Office of the **Special Investigations Monitor**

Annual Report 2010–2011

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1 Introduction

This is the annual report for the financial year ending 30 June 2011 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 (OSIM) 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.

2 The Special Investigations Monitor

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

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.

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 (p. 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 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.

That which conferred further powers on 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 exercisable 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 for the issuance of 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 by reason 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

The role of the SIM 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 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 a number of obligations on the DPI. In addition to reporting to the SIM the issuance of any witness summons (s. 115) or arrest warrant (s. 116), there is also a requirement to do so whenever a person attends before the DPI (e.g. to give evidence and/or to produce documentation) and which report must specifically address a number of matters which are set out in the governing legislation (s. 117).

The Act also:

- empowers the SIM to make recommendations to the DPI (s. 121)
- requires the DPI to provide assistance to the SIM (s. 122)
- provides the SIM with powers of entry and access to offices and records of OPI (s. 23)
- empowers the SIM to require the DPI and OPI members of staff to answer questions and to produce documents (s. 124).

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, OPI members of 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 recommended by the SIM.

The report must not contain any information identifying or likely to identify:

- a person who has attended the DPI in the course of an investigation
- 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
- the nature of any ongoing investigation under the Police Integrity Act
- 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 persons who make those disclosures and persons 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 comparable to those exercisable 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 previously exercisable by the Police Ombudsman under the Whistleblowers Protection Act.

Under subsection 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 as these powers 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

The MCIP Act conferred further powers on Victoria Police. Exercisable by the Chief Examiner and the Examiner (both of whom are Governor in Council appointees), these powers (as noted in section 4 above), commenced operation on 1 July 2005.

The nature and extent of these powers together with the statutory role of the Chief Examiner was reviewed in the 2005-2006 Annual Report and require only a brief reference 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. The SIM's report was subsequently 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 MCIP 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 (at section 40 and 41).

Section 5 of the MCIP 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 to be in force, it is further provided that upon 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 to produce documents or other things.

Part 4 of the MCIP 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

As 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 the 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 other thing
- investigate any complaints received by the SIM under Part 5 of the Act
- formulate recommendations and make reports as a result of having performed the above functions.

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

The MCIP Act imposes a number of obligations on the Chief Examiner and the Chief Commissioner of Police vis-à-vis the SIM, including those in which:

- the Chief Examiner must report the making of witness summonses and orders (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 computerised register, which 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).

In addition to regulating when, how and what type of complaint may be made to the SIM (ss. 54, 55 and 56), the MCIP Act also:

- empowers the SIM to make recommendations to the Chief Examiner and to the Chief Commissioner (s. 57)
- requires the Chief Examiner and the Chief Commissioner to provide any reasonable assistance to the SIM (s. 58)
- provides the SIM with powers of entry and access to the offices and records of the Chief Examiner and Victoria Police (s. 59)
- authorises the SIM to require the Chief Examiner or a member of the police force to answer questions, provide information and/or produce any document or other thing (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 recommended by the SIM.

The report must not contain any information identifying or 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 pursuant to legislation governing the use of telecommunications interceptions, surveillance devices and controlled operations.

The SIM's responsibilities rest primarily with the inspection of records and monitoring legislative compliance.

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).

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 to the Minister (for Police and Emergency Services) on the result of these 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 provisions of the State TI Act, the SIM may include a report on any matter where, as a result of the inspection of agency records, the SIM is of the opinion that a member of the staff of an agency has contravened a provision of the TIA Act or the requirement under the State TI Act to provide certain documents to the Minister.

The SIM 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, amongst other things, 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.

The legislation authorises four Victorian agencies to use surveillance devices. 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 four authorised 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 2010-2011, the SIM conducted two inspections and submitted the required reports. These 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). This legislative initiative resulted from a summit on terrorism and multi-jurisdictional crime held in April 2002 and which was 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 it was proclaimed and came into effect (with the exception of s. 52) on 2 November 2008.

The *Crimes (Controlled Operations) Act 2004* (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* (Fisheries Act) and the *Wildlife Act 1975* (Wildlife Act) 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' and associating with people suspected of criminal activity in order to obtain evidence to support the prosecution of an offence. In this regard and subject to strict controls and guidelines, the participant may need to engage in conduct which would otherwise be unlawful but for the protection offered by the (controlled operations authority) indemnity.

In addition to receiving biannual reports from the chief officer of each agency, the governing legislation requires the SIM to inspect the records and documents of the authorised law enforcement agencies and to report to the relevant Ministers and to the Parliament on the work, activities and the level of statutory compliance achieved by each.

During the current reporting period, Parts 6 and 7 of the CO Act (which inserted controlled operations provisions into the Fisheries Act and Wildlife Act respectively), were repealed by the *Statute Law Revision Act 2011*. These changes came into effect on 22 June 2011.

In the year under report, the SIM undertook two full inspections of agency records pursuant to the CO Act, Fisheries Act and Wildlife Act and received reports from the chief officer of each of the four agencies. The SIM's report will be available on the SIM's website after it has been tabled in the Parliament.

14.4 Cooperation 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 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, Fisheries Act and Wildlife 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. The commitment and quality of work performed by its specialist staff 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 the 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 the material, it is important to highlight some of the more significant matters. These are referred to later in this report.

The OSIM was created to oversee the use of coercive and covert powers by the DPI. Of particular significance is the implementation of a rigorous oversighting system designed to safeguard a central (administration of criminal justice) tenet, which is the need to ensure an appropriate balance between the exercise of these extraordinary investigative powers in the public interest and the abrogation of the rights of the individual.

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 not only includes the power to obtain information from any person in any manner deemed appropriate, but also whether or not to hold a hearing.

The rules of evidence applicable 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 which may assist the 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, it 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 the investigation. What was not apparent as a line of inquiry at the commencement of an investigation may become so as the investigation progresses. Expanding the lines of inquiry in this manner is a legitimate exercise of the power conferred on an investigative body by the legislature.

1 *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.

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

With the introduction of these extraordinary powers considered necessary in the public interest, the SIM acknowledges that the progress of an investigation should not be unnecessarily fettered by interpreting 'relevance' and 'appropriateness' too strictly. However, equally important is the SIM's duty to oversight and monitor the exercise of these powers, which 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.

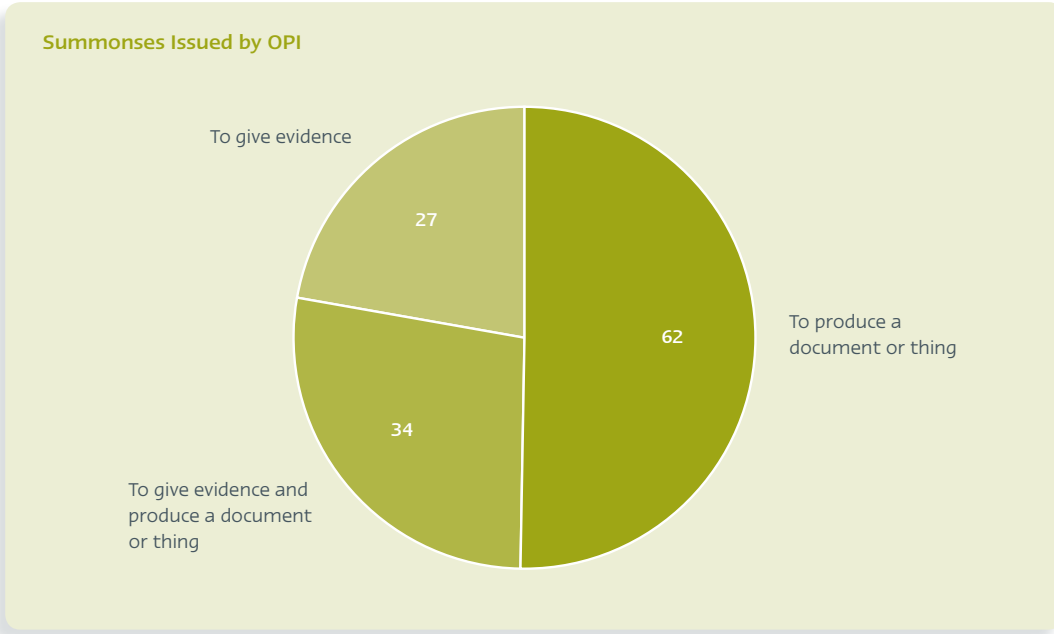
17 Section 115 Reports

Section 115 of the Police Integrity Act requires the DPI to provide a written report to the SIM 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 (Division 2 of Part 4). Section 54 specifies the content and form of a witness summons which now must state the general nature of the matters about which the person is to be questioned (except to the extent that 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.

