Office of the **Special Investigations Monitor**

Annual Report 2011–2012

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1 Introduction

This is the annual report for the financial year ending 30 June 2012 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 the above legislative provisions, 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** which commenced operation on 16 November 2004.

David Anthony Talbot Jones was the inaugural Special Investigations Monitor. Appointed on 14 December 2004, Mr. Jones retired on 14 December 2009. On 15 December 2009, the Governor-in-Council appointed Leslie Charles Ross as SIM. Following an initial two year term, the appointment of Mr. Ross has since been extended.

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

The **Major Crime Legislation (Office of Police Integrity) Act 2004**, 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 (para. 8 at 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 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 and which conferred further powers on the DPI, commenced operation on 16 November 2004 and are now contained in the Police Integrity Act.

The provisions conferring further powers on Victoria Police 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 of apprehension for 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. 123)
- 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 Police Integrity Act.

9 *The Whistleblowers Protection Act 2001* (as amended)

The purposes of this Act are:

- to encourage and facilitate disclosures of improper conduct by public officers and public bodies
- to provide protection for person(s) who make those disclosures and person(s) who may suffer reprisals as a result
- 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 s. 43(1) of the Whistleblowers Protection Act, the Ombudsman may refer a disclosed matter (as defined by the Act), if it relates to:

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

The MCIP Act amended the Whistleblowers Protection Act to extend the DPI's coercive questioning powers under that Act in the same way as these powers were extended under the Police Regulation Act (see para. 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 para. 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 para. 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 para. 8 of this report).

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

There was one matter 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 commenced operation on 1 July 2005.

The nature and extent of these powers together with the statutory role of the Chief Examiner were discussed in the 2005-2006 Annual Report and, therefore, require only a brief reference.

A review of the consequent powers derived from the legislation 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 para. 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 a number of matters relating to the conduct of a coercive examination into an organised crime offence.

The SIM's 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 to the SIM (s. 52)
- the Chief Examiner must report matters relating to the coercive questioning of a person (s. 53)
- the Chief Commissioner must ensure that certain prescribed records are kept on a 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 the legislation governing the use of telecommunications interceptions, surveillance devices and controlled operations.

The SIM's responsibilities include 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 to the Commonwealth Minister making a declaration at the request of a State Premier, a State must have legislation in place which addresses the accountability of the State agencies through record keeping requirements and inspection oversight. In this regard, s. 35 of the TIA Act requires the inclusion of certain legislative provisions which, in the Victorian context, are found 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 Police Minister and the Police Integrity Minister 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) to inspect those Victorian agencies authorised to use surveillance devices. The SD 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 SD Act requires the SIM to inspect the records of those agencies from time to time and to report the results of inspections to each House of the Parliament as soon as practicable after 1 January and 1 July of each year. A copy of the report must be provided to the Minister (the 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
OPI
Department of Primary Industries
Department of Sustainability and Environment.

During 2011-2012, the SIM conducted two inspections. The inspection results are reported and once tabled in Parliament are publicly available on the OSIM'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, 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 and the Department of Sustainability and Environment. 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 clearly be unlawful but for the protection offered by the (controlled operations authority) indemnity.

In addition to receiving bi-annual reports from the chief officer of each agency, the CO Act 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 level of statutory compliance achieved by each.

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, due as soon as practicable after receipt of the chief officers' reports, will be tabled in the Parliament.

14.4 Cooperation and compliance reporting

The SIM's reports under the SD Act are publicly available once tabled in Parliament.

Reports under the State TI Act are not publicly available and are provided only to agency chief officers, the State Attorney-General, the Minister for Police and Emergency Services and to the Minister for Police Integrity who must then forward a copy to the Commonwealth Attorney-General (as the Minister responsible for the TIA Act).

The CO Act, Fisheries Act and Wildlife Act reports are publicly available once tabled in Parliament. Some reports are specifically accessible on the OSIM's webpage.

