal representatives to destroy all examination hearing notes or alternatively having the notes sealed and kept securely at the Office of the Chief Examiner or in the custody of the legal practitioner.

53 When Confidentiality Notices May Or Must Be Issued

The Chief Examiner must issue a confidentiality notice under subsection 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.

Subsection 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 subsections 20(2)(a) and (c). Consideration was given in the s. 62 Report to confidentiality notices and the cessation of effect (pages 109-110). In this context, recommendations were made to amend the legislation.

The 2008-2009 Annual Report referred to the legislative passage of a number of amendments affecting the operation of the confidentiality provisions, but which had not yet commenced operation (section 53). These amendments (which included providing for the cessation of confidentiality notices after five years), came into effect on 1 February 2010.[44]

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
- (in the case of a summons but not a s. 18 order), compel the production of documents or other things from a witness which are not subject to legal professional privilege [45]
- 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 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[46]
- upon application, order the retention of documents or other things by police for a period not exceeding 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.

44 Section 6 of the *Major Crime Legislation Amendment Act 2009*.

45 The 2008–2009 Annual Report discussed the Chief Examiner's use of coercive power to compel a person to produce documents in an examination hearing (section 56.11) During the current reporting period and consequent upon passage of a new *Victorian Evidence Act 2008*, s. 35A was introduced into the MCIP Act. This was necessary to preserve the power of the Chief Examiner to question and confiscate documents in the possession of witnesses who have not been summonsed, but who are present and competent to give evidence. Introduced as part of the *Statute Law Amendment (Evidence Consequential Provisions) Act 2009*, this amendment came into effect on 1 February 2010, as did an identical provision preserving the power of the DPI (i.e. s. 65A of the Police Integrity Act).

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

Section 37 of the MCIP Act makes it an offence for a person who having been served with a summons under the Act, without reasonable excuse then 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.[47] 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 if 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 includes imprisonment for up to 12 months.

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

However, the SIM notes that during the current reporting period an arrest warrant (pursuant to s. 46 of the MCIP Act) was issued in relation to a witness who attended part of the coercive examination hearing, but then absconded. In this context s. 46 permits a police member to make application to the Supreme Court in respect of a person who, after being served with a witness summons, then fails to attend the hearing without reasonable excuse, absconds or who is otherwise attempting to evade service of a summons.

55 Contempt Of The Chief Examiner

The Chief Examiner can issue a certificate of charge and an arrest warrant 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.

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.

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

The 2008-2009 Annual Report highlighted a case in which a person held in custody was directed to attend before the Chief Examiner and to there give evidence in relation to the investigation of an organised crime offence (section 55). However, an issue arose in circumstances in which the provisions of (the then) s. 49 of the MCIP Act specified that a person is guilty of contempt of the Chief Examiner if "in answer to a witness summons" he/she refuses *inter alia* to be sworn or to make an affirmation when required to do so. The matter in contention was whether a person appearing before the Chief Examiner pursuant to a written (custody) order issued under s. 18 of the MCIP Act could properly be said to have appeared "in answer to a witness summons"? That is, notwithstanding provision in the Act which operated to make the term "custody order" and "witness summons" interchangeable, was there anything in the s. 49 contempt provisions which militated against adopting the same "interchangeable" interpretation? In relation to this important issue, the previous SIM observed (at p.58 of 2008-2009 Annual Report) that "[W]hilst...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." This led the SIM to conclude (at p.59) that "[T]o the extent that it is considered a drafting issue only...it is open to categorise the dichotomy...as an unintended consequence. It is understood that appropriate amendment to the legislation is being considered."

In the result, the MCIP Act was amended to make it clear that a custody order was to be treated as a witness summons when used in the context of s. 49 and for other purposes under the Act. This amendment came into effect on 16 December 2009.[48]

56 The Conduct Of Examinations By The Chief Examiner

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

56.1 The need for a support person and other examination hearing issues

Subsection 34(3) of the MCIP Act requires the Chief Examiner to direct an independent person to be present at an examination whenever a witness believed to have a mental impairment so wishes. However, this does not operate to fetter a discretion of the Chief Examiner to also authorise the presence of an additional "support" person to assist and offer counsel to the witness during the examination hearing.

In one matter reviewed by the SIM, the Chief Examiner believed the witness to have a mental impairment (s. 3 of the MCIP Act defines "mental impairment" to include impairment because of mental illness, intellectual disability, dementia or brain injury). Found to be illiterate, the witness was totally reliant upon others whenever something needed to be read and/or signed. Subject, therefore, to the witness expressing a wish to the contrary, subsection 34(3) of the Act required the Chief Examiner to direct that an independent person be present during the examination hearing. In addition, that the witness elected to attend the examination accompanied by a parent and without a legal representative, created an obligation on the Chief Examiner to explain that beyond the entitlement to have an independent person present, the witness also had a statutory right to be legally represented. The witness was further informed that it was within the discretionary power of the Chief

48 Section 7 of the *Justice Legislation Miscellaneous Amendment Act 2009.*

Examiner to also permit others (in this case the parent of the witness), to be present during the examination hearing. In the circumstances and to allow the witness an opportunity to consider his/her position (including the possible engagement of a legal representative), the Chief Examiner adjourned the hearing. On the return date and having acknowledged the wish of the witness to be legally represented and to have an independent person present, the Chief Examiner authorised the presence of both. In then providing the independent person with a comprehensive explanation of the role he/she was expected to play, the Chief Examiner next addressed the witness and his/her legal practitioner and explained and contrasted the role of the independent person from that of the legal representative. The SIM notes that it was in response to the desire and stated need of the witness to have his/her parent present, that the Chief Examiner then took the unusual step of also permitting this to occur.