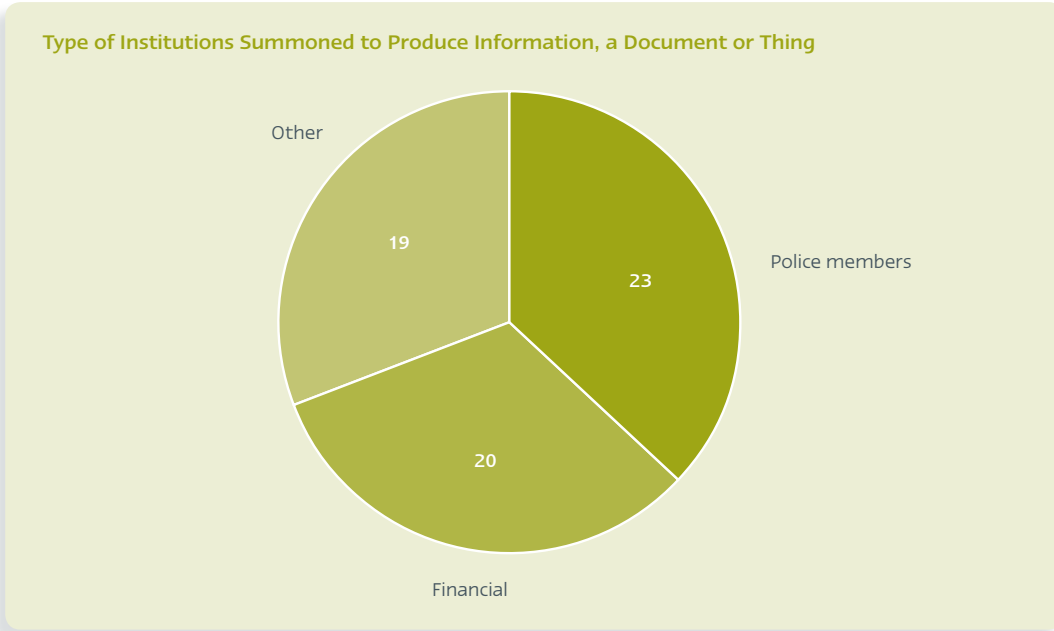
17.1 Overview of section 115 reports received by the Special Investigations Monitor

A total of 123 s. 115 reports were received by the SIM in the current reporting period. All reports (with one exception) 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 credit card and consumer finance files, names of bank account holders, types of bank accounts (e.g. loan, savings, cheque accounts etc) evidencing transactions, bank statements, bank vouchers 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 matters being investigated by OPI include allegations of misconduct in public office, improper associations, assault, obtaining financial advantage by deception, 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 method to establish unexplained wealth as 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. Examples include computer records, hand written notes, letters, registers and motor vehicle purchases.

17.5 Police members

Twenty three police members were served with a summons to produce a document or thing relevant to the subject matter and period under investigation. These included diary entries, correspondence, daybooks and receipts.

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 will be made of the person attending the OPI office and providing the documents specified or stating the grounds upon which objection to producing the documentation 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

Thirty two reports pursuant to s. 117 of the Police Integrity Act were provided to the SIM between 1 July 2010 and 30 June 2011.

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 that summons can be arrested under warrant to compel 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 arrest warrants during the current reporting period.

22 The Need For The Use Of Coercive Powers

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

As stated in the 2005-2006 Annual Report, the use of coercive powers for the production of documents or things and/or the giving of evidence should only be used where the DPI determines that other information/evidence gathering techniques were exhausted or could not further the investigation.

The SIM remains of the view that the use of coercive questioning needs to be considered on a case by case basis and that the use of a coercive power should be a last resort where voluntary or other non-intrusive options have been explored and tested.

4 Police Integrity Act s. 84(1).

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 improper associations, fraud, unlawful disclosure of confidential information, serious assault, perverting the course of justice and corruption.

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 and in respect of which coercive powers were used.

Investigation Type	10-11	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)	**9**	7	11	13	11	6	4	61
Complaint generated investigation s. 40 (formerly s. 86N of the Police Regulation Act)	**0**	0	1	1	2	2	1	7
Further investigation conducted by the DPI s. 48 (formerly s. 86R of the Police Regulation Act)	**0**	0	1	0	1	1	0	3

5 This refers to the delegates' manual which was initially provided to the SIM in a draft form during the 2006-2007 reporting period and thereafter developed further.

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

A total of 29 witnesses were examined in this reporting period. Included are some witnesses who, having been recalled, were examined on more than one occasion. This can be compared with the total of 17 witnesses for the period 2009-2010. Of the 29 witnesses examined, 15 are serving police members.

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 which 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	10-11	09-10	08-09	07-08	06-07	05-06	04-05[7]	Total
s. 115 and s. 86ZB Director must report summonses	**123**	72	87	143	106	202	84	817
s. 117 and s. 86ZD Director must report other matters	**32**	18	57	63	44	60	30	304
s. 47 and s. 86Q Power to require answers etc. of a member of the force	**0**	0	0	0	4	24	7	35

25 Legal Representation

25.1 Legal representation and witnesses appearing before the DPI

As discussed in the 2005-2006 Annual Report (para 26.1), the DPI or his delegate regulated 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.

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

25.2 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	10-11	09-10	08-09	07-08	06-07	05-06	04-05	Total
Police witnesses legally represented during examination	**10**	9	18	34	25	38	9	143
Police witnesses not legally represented during examination	**5**	5	2	8	1	9	1	31
Former police members legally represented during examination	**1**	0	0	4	1	0	0	6
Former police members not legally represented during examination	**0**	0	0	0	0	2	0	2
Civilian witnesses represented during examination	**7**	1	18	12	3	2	2	45
Civilian witnesses not represented duringexamination	**6**	2	10	4	2	8	3	35

26 Mental Impairment

The measures to be taken by the DPI or his delegate under subsection 64(4) of the Police Integrity Act, where a witness is believed to have a mental impairment, were discussed in the 2005-2006 Annual Report (section 29). 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.

However, in relation to one examination reviewed, the SIM observed that the DPI/delegate's initial belief that the witness was not suffering from a mental impairment understandably changed in light of further events, the most significant of which was the subsequent reception of expert medical evidence. In the result and while still not exhibiting any palpable symptoms suggesting that his/her ability to comprehend and respond to questioning had been compromised, the DPI/delegate's later finding was one in which the witness was believed to be suffering from a mental impairment. In the circumstances, he/she was offered and accepted the right to confer with an independent person and to have that person present throughout the duration of the examination hearing.

The SIM considers that the transparent and responsive approach demonstrated by the DPI/delegate, greatly facilitated the conduct of the examination hearing.

27 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.

28 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 this was not explicitly required by the (then) Police Regulation Act.

In this regard and absent any legislative compulsion to do so, persons were nevertheless advised of this right by virtue of a written document which was provided together with the summons at the time of service and which accorded with that set out in the SIM's Recommendation 1 of 2007.[8] 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 provides that before witnesses are coercively examined and/or required to produce a document or other thing, the DPI must first inform them of their rights and obligations under the legislation. As was also recommended, the provision allows for witnesses to receive written notification of their rights and obligations prior to and in lieu of any oral advice (but only the witness is legally represented and the legal practitioner informs the DPI that the document has been explained to the witness).

Section 62 is an important safeguard for witnesses and compliance with it is monitored by the SIM. Where appropriate, the DPI follows the practice of providing written notification in advance. The SIM is satisfied with the s. 62 compliance and which, importantly, includes informing the witness of the general scope and purpose of the investigation to which the examination relates (unless the DPI considers that this might prejudice the effectiveness of the investigation).