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

Paragraph 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 system of oversight designed to safeguard a central tenet in the administration of criminal justice, 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 the investigative process.

The Police Integrity Act gives the DPI the power to regulate the conduct of an examination as he/she 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'.*

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.

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.

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.

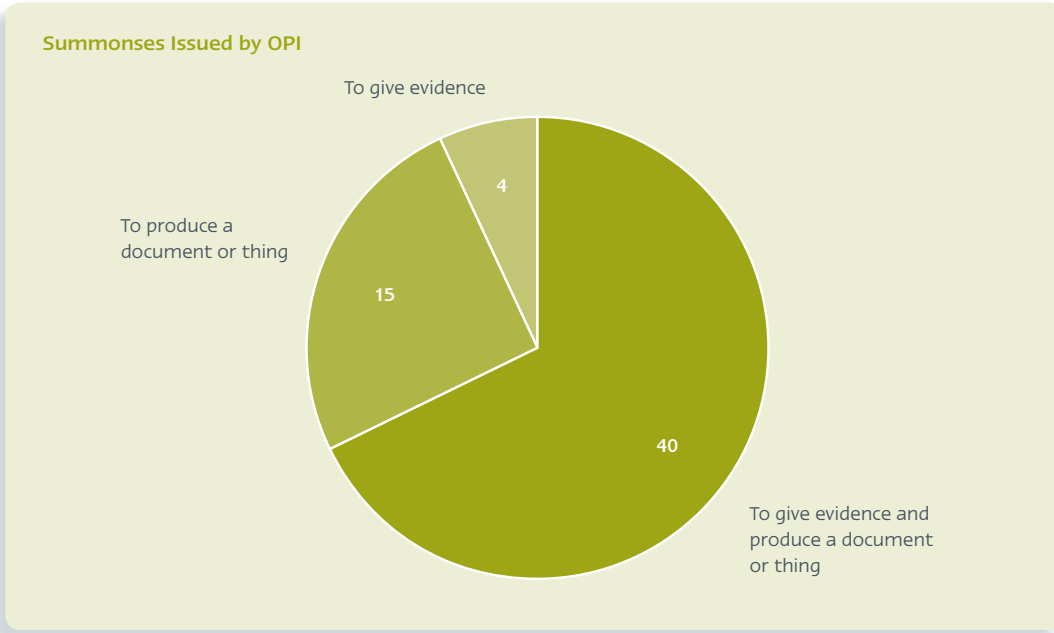
17 Section 115 Reports

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 (Part 4 Division 2). 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 - s. 54(2)). To monitor compliance with this provision, the s. 115 report now contains additional information, including a copy of the summons.

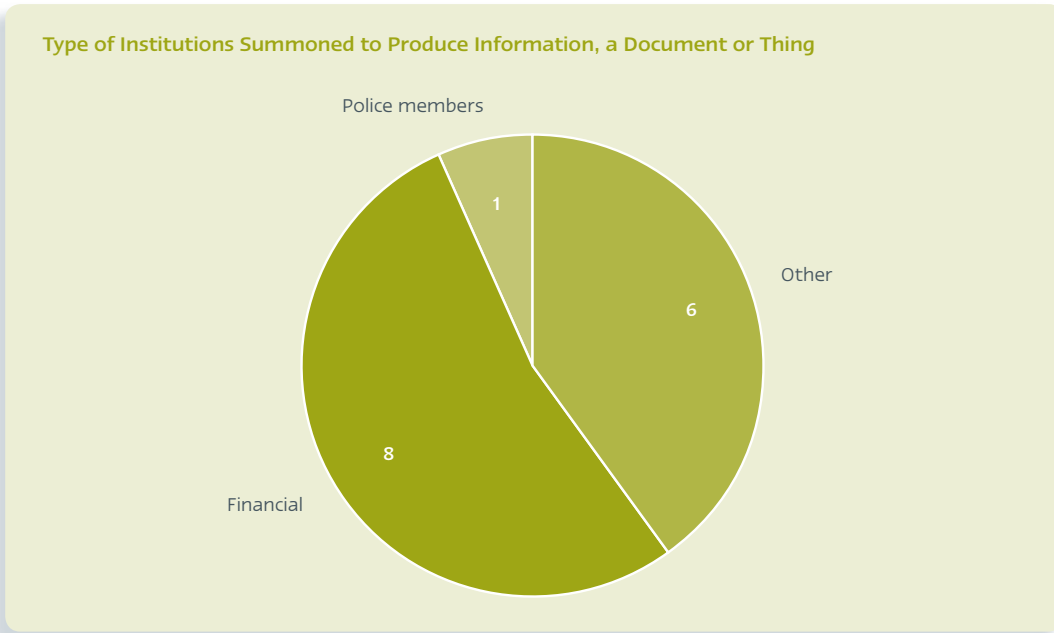
17.1 Overview of section 115 reports received by the Special Investigations Monitor