The Chief Examiner then further adjourned the hearing in order to give the witness, the independent person (and with his/her concurrence, the legal representative), sufficient time and opportunity to speak before any evidence was given.

A further issue in this matter concerned the operation of a confidentiality notice which (together with the summons to give evidence) was served on the witness prior to the first hearing date. More particularly, the witness had made it known to the person who served the summons and related documentation, that he/she could neither read or write. In order to ensure that all relevant matters were brought to the attention of the witness, the server suggested that the official papers be shown to and read by the witness's parent. That this in fact happened gave rise to a potential breach of the confidentiality provisions of the Act. The Chief Examiner dealt with his by explaining to the witness and to his/her parent, the operation of s. 20 of the Act (including the meaning of "reasonable excuse" and the penalty for an impermissible disclosure). Whilst emphasising the importance of maintaining confidentiality, the Chief Examiner nevertheless found that in the circumstances as presented, it was not unreasonable for the documentation to have been shown to the parent.

This examination raised a number of important and challenging preliminary issues. Having reviewed the material, the SIM considers these matters to have been appropriately addressed and well handled by the Chief Examiner, whose careful, patient and considered approach extended not only to the witness and his/her parent, but also to the independent person and the witness's legal representative.

As discussed in the 2008-2009 Annual Report (section 56.6), the Chief Examiner's power to authorise the presence of a "support person" is not dependent upon whether the witness is believed to have a mental impairment (unlike that of an independent person), but may apply to someone, for example, who suffers short-term memory problems, a dependency or whose emotional state demonstrates a need for the particular help, assistance and comfort which a "support" person can bring during the conduct of a coercive examination.

56.2 Confidentiality

As previously discussed,[49] the direction that confidentiality notices be served with all witnesses summonses issued by the Chief Examiner in this reporting period is one which, given the serious and sensitive nature of the investigations undertaken, the SIM considers justified.

49 Section 53.

The following cases reviewed by the SIM illustrate the type of confidentiality issues which the Chief Examiner may be called upon to address during a coercive examination hearing.

56.2.1 In one examination, the SIM noted the witness to have been querying the Chief Examiner about the effect of a confidentiality notice which had been served on him/her in conjunction with the "summons to witness" documentation. Specifically, the witness was concerned to question exactly who had been made subject to the confidentiality provisions of the MCIP Act. The witness aside, this is to ask whether it included, for example, a third party whose physical presence to the witness at the time of service is so proximate as to make him/her aware of the highly confidential nature of the legal process involved? In answering this question, the Chief Examiner referred to and explained what he considered to be the legal scope of these provisions when persons other than the witness are involved. However, following a careful review of the examination transcript, the SIM wrote to the Chief Examiner seeking clarification about certain aspects of this explanation. The Chief Examiner responded in writing and although this exchange evidenced a difference in legal interpretation, the SIM further noted the Chief Examiner's advice highlighting the implementation of certain procedural changes concerning how personal service may best be effected. As a means of further strengthening and protecting confidentiality, the SIM welcomed these amendments and advised the Chief Examiner accordingly.

56.2.2 The need to maintain investigative integrity and confidentiality is reflected not only in the issuance of (s. 20) confidentiality notices, but in the directions which the Chief Examiner may (and, in certain circumstances, is required to) make under s. 43 of the MCIP Act, which operate to restrict the publication of evidence and other information arising from an examination hearing. Although the circumstances in which the Chief Examiner may/must make such a direction are discussed in more details later in this report[50], in another matter reviewed by the SIM the witness queried the practical application of such a direction. More particularly, the witness was concerned with his/her ability to comply with a non-publication/communication prohibition at the same time as managing a condition which not only required ongoing medical treatment, but which was said to have been exacerbated by the stress of having to appear as a witness at the coercive examination. In all the circumstances and having referred to an existing enforceable "doctor/patient" obligation of confidentiality, the Examiner acknowledged the witness's concerns and varied the terms of the non-publication/communication direction to allow the witness to communicate with his/her treating doctor. This variation meant that in the course of receiving ongoing treatment, it was permissible for the witness to inform the medical practitioner about his/her participation in a coercive hearing, but not as to anything said, produced or arising from the examination.

The SIM considers that the decision taken by the Examiner to vary the s. 43 order was appropriate. This is because the variation permitted the witness to continue with his/her ongoing medical treatment, but in a manner which did not risk prejudicing the integrity or effectiveness of the investigation.