29 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 who had 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)).

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

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.

Detailed reference to the Supreme Court decision has been made in earlier annual reports (2007-2008 at para 54.4.2; 2008-2009 at sections 30 and 64 and 2009-2010 at section 64).

30 Certificates

In addition to the observations made (in section 29 above), the certification procedure under the earlier s. 86PA of the Police Regulation Act and its operation has been discussed previously (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.

31 Complaints

The SIM's complaint jurisdiction under s. 118 of the Police Integrity Act has also been the subject of discussion in previous annual reports. Although the SIM can receive complaints from persons attending the DPI in the course of an investigation, the jurisdiction is very narrow and is confined to 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 provides 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.[9] A complaint can be oral or written. If the complaint is made orally, the SIM may require that the person making it confirm the complaint in writing.

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 considered to be trivial, frivolous, vexatious or not made in good faith.

In reporting that a total of six written complaints were received by the SIM during the year under review, all except one (which was sent by post), were forwarded to the OSIM via electronic mail.

As has been discussed in previous Annual Reports (including 2009-2010 at section 32), the very narrow jurisdiction provided under the Police Integrity Act precludes the SIM from further investigating a number of complaints.

While the SIM reports having to inform each of the six complainants of his inability to investigate their grievances, he observes that certain of the issues raised would not have enlivened even the most expansive investigative jurisdiction.

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

32 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 four search warrants were granted and 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 para 18.1, 18.2 and 18.4 of that report and Recommendations 11, 12, 13 and 14. These recommendations have largely been implemented in Division 8 of Part 4 of the Police Integrity Act.

33 Issues Arising Out Of Examinations

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

33.1 Service of witness summons

The important issue of service (particularly that concerned with 'reasonable service') of a witness summons was discussed at some length in the 2009-2010 Annual Report (para 25.4). It was there noted that certain key recommendations made by the SIM were subsequently implemented as part of the Police Integrity Act. These statutory provisions included not only subsection 56(3) requiring a witness summons to be served a 'reasonable time' before the return date, but also subsection 56(4) which provides that:

> *The Director may issue a summons that **requires the immediate attendance** before the Director of the person to whom it is directed if the Director reasonably believes that a delay in the person's attendance is likely to result in:-*
>
> *(a) evidence being lost or destroyed; or*
>
> *(b) the commission of an offence; or*
>
> *(c) the escape of an offender; or*
>
> *(d) serious prejudice to the conduct of the investigation to which the summons relates* (emphasis added).

By way of example, if the DPI believed that a delay in having a person attend would likely result in serious prejudice to the conduct of the investigation, subsection 56(4)(d) permits a 'forthwith' (i.e. an 'immediate attendance') summons to be issued and served.

Service of a 'forthwith' summons can amount to 'short service' and is something which may be objected to by a witness who claims he/she has not been afforded an adequate opportunity to prepare for the attendance (e.g. inadequate time to obtain legal representation, locate required documentation, make alternate work arrangements etc).

The SIM holds to a previously stated view that subsection 56(4) of the Police Integrity Act 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.[10] The corollary is that if not considered to be a 'forthwith' summons (i.e. because it does not require the immediate [same day] attendance of the witness), then pursuant to subsection 56(3) of the Police integrity Act, the summons must be served a 'reasonable time' before the required attendance date.

What is a 'reasonable time?' As a general rule, a period of seven days is considered by many (including OPI) to be adequate. This is not to suggest that a witness is necessarily 'short served' if the summons requiring his/her attendance is anything less than this generally recognised period or that 'short service' cannot, in certain circumstances, still be considered 'reasonable'. It is to suggest no more than 'reasonable service' is a question of fact to be decided on a case by case basis.

In one examination reviewed by the SIM, the witness was served with a summons late on Friday afternoon. Although the hearing was set down for the following Wednesday, the legal requirement to exclude the day of service (Friday) and both days of the weekend in calculating time, meant that the witness had only two 'clear' days (i.e. Monday and Tuesday) before the scheduled hearing.

Although OPI's report to the SIM noted that service of a witness summons seven days prior to the return date was the 'normal' period, in this particular instance it cited possible prejudice to the investigation and the further delay which it may cause as the reason why it was necessary for service to take place earlier.

However, in the circumstances the SIM wrote to the DPI querying why a subsection 56(3) 'reasonable time' witness summons was issued and served, when the sole purpose of the subsection 56(4) 'forthwith' provision (more particularly, subsection 56(4)(d)), was to address the very concern raised by OPI i.e. possible prejudice to the investigation?

In the result, the SIM observed that having been 'short served', the witness was denied that to which he/she was otherwise legally entitled to expect under the legislation, which was the right to be served a 'reasonable time' before the return date.

In responding to the SIM's assessment, the DPI conceded that while the summons had been served less than seven days prior to the return date, the matter did not justify the use of a 'forthwith' summons. Although concerned about prejudice to the investigation, OPI did not consider it such as to warrant the immediate attendance of the witness. In the circumstances, the DPI determined that it was appropriate for the witness to be 'short served' with a five day notice period.

10 2009-2010 OSIM Annual Report at p. 25.

In another matter reviewed by the SIM, a summons served on a Friday afternoon required the witness to attend the following Monday morning. In a report to the SIM, OPI stated that the circumstances of this particular matter were such as to necessitate the witness being 'short served'. In this regard, the SIM takes no issue with and fully accepts the reasons proffered by OPI for having to respond in a manner which was clearly subject to severe time constraints brought about by operational considerations. However, the SIM considers that as the reasons cited by OPI were such as to enliven the operation of subsection 56(4), the issuance of a 'forthwith' summons as opposed to the resultant 'short service' of an 'ordinary' summons, was a course with much to recommend it.

The decision whether to issue a witness summons and, if so, the type of summons, is clearly a matter for the DPI. That said, and while it is not possible to measure relative concepts such as 'reasonableness' in absolute terms, the SIM emphasises the importance of subsections 56(3) and (4) of the Police Integrity Act. The SIM considers these statutory provisions to represent a purposeful construct intended to identify and separate the exceptional circumstances from that which may be thought of as the usual or the 'norm'.

Instances where the service of a summons may not afford a witness procedural fairness remains a matter of concern for the SIM.

33.2 Length of attendance

The 2008-2009 (para 25.7) and 2009-2010 (para 25.3) Annual Reports emphasised the need 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.

In this regard it is pleasing for the SIM to report that with one exception, all reports received from OPI during the period under review consistently reflected the SIM's stated preference for time spent to be calculated as from the time of initial attendance.

The SIM gratefully acknowledges OPI's positive response to this important matter.

33.3 Provision of copy exhibits of OPI

Previously canvassed in the 2008-2009 (para 25.13) and 2009-2010 (para 25.3.8) Annual Reports, this matter compromises two closely related, but separate issues.

The first concerns the provision of an 'Exhibit List' (i.e. a catalogue of documents tendered during a coercive examination which is attached to a report prepared by the DPI and then given to the SIM pursuant to s. 117 of the Police Integrity Act).

The second issue involves an expectation that the DPI will arrange for copies of key exhibits to be provided to the SIM. In this regard and insofar as it permits the contextualisation of questions asked and answers given, copy exhibits are of invaluable assistance to the SIM when reviewing a coercive examination. This is primarily because such documentation ensures the SIM is much better placed to make an informed assessment.

The SIM makes the following observations concerning these two issues. In relation to the first (provision of 'Exhibit Lists'), the SIM gratefully acknowledges the cooperation demonstrated by OPI during the current reporting period in which (except for one matter), copy 'Exhibit Lists' were attached to all the DPI's s. 117 Reports.