50 Section 63.

56.2.3 Following the conclusion of another examination, the SIM was informed by the Examiner that at the time when the coercive questioning of a witness was about to commence, Victoria Police officers had attended the hearing premises and, court order in hand, sought to interview the witness over an unrelated matter i.e. one having no connection with the organised crime offence then under investigation. In the result, the police members were refused entry to the hearing room. The SIM considers this to have been a prudent decision in the public interest, preserving as it did, both the integrity of the investigation and the coercive examination process by ensuring that the only persons privy to the hearing were those already bound by and subject to the strict MCIP Act confidentiality requirements and sanctions.

Nevertheless, that Victoria Police members were present at premises where an otherwise confidential hearing was to take place, led the SIM to write to the Chief Examiner seeking further information. In response, the Examiner and a member of Victoria Police (Office of Chief Examiner) attended the OSIM and there met with the SIM and the OSIM Senior Legal Officer. This constructive meeting enabled the SIM to receive and contextualise additional information/material and to clarify and expand upon matters raised previously. It proved to be critically important to the SIM's further consideration and final assessment of this matter.

In the result, the SIM was not satisfied that any breach of confidentiality had been demonstrated by any person or body. That this included the actions of the Victoria Police members in attending at a time when the witness was in a coercive hearing, must be considered against all the facts which, when subsequently known, led the SIM to consider that the conduct of these members was not unreasonable.

The SIM acknowledges the assistance and co-operation extended by the Office of Chief Examiner in the course of reviewing this examination.

56.3 Fair and transparent handling

In this matter, the coercive examination was conducted over the course of five days and in circumstances where an already inherently complex matter was further complicated by a number of external factors which, in combination, necessitated multiple adjournments. These "other matters" included the witness having to simultaneously deal with a pending but otherwise unrelated criminal proceeding and his/her own state of health and consequent ability to continue participating in and responding to the coercive examination.

The SIM considers these proceedings to be notable, not simply because of the duration, but for the patient approach and fair and transparent manner in which the Chief Examiner dealt with a most difficult and complex hearing.

56.4 Charter of Human Rights and Responsibilities

In this coercive examination, a number of preliminary legal issues were raised by the witness's legal practitioner. Some were identified prior to the return date of the witness summons and others on the day of hearing (but before the commencement of any coercive questioning). These included:

Definition of an organised crime offence

As previously discussed,[51] the s. 3 MCIP Act definition of an "organised crime offence" consists of a number of elements including that it must form *'[p]art of systemic and continuing criminal activity."* This prompted the witness's legal practitioner to write to the Office of Chief Examiner and question the lawfulness or otherwise of his/her client's proposed coercive examination. Specifically, the legal practitioner queried how a single event (being the subject of the proposed coercive examination) could possibly satisfy a definitional element which includes "systemic and continuing"?

The response given (both by the Office of Chief Examiner staff and the Examiner), was to refer the legal practitioner to s. 8 of the MCIP Act which provides that before making a coercive powers order the Supreme Court must be satisfied of a number of matters, including that it is in the public interest to do so having regard to the nature and gravity of the alleged organised crime offence. In this context, the legal practitioner was advised that the answer to his/her question lay with the Supreme Court and its decision whether or not to issue a coercive powers order. That this should be the case is because the making of such an order provides the investigation into the organised crime offence and the attendant coercive examinations with the requisite authority needed to proceed according to law.

The SIM agrees that the response provided to the witness's legal practitioner represents a clear, concise and accurate statement of the law.

Legal Aid and the *Charter of Human Rights and Responsibilities Act 2006*

In further correspondence with the Office of Chief Examiner, the witness's legal practitioner asserted that insofar as legal aid had been denied, it would be both unfair and a breach of law for his/her client to have to appear at a coercive examination without legal representation. More particularly, it was submitted that to require him/her to do so would constitute a breach of the Charter[52]. In response, a letter on behalf of the Office of Chief Examiner was forwarded to the witness's legal practitioner which not only confirmed the absence of any obligation under the MCIP Act (and hence on the Office of Chief Examiner) to provide funding for the purpose of enabling a summonsed witness to be legally represented, but that equally no such right existed under the Charter.

Whilst in further correspondence with the Office of Chief Examiner, the witness's legal practitioner conceded that this may be the case under the MCIP Act, it was said to be otherwise under the provisions of the Charter which (it was submitted), imposed an obligation to fund legal representation.

51 Section 40.

52 *Charter of Human Rights and Responsibilities Act 2006*.

At the examination hearing and prior to commencement of any coercive questioning, the witness was represented by the same legal practitioner who again raised the issue of legal funding. The Examiner was informed that although the status of the application for legal aid was being reviewed, he (the Examiner) ought make a direction that the body responsible attend to it as a matter of urgency.