Turning to the second issue (provision of copy exhibits). Concerned that what had been understood to be a shared understanding was not being reflected in practice, the SIM wrote to the DPI on 28 April 2011 and again stressed the importance of having copy exhibits to hand when reviewing coercive examinations. In a letter dated 15 July 2011, the DPI informed the SIM that:

> *'I accept that there was a breakdown in arrangement for the transmission of the exhibits to your office...(and that)...[A] review was recently undertaken of OPI's practice for the provision of the exhibits to accompany section 117 reports. The processes have been updated...'*

In attaching an expanded and far more informative pro-forma 'Exhibit List', the DPI's correspondence of 15 July 2011 further advised the SIM that in this regard OPI's updated practices and redesigned processes had been undertaken to accord with and reflect the views of the SIM as expressed in the 2009-2010 OSIM Annual Report (para 25.8).

Whilst continuing to monitor the situation over the course of the next reporting period, the SIM's preliminary assessment of OPI's revised Exhibit List is very favourable.

The SIM wishes to acknowledge the constructive work undertaken by the DPI/OPI in revisiting and positively addressing both these important issues.

33.4 Confidentiality

Included within the various confidentiality provisions of the Police Integrity Act are those which deal with:

- Disclosure of information by OPI personnel and others (Division 4 Part 1)
- Witness summonses (Division 1 of Part 4)
- Examinations (Division 3 of Part 4)
- Secrecy provisions and Crown privilege (section 74)
- Protections of persons, documents and other things (Division 10 of Part 4).

During the current reporting period, the SIM identified the following issues which arose from the interpretation and/or intended application of a number of these confidentiality provisions. Whilst the factual circumstances may differ, each falls to be determined by reference to the exercise of coercive power by, or on behalf, of the DPI.

33.4.1 Confidentiality - Notices

Further to a detailed exchange of correspondence, the SIM and the DPI agreed it would be productive to meet in order to discuss a range of important matters. Included was to be a discussion about the Police Integrity Act confidentiality provisions generally and the interpretation and application of confidentiality notices in particular.

A significant aspect of this meeting was the readiness of all those present to identify the most critical issues through a process of engagement based on constructive dialogue and informed analysis. This ensured that time spent was more productive and more usefully directed towards the pursuit of agreed outcomes.

In the result, the meeting was able to resolve, or at least satisfactorily address, a number of the issues previously raised by the SIM. Even so, the SIM observes that it was still necessary to earmark certain matters for further discussion. One of the more significant residual issues was that the SIM and the DPI/OPI continued to have interpretative differences in relation to procedural and process matters governing the issuance of confidentiality notices.

However, the SIM is pleased to report that following further consideration, analysis and correspondence, a consensus was finally reached. In the form of a shared understanding, this resolution provided the clarity and certainty needed to ensure a consistent application of the legislation in the public interest.

33.4.2 Confidentiality and reporting

Division 4 of Part 2 of the Police Integrity Act deals with the circumstances in which the disclosure of information, otherwise treated as confidential, is permitted. This includes information obtained or received by OPI and which may be disclosed, for example, to Victoria Police, the Ombudsman or the Auditor-General, if the DPI considers it relevant to the function or duties of the recipient law enforcement organisation or entity concerned.

However, apart from the above, the Police Integrity Act makes it an offence (punishable by fine of 120 penalty units[11] or 12 months imprisonment or both), for individuals to disclose confidential information.[12] In this regard, a member of OPI personnel who obtains or receives information in the course of his/her work may only disclose such information in the course of carrying out the functions of the DPI or for the other limited purposes referred to in (subsection 22(1) of) the Police Integrity Act. OPI personnel aside, it is impermissible for others to disclose such confidential information (described as 'restricted matter' in the Police Integrity Act) and which, by way of example, includes the existence of a witness summons, evidence given before the DPI or information which might enable a witness to be identified. The only exceptions to the prohibition on disclosing a 'restricted matter' are those set out in subsection 23(3) of the Police Integrity Act, which provides in part:

A restricted matter may be disclosed:-

(a) in accordance with a direction of the Director; or

(b) *to a legal practitioner for the purposes of obtaining legal advice or representation relating to a notice, witness summons or matter, or*

(c) to a person for the purposes of obtaining legal aid relating to a notice, witness summons or matter; or

(d) ...

(e) to the Ombudsman for the purpose of, or in connection with, a complaint to the Ombudsman; or

(f) ...

(g) by a legal practitioner referred to in paragraph (b) for the purpose of giving legal advice, making representations, or obtaining legal aid, relating to the notice, witness summons or matter; or

(h) ...

(i) if that disclosure is otherwise authorised or required under this Act.

11 In 2010-2011 one penalty unit equated to $119.45.

12 Subsections 22(2) and 23(1) of the Police Integrity Act.

(A) As noted above, subsection 23(3)(a) provides the DPI with a discretion to permit a 'restricted matter' to be disclosed. In this context a review of relevant examination transcripts led the SIM to query certain decisions made by the DPI/delegate which, in the result, permitted 'restricted matter' to be disclosed in the course of an examination hearing.

In the circumstances, the SIM wrote to the DPI. The exchange of correspondence which followed was punctuated by the meeting referred to above (at 33.4.1) and the resultant need to work towards a shared understanding about a matter of the highest sensitivity and importance.

Sometime after this meeting, the SIM forwarded a further letter to the DPI highlighting the juxtaposition which he considered (and considers) exists between the exercise by the DPI of a discretionary power (under the Police Integrity Act) to permit disclosure of 'restricted matter' and the SIM making enquiry for the purpose of understanding why that exercise of power was considered necessary or appropriate. It is only then may it be properly said that the SIM is in a position to effectively review, fairly consider and make an objective, balanced and informed assessment on the material presented.

In addition, this letter raised an allied issue involving those matters which the SIM considered highly significant to informing the decision whether to permit 'restricted matter' to be disclosed (as distinct from the lawful authority of the decision-maker to do so).

Further to this correspondence and the SIM's invitation to respond, the DPI provided further information which, in addition to giving the examination hearings under review a far more useful and informative context, served to reaffirm and strengthen the DPI's view that the decisions made (permitting disclosure) were lawful, necessary and appropriate.

In the final analysis, the SIM's view of confidentiality (and the role of the confidentiality provisions under the Police Integrity Act) is unequivocal. A matter of the highest importance, the disclosure of otherwise confidential 'restricted matter' in the course of a coercive examination hearing ought, as with the matters under review, only be considered in the most exceptional circumstances.

The SIM further notes that the decision to disclose a restricted matter must be seen to be an appropriate exercise of discretion. In recognising this, both the SIM and the DPI have agreed to implement a procedure whereby the DPI will document the reason(s) for the discretionary exercise (i.e. permitting disclosure) and will also arrange for that documentation to be included in the statutory report which the DPI is required to deliver to the SIM as soon as practicable after the examination hearing.[13]

The SIM gratefully acknowledges the DPI's assistance and appreciates his cooperation in agreeing to the future inclusion of this important information.

13 Section 117 of the Police Integrity Act.

(B) In another matter reviewed, the SIM observed OPI to have forwarded certain confidential information via electronic mail (email). This matter was discussed at some length between the SIM and the DPI and was also the subject of correspondence.

The OPI has expressed a firm view that the use of email is a lawful and legitimate investigative strategy which the DPI was (and is) entitled to employ in the performance of his functions under the Act.

The SIM recognises that it is entirely a matter for the DPI to decide how OPI investigations are conducted, including in this context, how each is organised and strategised. However, as conveyed to the DPI, the SIM considers that the use of email brings with it an increased risk of compromising confidentiality and that when intended as a vehicle for the conveyance of confidential information, it demands close examination and very careful consideration at first instance.

Ensuring confidentiality arrangements remain secure and effective is a matter about which there is no contention. The question is how that is best achieved. The SIM will continue to monitor this issue over the course of the next reporting period.

(C) In another matter reviewed, the witness attended before the DPI in accordance with the requirements of a summons served. However, he/she then elected to participate in a voluntary interview and the matter was stood down. In the circumstances, the DPI did not have to address the preliminary requirements[14] (i. e. as no questions were asked of the witness, nor was he/she required to produce any document or other thing). However, at the conclusion of the matter, the DPI proceeded to remind the witness and his/her legal representative of the continuing confidentiality obligations.

The SIM agrees with the approach taken by the DPI.