Although the Examiner rejected this application (there being no legal authority to make such a direction), he observed not only that the witness was entitled to be legally represented (under the MCIP Act), but that every effort should be made to make such representation available. Accordingly, in order to give the witness's legal practitioner a further opportunity to attempt to resolve this issue, the Examiner temporarily adjourned the proceedings. Upon resuming, the Examiner was informed that although matter of legal funding was still unresolved, the witness nevertheless wanted the coercive examination hearing to proceed without delay.

In reviewing this examination, attention focused on subsection 34(1) of the MCIP Act which expressly provides that a witness giving evidence at an examination may be represented by a legal practitioner.[53] Whilst, however, the SIM considers this to be a particularly important provision in the context of the otherwise limited rights available to those who are summonsed to appear to give evidence/produce documents or other things at a coercive examination, it nevertheless remains something which creates but an entitlement, as distinct from the right to the provision of, legal representation.[54] When considered in this context, it is apparent that the proposition advanced by the witness's legal practitioner (that the MCIP Act obliges the Chief Examiner to provide legal representation) is, in the SIM's opinion, not supportable. Similarly, the proposition that a failure to provide legal representation constitutes breach of the Charter. To the extent that this assertion is presumably founded on s. 25 of the Charter ("Rights in criminal proceedings"), the SIM considers it to be misconceived given that s. 25 applies only to *"A person charged with a criminal offence."* In the view of the SIM, s. 25 cannot on a proper construction be considered as having any application to a witness who attends under summons for the purpose of being examined by a non-decision making investigative authority.

Accordingly, having reviewed and considered the transcript and attendant material arising from this examination hearing, the SIM agrees with the construction placed on the MCIP Act and the views expressed by the Office of the Chief Examiner (prior to) and the Examiner (in the course) of responding to these important preliminary matters.

56.5 Outstanding criminal charges

Prior to the commencement of the coercive examination, the witness's legal representative applied for an adjournment on the grounds that his/her client, having been charged with the commission of a number criminal offences, was still awaiting to be tried. With a trial date pending, it was submitted that it would be inappropriate to proceed with a coercive examination before these matters had been finalised at court.

53 See section 58 of this report where the matter of legal representation is discussed further.

54 This contrasts with Division 5 of Part 4 of the Police Integrity Act which provides the Secretary of the Department of Justice with a discretion to approve an application from a witness for legal assistance.

In refusing the adjournment, the Chief Examiner cited grounds which were expanded on and supplemented by an Addendum to the (s. 53) report which must be given to SIM following the completion of every coercive examination.

In examining the coercive powers order made and varied by the Supreme Court and taking account of the particular offences with which the witness had been charged, the SIM considered that the decision of the Chief Examiner to refuse the adjournment and to proceed with the coercive hearing was soundly based.

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 any question. This applies whether or not the person is represented.

The process under s. 31 also ensures that there is consistency in the information which 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 which the Chief Examiner must follow before any question is asked of a witness, or the witness produces a document or other thing are:

(a) 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

(b) 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 which apply to the use of any evidence given during an examination

(c) 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

(d) confidentiality requirements are to be explained to the witness

(e) all witnesses are to be told of their right to be legally represented during an examination and, where applicable, their right to have an interpreter or the right to have an independent person present where age or mental impairment is an issue

(f) 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.

In this context, the SIM notes that during the current reporting period s. 31 was amended to provide that when a witness attends an examination solely to produce documents on behalf of a corporation or an Authorised Deposit Taking Institution (ADTI), the Chief Examiner is no longer required to comply with subsections (a) and (b) above (i.e. those matters dealing with age of the witness and the privilege against self-incrimination). This amendment came into effect on 16 December 2009.[55]

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 which 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 be in a position to understand the ramifications of the privileges before their evidence is given. A witness is also asked by the Chief Examiner to confirm that he/she understood what each privilege entailed and how it applied or not in an examination. This process step is one which the SIM encourages. The privileges contain difficult concepts which must be understood by a witness and the best means to do this is by seeking confirmation from the person concerned.

58 Legal Representation

As was noted earlier,[56] subsection 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 subsection 36(1) of the MCIP Act which provides the Chief Examiner with a discretion to decide whether to allow a legal representative to examine or cross-examine on a matter considered relevant to the investigation of the organised crime offence.

This provision, 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 role to be played by a legal representative during the examination.

In the 2005–2006 reporting period, the Chief Examiner provided the SIM with a copy of the procedural guidelines applicable to legal representation.[57] The guidelines provide a thorough explanation of the requirements which exist under the MCIP Act and the procedures which are appropriate to be applied in an examination (section 64 of the 2005-2006 Annual Report).

55 Section 9 of the *Justice Legislation Miscellaneous Amendment Act 2009*.
56 Section 56.4.
57 These procedural guidelines form part of a detailed document prepared by the Chief Examiner.

The guidelines acknowledge the importance of legal representation in ensuring procedural fairness. 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 which apply and how certain rights are abrogated.

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

59 Mental Impairment

As discussed earlier in this report,[58] subsection 34(3) deals with the examination of a person who is believed to have a mental impairment (as defined in s. 3 of the MCIP Act), In these cases and if the witness so wishes, the Chief Examiner must direct that an independent person be present during the examination and that the witness may communicate with that person before giving evidence at the examination.

In one examination reviewed by the SIM, it was before commencement of any formal questioning that the Examiner identified a need to further engage the witness concerning his/her current/past medical condition and treatment. That the Examiner considered this necessary was to ensure that he had before him all the information necessary to properly assess whether the witness had a mental impairment and, if so, whether he/she wished to have an independent person present during the examination.

In this context, the Examiner undertook a thorough enquiry of the witness's medical history, including the state of his/her memory, dates of hospitalisation and details of past and present treatment and medication. Having then explained the purpose and the role of an independent person in the hearing process, the Examiner invited the witness to indicate whether he/she would be assisted by having such a person present. Although the witness did not believe that he/she would be, the Examiner confirmed that the opportunity to reconsider this option was one which remained open to the witness, even after the coercive questioning had commenced.

In another matter, the Examiner ascertained that the witness had previously sustained serious and extensive physical injuries which necessitated lengthy hospitalisation. The witness suffered a number of ongoing health issues, including some sensory loss and memory impairment.

The SIM noted that, believing the witness to have a mental impairment, the Examiner informed him/her that in the circumstances he (the Examiner) favoured the presence of an independent person, but that this was ultimately a matter for the witness. Although the witness expressed a preference to proceed alone, the Examiner nevertheless reminded him/her that in the event of a change of mind, he would adjourn the hearing and arrange for an Independent Person to attend and assist the witness.

58 Section 56.1.

In reviewing both these coercive examinations, the SIM considers that the detailed enquiry undertaken by the Examiner in relation to this complex and sensitive issue was not only well considered, but was handled with commendable care and attention.

Further to the important public interest considerations which attach to the use of coercive powers generally, it is the view of the SIM that in the period under review both the Chief Examiner and the Examiner demonstrated the sensitivity which must be used when dealing with those believed to have a mental impairment and 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.

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 which may assist an investigation into a serious (organised crime) offence. The gravity of the criminal behaviour is such that the public interest in the coercive examination of the criminal conduct outweighs the person's right to exercise this privilege.

In order to protect a witness who has given incriminating evidence, subsection 39(3) of the MCIP Act limits the use which 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 subsection 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 therefore provides that the privilege must not only be explained to the witness, but that insofar as it does not apply to proceedings before the Chief Examiner, the exceptions must also be detailed.

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.

In the view of the SIM, this step ensures that a witness understands that there are certain protections in place which prevent evidence given by him/her at an examination from being used against that person in subsequent proceedings. 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.

That the explanation given by the Chief Examiner in relation to the abrogation of the privilege against self incrimination has been amended to include a reference to and the implications of the 2009 decision of Warren CJ in *DAS v Victorian Human Rights and Equal Opportunity Commission*, is discussed further in the section of this report dealing with the use of derivative information (section 64).

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 59 examinations were reported to the SIM, being an increase of 10 from the previous reporting period. Of the 59 witnesses examined, 36 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	09-10	08-09	07-08	06-07	05-06	Total
Witnesses examined	**59**	49	24	50	15	197
Witnesses legally represented	**36**	19	12	30	9	106

62 Legal Representation – Right To A Particular Practitioner

Although subsection 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 a particular legal practitioner.

In relation to 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. However, that this is not always possible was highlighted in the 2008-2009 Annual Report (section 62). It is in this context that the SIM reviewed other examination hearings in the current reporting period which illustrate the complexities accompanying what may otherwise have been thought to be uncomplicated and straightforward e.g. a request by witness AB to be represented by legal practitioner CD.

62.1 Examples of legal representational issues arising at a coercive examination

62.1.1 In this matter it was before commencing the coercive examination that, the Examiner informed legal counsel (counsel) for the witness that his/her instructing solicitor (the instructor), was also representing another person who was awaiting trial in relation to an organised crime offence which was directly connected with the coercive examination under review. More particularly, it was said that had the instructor sought to attend this examination hearing in person, he/she would have been excluded by the Examiner. This is because not to have done so would have placed the instructor in a difficult, if not impossible, position of conflict (i.e. attempting to simultaneously represent two clients).

Further, that both counsel and the witness were subject to confidentiality directions, meant that they were prevented from discussing with others any evidence arising from the coercive examination.

In the circumstances, the Examiner was not prepared to commence questioning until such time as counsel had contacted the instructor and explained to him/her that it was impermissible for them to engage in any discussion about questions asked or answers given during the proposed coercive examination. The Examiner then temporarily adjourned the proceedings to allow counsel an opportunity to contact and discuss the matter more fully with the instructor. Having made contact counsel then confirmed with the Examiner that he/she (counsel) was under no obligation to disclose to the instructor any information arising from the coercive hearing. Given this assurance, the Examiner then directed that the examination hearing commence.

The SIM agrees with and commends the sound and pragmatic approach taken by the Examiner, enabling as it did, the witness to retain his/her preferred legal representative without compromising investigative integrity or confidentiality.