33.4.3 Confidentiality – witness summons

The Police Integrity Act provides that upon issuing a witness summons, the DPI may (or, if the facts and circumstances of the case are otherwise, must) issue a further document known as a 'confidentiality notice'. As with a summons to attend, the confidentiality notice must be served personally and must (pursuant to subsection 58(1) of the Police Integrity Act) also state:

> *(a) that the summons is a confidential document; and*
>
> *(b) that it is an offence to disclose to anyone else, except in the circumstances, if any, specified in the notice, the existence of the summons or the subject-matter of the investigation in relation to which the summons was issued, unless the person has a reasonable excuse.*

The penalty for breaching a confidentiality notice is 120 penalty units (as noted above one penalty unit in 2010-2011 equated to $119.45), 12 months imprisonment or both (s. 59 of the Police Integrity Act).

14 Section 62 of the Police Integrity Act.

The Police Integrity Act further sets out that which is a 'reasonable excuse' for what would otherwise be an unlawful disclosure. This includes a disclosure made for the purposes of seeking legal advice or legal aid or in obtaining information to comply with a summons. However, even in these examples it is still deemed to be an unlawful disclosure unless the person to whom the disclosure is made is similarly informed about it being an offence to disclose to anyone else. (subsection 59(2) of the Police Integrity Act).

In four coercive examinations reviewed during the current reporting period, the SIM observed that while each was defined by its own facts, in all four the partner of the summoned witness knew (or would soon become aware) of the existence of the OPI summons. In one instance, it was the taking of a preparatory telephone call from the process server which led the witness's partner to be the first person outside of the OPI to learn of the existence of the summons i.e. before that of the witness himself/herself. In another, after reading the summons the witness's partner accompanied the witness to the premises where the examination was to be conducted (although he/she was denied access to the examination hearing room and its immediate surrounds). The third matter concerned a witness who informed his/her partner of having to attend before the DPI, but only after being permitted to do so by an OPI member of staff. The final case involved a witness who during the coercive examination had sought and obtained permission from the DPI/delegate to inform a partner of the fact (but not the detail) of his/her appearance at an OPI hearing.

The SIM notes the issue of 'confidentiality' brings into sharp focus the need to ensure that an appropriate balance is maintained between safeguarding and preserving the public interest (through protecting ongoing investigative integrity and effectiveness) and the expressed need of individual witnesses to be permitted to inform a spouse/partner of the receipt (but not the detail) of a witness summons previously served on him/her.

In a letter to the DPI regarding the third matter referred to above, the SIM also included an issue common to the first two. This dealt with confidentiality and the apparent pre-hearing disclosure of a restricted matter (e.g. the existence of a witness summons).

In a written response to the SIM, the DPI referred to subsection 23(3)(a) of the Police Integrity Act which, as noted, provides the DPI with a discretion to authorise what would, in the absence of such a discretion, constitute an offence (i.e. unlawful disclosure of restricted matter and which, as discussed above, is punishable by a substantial fine, imprisonment or both).

The DPI further informed the SIM that if a witness made a request that he/she be permitted to inform a spouse/partner of having attended an examination following service of a summons then, if satisfied that such a disclosure would not compromise the investigation, the DPI may permit the witness to do this, but nothing more i.e. at the discretion of the DPI, the witness may be permitted to disclose the fact of his/her attendance, but not the nature or subject-matter of the investigation, persons(s) involved, evidence given etc).

A matter for the DPI, the SIM agrees that there may be circumstances in which it is considered necessary and appropriate to permit a summoned witness to inform a spouse/partner of his/her required attendance at an examination hearing. However, given the obvious significance which attaches to confidentiality provisions in the architecture of the Police Integrity Act, it is the SIM's expectation that the discretion provided by subsection 23(3)(a) would, in the circumstances, be exercised sparingly.

33.5 Procedural fairness

Subsection 68(2) of the Police Integrity Act provides:

> *(2) A person appearing as a witness before the Director must not:-*
>
> *(a) at an examination, without reasonable excuse, refuse or fail to answer a question that he or she is required to answer by the Director.*

In one matter reviewed, an issue arose concerning the possible contempt of the witness in circumstances in which he/she answered certain questions during an examination hearing, but cited 'reasonable excuse' in refusing to answer others.

At the conclusion of the hearing, the DPI indicated that he was considering charging the witness with contempt (because of his/her refusal to answer a number of questions when required to do so). For this reason, the witness's legal representative sought and was granted leave by the DPI to prepare a written submission on behalf of his/her client. To this end, the DPI also agreed to provide the witness's legal representative with a copy of the transcript. In the result, the witness's legal representative lodged two detailed submissions. After the first submission was lodged, but before the second was delivered, the DPI recalled the witness and he/she was questioned further. The DPI then ruled on the matter and the witness's legal representative was advised accordingly.

Not only in the interests of transparency and ensuring fairness to the witness, but also as a means of facilitating the conduct of the hearing, the SIM agrees with the approach taken by the DPI.

34 Meetings With The Director, Police Integrity And Cooperation 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 (with one exception) 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 the OSIM of an impending delivery and the documents are then provided by safe hand. 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

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 para 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'.

As discussed in para 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.

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

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

38 Generally

Cooperation 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.

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 how the SIM has exercised this jurisdiction.

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'.[15] 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. 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 the establishment of the position of Chief Examiner under Part 3 of the Act. It is the Chief Examiner who controls and conducts the examination hearing. The position is a statutory office, independent of Victoria Police. That independence is fundamental to the grant and exercise of the coercive powers.

15 Section 1(a) MCIP Act.

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*.

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 (see para 43.3ff of this report for a discussion detailing the requirements imposed by s. 53 of the MCIP Act).

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

The provision of these unprecedented powers to Victoria Police raised many concerns amongst various legal bodies[16] and academics[17] about the undermining of traditional rights of citizens and the use of coercive powers. 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 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 or of sexual gratification where the victim is a child.

16 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.

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

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]

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]

18 Section 5(8) MCIP Act.
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).
20 Section 5(2) MCIP Act.
21 Ibid., s. 5(1).
22 Ibid., s. 6.

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.

Section 8 of the MCIP Act sets out the specific matters the court must be satisfied of prior to granting a CPO. These are:

(a) that there are reasonable grounds for the suspicion founding the application

(b) 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 been or is about to be committed is well founded. Additionally, the court must be satisfied that the making of the order is in the public interest having regard to the nature and gravity of the organised crime offence and the impact of the coercive powers on the rights of members of the community.

This second requirement adds a further protection for the community in that only investigations 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 concerning 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 (pp 91-96).

23 Ibid., ss. 10 and 11.

In addition, reference was made in the 2009-2010 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 (para 41.1.1). The amending legislation came into effect on 1 February 2010[24] and provides 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.

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 is 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 (para 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	10-11	09-10	08-09	07-08	06-07	05-06	Total
Number of CPO's Issued by the Supreme Court	**7**[25]	5	2	1[26]	6	4	25
Duration of Orders	**12 months**	12 months	6 months[27]	6 months	6 months[28]	6 months	-
Number of Orders with Conditions Attached	**1**	4	2[29]	1[30]	6	1	15

24 Section 4 of the *Major Crime Legislation Amendment Act 2009*.
25 During this reporting period the Supreme Court also made extension orders in respect of five CPO's.
26 This CPO was extended once for a further 6 month period.
27 In two cases an extension being granted for 12 months.
28 In three cases an extension being granted for six months, one of which was initially extended for 14 days and then for six months.
29 There was also one extension order made in respect of a CPO issued in the previous reporting period.
30 However there were also two extension orders made in respect of two CPOs issued in a previous reporting period which were subject to conditions.

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 set out in s. 51 of the MCIP Act and referred to earlier in this report (section 11).

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, the SIM also monitors the form of the summons and whether it 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. The Chief Examiner has provided a copy of the video recording to the SIM with the s. 52 report on all applications made in the period under review.

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 these become available.

43.2 Section 52 reports received

A total of 82 s. 52 reports were received for the 2010-2011 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 below (at para 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.[31]

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 be 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[32] 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 49 s. 53 reports during the 2010-2011 reporting period.

All s. 53 reports 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 and DVD recordings of the coercive examinations.

31 *Major Crime (Investigative Powers) Regulations 2005* (Vic).
32 See sections 52 and 53 of this Report.

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	10-11	09-10	08-09	07-08	06-07	05-06	Total
s. 52 - Chief Examiner must report witness summonses	**82**	55	73	36	10[33]	14	270
s. 53 - Chief Examiner must report other matters	**49**	59	50	25	50	16	249

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.

The grounds on which a witness can complain to the SIM differ to those applying 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 it is determined that a complaint is to be investigated, s. 56 of the MCIP Act provides the SIM with great flexibility in the procedure to be employed. 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.

33 Some reports included information for two or more witnesses.

Upon making a recommendation, the SIM may require the Chief Examiner or the Chief Commissioner to provide him, within a specified period of time, a written report 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.[34]

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 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 before him to answer any questions or provide any information or produce any documents or other things in the person's possession.[35] It is an indictable offence for a person to refuse or fail to attend to produce documents, to answer questions or provide information requested by the SIM. A person must not provide information which he or she knows is false or misleading.[36]

Both the Chief Examiner and the Chief Commissioner have been fully co-operative with the SIM during 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 functions 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.

34 Section 58 MCIP Act.
35 Ibid., s. 60.
36 The penalty for breach of these requirements is level six imprisonment (five years maximum) (subsection 60(4) of the MCIP Act.

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

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

48 The Power To Summons Witnesses

Both the Supreme Court and the Chief Examiner have the power to issue the following summonses requiring the attendance of the person before the Chief Examiner:

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

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

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

(4) a summons to attend for any of the above purposes but concerning which attendance is required immediately; a summons requiring the immediate attendance of a person before the Chief Examiner can only be issued if the court or the Chief Examiner reasonably believes that a delay may result in any one or more of the following situations: 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.[37]

48.1 Types of Summonses Issued

In the reporting period 1 July 2010 to 30 June 2011, a total of 82 summonses were issued.[38] Of these, 64 summonses were to give evidence, one was to give evidence and to produce documents or other things and 17 were to produce specified documents or other things. There were no summonses requiring 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	10-11	09-10	08-09	07-08	06-07	05-06	Total
To produce a specified document or other thing	**17**	3	7	3	1	0	31
To give evidence	**64**	58	63	20	46	17	268
To give evidence & produce documents or other things	**1**	2	9	5	4	1	22

37 Section 14(10) and 15(9) MCIP Act.

38 This number includes summonses issued but either revoked 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.

It is important to note that the Supreme Court and the Chief Examiner are prohibited from issuing a summons to a person known to be under the age of 16 years. A summons served on a person under the age of 16 years at the date of issue has no effect.[39]

The Supreme Court can only issue a summons once an application has been made by a police member. An application to the Supreme Court can be made at the time of the making of a CPO or at any later time while the CPO is in force.[40]

Every application to the Supreme Court must be in writing and must include the information specified in 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/her own motion. The Chief Examiner can also determine the procedure to be applied when an application is made for the issue of a summons.[41] The Chief Examiner has implemented a procedure for such applications which 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 (pp 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

39 Section 16 of the MCIP Act.
40 Ibid., s. 14(3).
41 Ibid., s. 15(3).

- whether normal service or immediate service is required and the reasons for the need for immediate service where applicable
- whether the summons should state the general nature of the questioning proposed; if the member submits that such information should not be in the summons, the 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

Subsection 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.

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 arose 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 the proceedings relating to that action are referred to in the 2007-2008 Annual Report (para 54.4.2) and discussed in greater detail in the 2009-2010 Annual Report (section 64).

48.4 Procedure relating to summonses issued by the Supreme Court

As the Supreme Court is not required to notify the SIM when it has issued a summons, 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 which can arise in the compilation of statistics when the OSIM is otherwise 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.[42] 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.

42 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.

50 Contents Of Each Summons

The Act and the Regulations are specific about the contents of a summons. In combination, subsections 15(7), (10) and (11) of the MCIP Act require each summons to be in the prescribed form and contain the following information:

- a direction to the person to attend at a specific place on a specific date at a specific time
- that the person's attendance is ongoing until excused or released
- the purpose of the attendance, that is to give evidence or produce documents or other things or both
- the general nature of the matters about which the person is to be questioned (unless this information may prejudice the conduct of the investigation)
- that a CPO has been made and the date on which the order was made
- a statement that if a person is under 16 years of age at the date of issue of the summons, he/she is not required to comply; a person in this situation must give written notice and proof of age.[43]

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 six s. 18 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.

43 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.

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

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:

(a) the safety or reputation of a person; or

(b) the fair trial of a person who has or may be charged with an offence; or

(c) the effectiveness of an investigation.

44 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 20(9).

Subsection 20(3) of the MCIP Act 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)

The 2008-2009 and 2009-2010 Annual Reports (both reported at section 53), discussed the s. 62 Report recommendations made by the previous SIM concerning the operation of confidentiality notices. As noted, the adoption of these recommendations (which included providing for the cessation of confidentiality notices after five years), came into effect on 1 February 2010.[45]

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[46]
- 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

45 Section 6 of the *Major Crimes Legislation Amendment Act 2009*.

46 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 last 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).

- issue a written certificate of charge and issue an arrest warrant for contempt of the Chief Examiner;[47] this situation arises if a person has failed to comply with the requirements of a summons and is discussed further below (at section 55)
- 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.

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.[48] 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.

The SIM was notified of one instance where a witness refused to answer questions when lawfully required to do so. The relevant statutory provision is discussed immediately below (Contempt of the Chief Examiner) and discussed further at para 67.5 of this report.

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

56 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 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;[49] 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.

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.

49 See section 59 of this report.

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 any 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.

57 Legal Representation

As discussed later in this Report,[50] 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. This 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.[51] 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).

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.

50 Section 61.
51 These procedural guidelines form part of a detailed document prepared by the Chief Examiner.

58 Mental Impairment

As is noted later in this report,[52] 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.

As with the view expressed in the 2009-2010 Annual Report (section 59), the SIM again commends the Chief Examiner and the Examiner for demonstrating 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.

59 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. A witness 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 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.

52 Para 67.6(a).

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.

60 Who Was Represented And Who Was Not

The witnesses examined by the Chief Examiner in this period were all civilian witnesses. A total of 49 examinations were reported to the SIM. Two s. 53 reports received during the year under review relate to examinations conducted in the 2009-2010 reporting period. Of the 49 witnesses examined, 23 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	10-11	09-10	08-09	07-08	06-07	05-06	Total
Witnesses examined	**47**	59	49	24	50	15	244
Witnesses legally represented	**23**	36	19	12	30	9	129

61 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 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 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.[53]

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).[54]

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

54 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*. 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.

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.

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

While the Chief Examiner informed the SIM that in the period under review he had rescinded certain confidentiality arrangements upon application by Victoria Police, the SIM reports that it was during the previous reporting period that the Chief Examiner heard argument in respect of what was a contested rescission application. In this context and further to the reasons published in the period under review, the Chief Examiner refused to rescind the confidentiality provisions in place.

63 The Use Of Derivative Information

The intersection between subsection 25(2)(k) of the Charter,[55] 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 the subject of detailed discussion in earlier Annual Reports (2007-2008 at para 54.4.2; 2008-2009 at sections 30 and 64 and 2009-2010 at section 64).

64 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) of the MCIP Act 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.

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

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.[56] 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 (as from 1 February 2010).

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.

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.

56 Section 65 at p. 75.

65 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 or

- 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 place or is likely to take place.

However, as noted by the SIM in the s. 62 Report (p. 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. This amendment formed part of the *Major Crime Legislation Amendment Act 2009* and commenced operation on 1 February 2010.[57]

66 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.

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

67 The Conduct Of Examinations By The Chief Examiner

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

67.1 Legal Representation

In relation to one matter, the legal representative (solicitor) appeared for witness (A) and applied to the Examiner for leave to represent his/her client at the examination hearing, even though the solicitor had represented witness (B) at an earlier coercive examination concerning the same investigation.