62.1.2 Prior to commencement of the coercive hearing and in the absence of the witness, the Examiner raised an issue with the witness's legal representative. This was a matter directed to his/her previous appearance on behalf of another witness at an earlier coercive examination which directly concerned the current (i.e. same) investigation and in respect of which confidentiality directions had been made.

The issue for the Examiner was that if the legal representative was given leave to appear on behalf of the witness in the current proceedings, there was a risk of inadvertent disclosure (i.e. the legal representative unintentionally revealing to his/her client [the witness] evidence given at the earlier hearing). That event, should it occur, would involve potential prejudice to the investigation and a contravention of the earlier non-publication direction.

Before giving his ruling, the Examiner carefully considered a range of matters which not only included the provisions of the MCIP Act and relevant Federal case law, but also involved:

- reviewing examination transcript of the earlier proceedings (which hearing he also conducted as delegate of the Chief Examiner)
- juxtaposing matters previously traversed (in the earlier hearing) with questions proposed to be asked in the course of the current examination
- assessing the risk of prejudice to the investigation
- confirming the statutory obligation to take all reasonable steps to preserve the confidentiality of the examination process
- acknowledging, (subject to the primacy of any of the above listed matters), that the witness had stated a preference to be represented by a particular legal practitioner.

Although noting the potential for the investigation to be prejudiced, the Examiner ultimately ruled in favour of the witness's legal practitioner being given leave to appear at the examination hearing. Accordingly, although reaffirming his view that the exclusion of a legal practitioner is an appropriate safeguard which can be used to preserve investigative integrity, the Examiner did not consider that the circumstances of this particular matter justified the making of such a direction.

The SIM considers the decision of the Examiner to be well considered and soundly based.

63 Restriction On The Publication Of Evidence

That which is common to every coercive examination reviewed by the SIM is the serious and highly sensitive nature of the matter(s) under investigation. In therefore seeking to minimise the risk of unlawful disclosure (which may severely prejudice or even irrevocably compromise an investigation), the SIM notes that the Chief Examiner continued to make extensive use of a power provided in s. 43 of the MCIP Act to make "non-publication/communication" directions.

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 as he specifies.

Subsection 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.[59]

In this context the SIM notes that during the current reporting period the use of this provision was not necessarily confined to the witness concerned, but extended to others who, either by necessity (e.g. carer) or in circumstances considered by the Chief Examiner to be reasonable (e.g. where the witness was illiterate), had become aware of the fact that a person had been summonsed to give evidence at a coercive examination and/or of the evidence given at the hearing itself. In these circumstances, both the Chief Examiner and the Examiner ensured that those concerned were made subject to the strict MCIP Act confidentiality provisions. This included providing a full explanation of what the statutory obligation to maintain confidentiality meant in practice, as well as informing the person(s) concerned that a breach of a s. 43 direction is a serious offence, punishable by a term of up to 5 years imprisonment.

Pursuant to subsection 43(4), only a court can override a direction given by the Chief Examiner. This subsection applies where a person has been charged with an offence before a court and the court is of the opinion that it is desirable in the interests of justice that the evidence, the subject of the direction, be made available to the person or his/her legal practitioner. Where a court forms this view, it may give the Chief Examiner or the Chief Commissioner a certificate requiring the evidence to be made available to the court. In the event that this is done, the Chief Examiner or the Chief Commissioner (as the case requires), must make the evidence available to the court.

However, although subsection 43(4) of the MCIP Act expressly provides that the issuance of certificate is a discretionary matter solely for the court, it was silent as to the means by which a court could receive the information 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 was implemented as part of the *Major Crime Legislation Amendment Act 2009* as amended by the *Justice Legislation Miscellaneous Amendment Act 2009*.[60] These amendments (which came into effect on 1 February 2010), ensure that the court in considering whether to release evidence subject to a restriction on publication is able to make its decision after examining the evidence and considering submissions (if any) made by the Chief Examiner, the Chief Commissioner of Police or any interested witness.

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

60 Sections 10 and 11.

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

The Chief Examiner cannot issue a direction which in any way impedes 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.

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 subsection 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 four earlier s. 43 directions relating to witnesses who had been summoned to an examination hearing.

The rescinded directions followed an application by Victoria Police who were seeking to use previous coercive examination evidence given by witnesses in support of ongoing prosecutions, including that of murder and other serious criminal offences. Also rescinded at this time were confidentiality notices previously made.

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

64 The Use Of Derivative Information

The intersection between subsection 25(2)(k) of the Charter[61], which provides that a person cannot be compelled to testify against him/herself or to confess guilt and s. 39 of the MCIP Act, which abrogates the privilege against self-incrimination, has been discussed in earlier Annual Reports (2007-2008 at section 54.4.2 and 2008-2009 at sections 30, 48.1 and 64). In this context, it was previously noted that Warren CJ of the Victorian Supreme Court handed down judgement in *Das v Victorian Human Rights and Equal Opportunity Commission*[62] (DAS) shortly before publication of the 2008-2009 Annual Report. This decision concerned the coercive powers exercised by the Chief Examiner, in particular the use immunity provided by s. 39 of the MCIP Act (which powers are essentially the same as the powers exercised by the DPI).