In circumstances where witness B was subject to a confidentiality order, the issue for consideration concerned the risk to the investigation, more particularly whether it could be prejudiced or undermined, by allowing the solicitor to represent more than one witness.

In what the SIM considers to be a comprehensive and well reasoned ruling, the Examiner referred to the legislative provisions governing witness representation and confidentiality, before undertaking a careful analysis of the relevant case law. In delivering his ruling, the Examiner cited a number of key considerations. These included:

- the examination of witness A was to be conducted with the intention of canvassing the same (or essentially the same) questions and subject-matter as that traversed earlier with witness B
- the likelihood of the solicitor (not knowingly or deliberately, but unintentionally and inadvertently), disclosing confidential information to his/her client (witness A)
- the need to assess the risk of prejudice to the investigation
- 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 witness (A) had stated a preference to be represented by a particular legal practitioner.

The Examiner found that to allow the application (i.e. to permit the solicitor to represent witness A) would or may prejudice the investigation. In the result, leave to appear was therefore refused.

In reviewing the examination, the SIM agrees with and supports the well considered approach and soundly based ruling delivered by the Examiner.

67.2 Legal representation – a change of view

In another matter reviewed, the SIM noted that having provided the witness with a comprehensive (s. 31) explanation of his/her rights and obligations, the Examiner asked the witness whether he/she had any questions. The witness responded by informing the Examiner that it was now his/her preference to have legal representation (in circumstances where the witness had earlier obtained legal advice but chose to attend the examination hearing unrepresented).

Upon further questioning, the Examiner elicited from the witness the decision not to have representation resulted from a failure to appreciate that the matters referred to in the witness summons had any application or relevance to him/her. Upon hearing the Examiner's preliminary remarks and the explanation provided, this position changed.

Receptive to the concerns brought about by the witness's change of perspective, the Examiner stood the matter down in order that enquiries could be made with a view to arranging representation for him/her. Upon resuming and with legal representation now secured, the Examiner not only revisited the s. 31 remarks previously given to the witness, but proceeded to also summarise these for the benefit of his/her legal representative.

In reviewing this examination, the SIM commends the fair and even-handed approach taken by the Examiner in the conduct of the coercive examination.

67.3 Procedural Fairness

In one matter reviewed by the SIM, it was observed that because the coercive questioning of the witness had not been finalised, it was necessary to adjourn the further hearing to a different day. In this regard, the next (i.e. second) hearing day was not for some five weeks. When the examination finally resumed, but before any further questions were asked of the witness, the Examiner noted the time which had elapsed between the hearing dates and deemed it appropriate to revisit (and, thereby, reacquaint the witness) with his/her rights and obligations pursuant to s. 31 (i.e. the preliminary requirements) of the MCIP Act. In providing the witness with a further comprehensive direction and explanation, the Examiner also summarised some key matters arising from the initial hearing.

The SIM commends the approach taken by the Examiner. The further explanation and the summary of that canvassed earlier are viewed as particularly helpful and of great assistance in facilitating the hearing.

67.4 A 'Conditional' Confidentiality Notice

(a) As discussed earlier in this Report[58] 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 and which operate to restrict the publication of evidence and other information arising from an examination hearing.

Having carefully reviewed the examination transcript of one matter, the issue for the SIM focused on the practical application of such a direction. The situation involved a de facto couple, each of whom had been served with a witness summons referable to the same investigation and which required each to attend (for questioning) on separate but successive days.

Responding to this unique circumstance, the Examiner exercised his discretion and inserted a special condition into the 'Confidentiality Notice' which permitted the witness to disclose to his/her partner the existence of the summons and the subject matter (but not the evidence given).

58 Sections 52, 53 and 62.

In circumstances in which two coercively examined witnesses are residing at the same premises and are in a domestic relationship, the SIM considers the exercise of discretion to permit the confidentiality exception as prudent and reasonable and unlikely to pose any risk to the integrity or effectiveness of the investigation.

(b) In the course of reviewing several other examinations, it was upon observing there to be a 'confidentiality' issue common to each, that the SIM wrote to the Chief Examiner and, in requesting additional information, also identified certain key matters for future discussion.

Coercive examinations often involve matters of significant factual complexity and the major issue here concerned the interpretation and application of the confidentiality provisions of the MCIP Act, particularly concerning the critical need to preserve investigative effectiveness and integrity and the safety and reputation of witnesses.

A subsequent exchange of detailed correspondence proved extremely useful in narrowing the problematic issues and, in helping to focus constructive dialogue between the SIM and the Chief Examiner, proved important in ultimately securing a shared understanding concerning the potential use of key statutory provisions.

The SIM is pleased to note that this successful result was the product of mutual cooperation and a demonstrated preparedness to further the public interest through the securing of authoritative, merit based outcomes.

67.5 Contempt of the Chief Examiner

In one matter reviewed, the SIM noted that in response to a summons, the witness attended before the Examiner and answered all questions asked. Being part-heard, the examination was then adjourned to another day when the witness again attended before the Examiner. However, in the course of this (second day of) hearing, the witness refused to answer questions when required to do so. As a result, the witness was charged with contempt, after which he/she was arrested and taken to appear before the Supreme Court for the issue to be tried.

67.6 Mental Impairment

(a) The SIM has previously observed that when addressing subsection 31(f) of the MCIP Act, it is as a matter of course that the Chief Examiner/Examiner will ask a witness whether he/she is currently suffering from any mental impairment. Although not a legislative requirement, the SIM considers the asking of this question to be an important safeguard in circumstances where the witness may be suffering 'mental impairment' as defined by s. 3 of the MCIP Act, but which may not otherwise be apparent.

By way of example, the SIM reviewed an examination where in the absence of any information to suggest that the intended witness was suffering from a mental impairment, a summons was issued. In the course of addressing the (s. 31) preliminary requirements during the subsequent coercive hearing, the Examiner enquired of the witness's legal representative whether his/her client was suffering from such an impairment. The witness interceded and informed the Examiner that he/she had (and continues to) attend a mental health specialist. Given the opportunity to be heard on the matter, the witness was able to explain his/her condition and, in the result, was deemed by the Examiner to be suffering from a mental impairment as defined in s. 3

of the MCIP Act. This served to enliven the requirements of subsection 34(3) of the MCIP Act and, although ultimately declining the offer, the witness was at least afforded the opportunity of being assisted by an independent person.

Despite any legislative compulsion to do so, the SIM considers this to be a very important enquiry to be made of witnesses attending for coercive examination and commends the approach taken by the Chief Examiner/Examiner.

(b) In another examination reviewed by the SIM, the witness's legal representative made two separate applications to the Examiner for a permanent stay of proceedings on the basis of his/her client's mental impairment.

Prior to delivering his rulings, the Examiner received a detailed medical report and had an opportunity to observe/converse with the witness and to hear from the witness's legal representative and the medical specialist who provided the report.

In making a finding in which he accepted the witness to be suffering from a mental impairment, the Examiner (in accordance with the legislation) informed the witness that the services of an independent person could be made available to assist him/her prior to the giving of any evidence, as well as throughout the examination hearing. The witness declined the offer.

In ultimately deciding against the applications, the Examiner delivered two rulings which the SIM considers accurately reflect the care which he took to fully inform himself not only of the submissions made in support of and against the applications, but also of the written and oral medical evidence, various statutory provisions, relevant legal principle and available common law authority.

The SIM observes that although the Examiner did not consider himself vested with the power to permanently stay the examination of a witness, he did consider it was open to him to formally discharge a witness from the requirements of a witness summons and proceeded to determine the applications accordingly.

Although satisfied that the witness was suffering from a mental impairment, the Examiner was not satisfied that he/she could not comply with the requirements of the witness summons. In these circumstances and with no further issue(s) arising, the dismissal of both applications meant that the coercive questioning of the witness could lawfully commence.

Having reviewed and considered the transcript and attendant material, the SIM considers the rulings made to be sound in law and commends the Examiner's approach to and handling of what was, in the result, a matter of considerable legal and factual complexity.

67.7 Section 45 – video-recording of examination

The Chief Examiner must ensure that the examination of a witness is video-recorded (subsection 45(1) of the MCIP Act). Without a visual recording, nothing said by the witness at the examination is admissible against any other person in later proceedings (subsection 45(2)). The only exception is where the court is satisfied that the failure to record resulted from circumstances which are 'exceptional (and which) justify the reception of the evidence' (subsection 45(3)).

It was following three coercive examinations conducted within days of each other, that the SIM received an urgent notification from the Chief Examiner informing him of a technical malfunction with the Office of Chief Examiner hearing room recording equipment and which, in the result, provided an audio record but no pictorial reproduction of the coercive examinations.

The Chief Examiner subsequently attached a detailed report which covered the background to, the discovery of and the reasons for the malfunction. This attributed the failure to a third party technical repair and installation fault. Following the taking of immediate action to rectify the problem, the report also cites a planned replacement of all existing recorders with new upgrades and the introduction of additional measures to minimise the risk of any reoccurrence.

In response to the information and documentation provided to him in relation to this matter, the SIM unreservedly accepts that at all material times the Chief Examiner and relevant members of staff were unaware of any problem with the recording equipment and that the limited number of examinations which did proceed only did so in the mistaken, but reasonable, belief that the audio visual recording processes were operating correctly.

In highlighting the provisions of s. 45 of the MCIP Act (which, as noted, requires a witness's examination to be visually recorded unless the circumstances are 'exceptional'), it is observed that while the forensic consequences (if any) arising from an ostensible breach of s. 45 are beyond the remit of the SIM, it is considered more likely than not that the third party technical malfunction experienced by the Office of Chief Examiner is the type of event which would have reasonably been in contemplation when subsection 45(3) of the MCIP Act was enacted.

67.8 Section 15(7) of the MCIP Act – Re-issuance of a witness summons

As noted,[59] subsection 15(11) of the MCIP Act provides that each summons must:

- be in the prescribed form
- include 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.

Other legislative provisions require that the summons also specify:

- 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 to do both.
- that a CPO has been made and the date on which the order was made.

59 Section 50 of this Report.

In relation to three matters reviewed by the SIM, the examination hearing of each witness commenced (albeit on different days) at premises 'A'. However, as the matters had not yet concluded, it was necessary to adjourn each 'part-heard' examination to another date and time. In this regard, the SIM observes that whilst the practice of adjourning part-heard matters is very common (not only for independent statutory agencies such as the OPI and OCE, but also for the common law courts), what distinguishes the three matters under review is that each was not only adjourned to another date and time, but to another place (i.e. premises 'B').

Shortly after these matters were adjourned (from premises 'A' to 'B'), but before the next hearing date, the Chief Examiner wrote to the SIM and informed him that in consultation with the Examiner it had been decided that the original summonses ought be revoked (thereby discharging each witness from the requirements of the summons) and that a further summons should be issued and served on each witness.

The reason for re-issuing each summons was said to be a concern arising from the operation of subsection 15(7) of the MCIP Act which, in addition to specifying whether a witness must attend to give evidence, produce documentation or do both, provides that a lawfully issued summons

> *'[m]ust require the person to whom it is directed to attend at a specified place on a specified date and at a specified time and from day to day unless excused or released from further attendance...'*

Therefore, in the absence of issuing a 'fresh' summons, a concern was expressed by the Chief Examiner whether a summons requiring attendance at premises 'A' (on a particular date , time etc) can be relied on to lawfully compel a witness to subsequently attend premises 'B' from 'day to day' until excused?

Having carefully reviewed and considered the issue raised in the examinations under review, the SIM agrees with the approach taken and decision made by the Chief Examiner to revoke the original (premises 'A') summonses and to reissue and serve a further summons on each witness.

Ensuring that process is free of any legal ambiguity is, in the opinion of the SIM, a public interest consideration of the highest importance.

67.9 Section 15 (10) of the MCIP Act – Adequacy of 'general nature' statement

As also discussed earlier[60] subsection 15(10) provides that the witness summons must contain a statement about the general nature of the matters about which the person is to be questioned (unless it is considered that this would prejudice the conduct of the investigation of the organised crime offence).

In one matter reviewed, the SIM wrote to the Chief Examiner and sought further information in relation to the content of the witness summons, more particularly that concerning the 'general nature' statement which, ostensibly at least, appeared to be less instructive than the information contained in a number of other witness summonses issued and served in the course of the same investigation.

60 Section 50 of this Report.

The Chief Examiner provided the SIM with a comprehensive written response in which he detailed the reasons why the 'general nature' statement was considered both adequate and appropriate to the particular circumstances of the witness.

The examination transcript is of significant length and factual complexity. Having carefully considered and assessed this issue and taking account of the commendable practice which the Chief Examiner consistently demonstrates when dealing with matters of procedural fairness, the SIM is unable to conclude the witness was denied information on the face of the summons that he/she was otherwise legally entitled to receive.

The SIM further observes the importance of the 'general nature' statement is such that it may well determine whether a witness seeks legal advice and/or chooses to secure legal representation at the examination hearing. Accordingly, it is the SIM's opinion that once it is decided that it will not prejudice the investigation, the inclusion of such a statement brings with it an obligation to ensure that the witness is fairly (if succinctly) informed of the matter under investigation. That said, the SIM readily acknowledges that the appropriateness or otherwise of a 'general nature' statement must fall to be considered on a case by case basis.

67.10 Privilege

As discussed earlier,[61] subsection 39(3) of the MCIP Act is a particularly significant provision and precludes the evidence given by a witness at a coercive examination from being introduced against him/her in any subsequent criminal proceeding(s).

In one matter reviewed, an issue arose which required the Chief Examiner to revisit the operation of subsection 39(3) and which, in the result, gave further definition and additional clarity to its operation.

In this regard, the Chief Examiner noted that:

- While subsection 39(3) provides an immunity for a witness in respect of the admissibility of evidence obtained during an examination hearing, that immunity does not operate generally but is only of benefit to the witness giving evidence
- If any issue should arise concerning the use/attempted use of such evidence in a manner which is said to be detrimental to the witness (e.g. in a subsequent criminal proceeding contrary to subsection 39(3)(a)), it is for the witness alone to take objection
- As it is not appropriate for the Chief Examiner to take any independent action regarding the subsequent use of evidence derived from a coercive examination hearing, the Chief Examiner does not have a role with respect to any possible breach of subsection 39(3) of the MCIP Act.

61 Section 59 of this Report.

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,[62] 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) of the MCIP Act:

- 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.[63] 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 June 2011. 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.

62 Section 66 of this Report.
63 Section 66(b) MCIP Act.

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 2010 to 31 December 2010 and 1 January 2011 to 30 June 2011.

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, Examiner, the SIM and his staff and members of the police force.

Permitted disclosures for the Chief Examiner, 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.

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, 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, 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 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 apply to 'unsworn' 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 legislative change (Recommendation 9 of the s. 62 Report at p.112) to ensure that all persons involved in the operations of the Chief Examiner are subject to appropriate secrecy requirements. This change (which imposes the secrecy requirements on sworn members and unsworn staff alike) was enacted as part of the *Major Crime Legislation Amendment Act 2009* and commenced operation on 1 February 2010.[64]

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 substantial 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.

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

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 offence.

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 offence.

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 (in all cases) transcript, 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 cooperation 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.

Difficult public interest considerations are involved in monitoring compliance with this complex legislation. 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 as requested. 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
5 September 2011

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 2010 to 30 June 2011) is as follows:

1	On 15 July 2010 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime of murder, accessory to murder and conspiracy to pervert the course of justice.
2	On 15 July 2010 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of trafficking in a large commercial quantity of a drug of dependence.
3	On 15 July 2010 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of conspiracy to murder.
4	On 7 September 2010 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of murder, attempted murder, conduct endangering life and intentionally causing serious injury.
5	On 16 September 2010 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of bribery of a public official.
6	On 9 May 2011 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of murder.
7	On 10 May 2011 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of attempted murder. The CPO included a special condition that except for a certain named persons, all other applications for a witness summons must be brought before the Supreme Court pursuant to s. 14 of the MCIP Act.