Prior to this case, the SIM understood that the use immunity provided by s. 39 of the MCIP Act (and s. 69 of the Police Integrity Act) did not extend to the use of derivative information. In DAS, however, the Supreme Court defined the circumstances in which it considered that derivative use immunity under s. 39 must extend to a coercively examined witness (see the judgement extract of Warren CJ reproduced at section 48.4.1 of the 2008-2009 Annual Report).

61 *Charter of Human Rights and Responsibilities Act 2006*.
62 [2009] VSC 381.

As discussed,[63] s. 31 of the MCIP Act imposes a number of preliminary obligations on the Chief Examiner which must first be discharged before coercive questioning of the witness may commence and/or a demand for the production of any document or other thing can lawfully be made. With the exception of a summons to produce documents on behalf of a corporation or ADTI, it was seen that this obligation includes not only informing the witness of the removal of the privilege against self-incrimination, but also explaining to him/her the restrictions which apply to the use of any evidence given during the course of the examination.

In relation to the s. 31 preliminary requirements, the SIM notes that insofar as the judgement in DAS was delivered during the current reporting period, the Chief Examiner responded quickly and ensured that his witness explanation was amended to include the salient features of Warren CJ's decision. In this context, the SIM further observes that by supplementing their use of plain language with descriptive hypothetical examples, both the Chief Examiner and the Examiner were able to reduce the otherwise conceptually complex legal principles underpinning DAS, to a readily comprehensible, well considered witness explanation. To this end, the former SIM and the Chief Examiner also engaged in timely discussions in relation to and the issues arising from the DAS decision, particularly the more obvious immediate impact, as well as the possible longer term implications in the conduct of coercive examinations.

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 subsection 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. Otherwise 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.

63 Section 57.

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 County Court or the Supreme Court. In this context, the 2008-2009 Annual Report noted that having reviewed the matter of LPP as part of the s. 62 Report, the SIM considered it appropriate, bearing in mind the nature of the claims which might be involved, that the issue be decided by a higher court.[64] With the acceptance and implementation of the SIM's recommendation as part of the *Major Crime Legislation Amendment Act 2009*, the role of LPP judicial decision maker was transferred from the Magistrates' Court to the higher courts. These amendments (which had not commenced operation during the 2008-2009 reporting period), came into effect on 1 February 2010.[65]

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 County Court or the Supreme Court for determination of the claim as provided by s. 42 of the MCIP Act.

If the Chief Examiner refers the matter to the court (which he is obliged to do unless the requirement to produce is withdrawn), 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.

Subsection 41(6) of the MCIP Act imposes a requirement on the Chief Examiner to give the sealed document or thing to the proper officer of the County Court or the Supreme 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 in accordance with s. 42 of the Act. Any claim for a determination 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.

With no oversight role in respect of LPP claimed over a document or thing, the SIM has requested the Chief Examiner to inform him 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.

During the current reporting period the SIM was notified of one claim for LPP in respect of documents. In this matter, a legal practitioner was served with a witness summons to appear before the Chief Examiner to give evidence and to produce documents. With the summonsed documentation in hand, the witness attended the hearing, but otherwise objected to production on the grounds of LPP.

64 Section 65 at p.75.

65 Section 9 of the *Major Crime Legislation Amendment Act 2009.*

In compliance with the (then) provisions of the MCIP Act, the Chief Examiner first elicited the details (e.g. the names) of the clients on whose behalf the privilege was claimed and in then arranging for the documents to be sealed as required, referred the matter to the Magistrates' Court (which, since the commencement of the amending legislation, would now be the County Court or the Supreme Court). The Chief Examiner then adjourned the further hearing of the examination to await the decision of the Court.

At the commencement of the adjourned hearing, the Chief Examiner reiterated the circumstances giving rise to the claim for LPP and the need to have the matter referred to and decided by the Magistrates' Court.

In the result and with the Court ultimately determining that none of the documents were properly the subject of LPP, subsection 42(7) of the MCIP Act required it make an order releasing the documentation to the Chief Examiner.

That the SIM considers this examination to have been well handled is founded in the Chief Examiner's considered approach and careful adherence to a number of procedural requirements and attendant MCIP Act obligations.

Finally, it is noted that 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 application given that there is no other means of scrutinising the determination. The SIM considers this to fall within his compliance monitoring function and determination of the relevance of questions asked of a person during an examination. No issues arose in this reporting period in respect of LPP determinations concerning oral evidence.

66 Warrant For Arrest Of Recalcitrant Witness

Section 46 of the MCIP Act provides for the arrest of a person in relation to whom a witness summons has been issued if there are reasonable grounds to believe the person has absconded or is likely to abscond:

- Is otherwise attempting, or likely to attempt to evade service of the summons
- in breach of subsection 37(1) of the Act, 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.

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 was considered appropriate that in relation to a summons issued by the Chief Examiner, it ought be possible to make an application for an arrest warrant to the County Court as well as to the Supreme Court. Although this amendment formed part of the *Major Crime Legislation Amendment Act 2009* (i.e. enacted during the last reporting period) it did not commence operation until 1 February 2010.[66]

66 Section 11 of the *Major Crime Legislation Amendment Act 2009*.

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 to be retained 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, subsection 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.

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

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

The Chief Commissioner's obligations are found in s. 66 of the MCIP Act which section includes his/her reporting obligations to the SIM. In addition, the Major Crime (Investigative Powers) Regulations 2005 (the Regulations) (which came into force on 1 July 2005) also 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 *Major Crime (Investigative Powers) Act 2004*

The legislation requires the Chief Commissioner to keep records and a register of all information relating to the use of coercive powers by Victoria Police. Section 66 lists not only the records and register which must be kept by the Chief Commissioner, but also requires that bi-annual reports be provided to the SIM to enable statutory compliance to be monitored.

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

(1) ensure that records are kept as prescribed

(2) ensure that a register is kept as prescribed in relation to all documents or other things retained under section 47 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; the number of CPOs refused by the Supreme Court and, if given, the reasons for refusal.

(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 extension applications were made; the number of extensions granted by the Supreme Court; the number of refusals and if given, the reasons, and for each CPO extended the total period for which the order has been effective.

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

(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 for the issue of a witness summons refused by the Supreme Court and the reasons if given, for the refusal
This record must also include the number of summonses issued by the Supreme Court and 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 and 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; and the number of refusals and, if given, the reasons for the refusals.

(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, if given, the reasons for 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

Subsection 66(b) of the MCIP Act relates specifically to documents or things retained by an authorised member of the police force under subsection 47(1)(d). Such documents or things are retained having been produced at an examination or to the Chief Examiner in accordance with a witness summons and after having been inspected by the Chief Examiner. As discussed 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 subsection 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 subsection 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 subsection 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.[67] 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 subsection 47(3) of the MCIP Act).

The register was inspected in March 2010. The SIM is satisfied that the data recorded in the register complies with legislative requirements.

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

Subsection 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 subsection 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 2009 to 31 December 2009 and 1 January 2010 to 30 June 2010.

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 part of 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 which are done for the purposes of the MCIP Act or in connection with the performance of their functions under the Act.

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

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 each of the above, 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, subsection 68(3) provides that any of the persons to whom the secrecy provision applies cannot be compelled by a court to produce documents which 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 which 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. Victorian 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) had been enacted as part of the *Major Crime Legislation Amendment Act 2009*, the amendment had not commenced operation at the time of the 2008-2009 Annual Report. It came into effect on 1 February 2010.[68]

68 Section 13 of the *Major Crime Legislation Amendment Act 2009*.

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

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 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 that the Chief Examiner and the Chief Commissioner complied with the provisions of the MCIP Act during the period the subject of this report.

76 Relevance

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 form of the current reports is sufficiently comprehensive and adequate to enable a proper assessment to be made of the requests 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 adequate and comprehensive and when considered in conjunction with the video recordings and transcript (in all cases), enabled a proper assessment of 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 SIM was satisfied that the s. 66 reports were sufficiently comprehensive and adequate and contained all the matters required under the Act and by the Regulations.

78 Recommendations

No formal recommendations were made during the period the subject of this report to the Chief Examiner or the Chief Commissioner pursuant to s. 57 of the MCIP Act. As 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 continued during the reporting year and was appreciated by the SIM and the staff of the OSIM.

As stated in previous annual reports and as is 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.

Leslie C Ross
Special Investigations Monitor
20 August 2010

80 Appendix A – 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 2009 to 30 June 2010) is as follows:

1	The original CPO issued by the Supreme Court 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. The CPO was extended for a further period of six months on 5 February 2008 and 5 August 2008, before again being extended for a further period of 12 months on 28 January 2009 and 24 January 2010.
2	On 13 August 2008 the Supreme Court issued a CPO for a six month period in respect of the organised crime offence of 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 10 February 2009, 12 months on 7 August 2009 and varied on 29 October 2009.
3	On 23 July 2009 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of conspiracy to traffick or trafficking drugs of dependence. The CPO included a special condition that any person then subject to criminal proceedings arising out of the investigation of the organised crime offence, is not to be summonsed or coercively examined until further order.
4	On 23 July 2009 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of conspiracy to manufacture or traffick, or manufacturing or trafficking, drugs of dependence. The CPO included a special condition that any person then subject to criminal proceedings arising out of the investigation of the organised crime offence, is not to be summonsed or coercively examined until further order.
5	On 23 July 2009 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of arson. The CPO included a special condition that any person then subject to criminal proceedings arising out of the investigation of the organised crime offence, is not to be summonsed or coercively examined until further order.
6	On the 23 July 2009 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of trafficking large commercial quantities of drugs of dependence or precursor chemicals. The CPO included a special condition that any person then subject to criminal proceedings arising out of the investigation of the organised crime offence, is not to be summonsed or coercively examined until further order.
7	On 18 December 2009 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of murder.