A total of 59 s. 115 reports were received by the SIM in the current reporting period. Except in two instances, all reports were received within the required time frame. The following chart displays the breakdown of the types of summonses issued by the DPI.



17.2 Summons to produce a document or thing

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



17.3 Financial institutions

Financial documentation sought and produced included, for example, details of corporate business interests, real and personal property, applications for finance, saving, cheque, credit card records and loan accounts, bank statements, voucher records and travel expenditure. 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 investigated by OPI include, for example, allegations of misconduct in public office, improper associations, unauthorised secondary employment, handling stolen goods, obtaining financial advantage by deception, attempting 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 documentation. 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 investigations conducted by OPI. Examples include computer records, handwritten notes, letters, registers and motor vehicle purchases.

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) was discussed in para. 18 of the 2006-2007 Annual Report.

19 Persons Attending The Director, Police Integrity To Produce Documents

This category:

- Includes persons who have been summoned to give evidence in addition to receiving a summons to produce
- may include 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. These 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 three reports pursuant to s. 117 of the Police Integrity Act were provided to the SIM between 1 July 2011 and 30 June 2012.

Transcripts were provided for all but one examination. All hearings were accompanied by visual 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 before the DPI.

The DPI may apply to a magistrate for the issue of a warrant to arrest. A warrant can be issued if the DPI believes on reasonable grounds that there was proper service of the summons on the witness and that the witness has failed to attend before the DPI in answer to the summons.[4]

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

22 The Need For The Use Of Coercive Powers

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

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

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.

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.' Paragraph 3 of this document confirms the need to use coercive powers only 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.

4 Police Integrity Act s. 84(1).

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.

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 serious misconduct, improper associations, fraud, unlawful disclosure of confidential information, serious assault, perverting the course of justice, conflict of interest 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	11-12	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)	**8**	9	7	11	13	11	6	4	69
Complaint generated investigation s. 40 (formerly s. 86N of the Police Regulation Act)	**0**	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	0	1	0	1	1	0	3

A total of 35 witnesses were examined in this reporting period. Included were some witnesses who, having been recalled, were examined on more than one occasion. This can be compared with the total of 29 witnesses for the period 2010-2011. Of the 35 witnesses examined, 21 were serving police members.

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

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

The table below provides an overall summary of the total incoming material from the OPI during the current and previous reporting periods referable 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 (s. 115 and s. 117) Police Regulation Act (s. 86ZB and s. 86ZD)	**11-12**	**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	**59 (a)**	123	72	87	143	106	202	84	876
s. 117 and s. 86ZD Director must report other matters	**33 (b)**	32	18	57	63	44	60	30	337
Included in *(a)* and *(b)* above are a limited number of reports received pursuant to ss. 105B and 105D of the **Whistleblowers Protection Act 2001**.									

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 regulates the role played by legal representatives (formally pursuant to a power under s. 86P(1)(d) of the Police Regulation Act and 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	11-12	10-11	09-10	08-09	07-08	06-07	05-06	04-05	Total
Police witnesses legally represented during examination	**12**	10	9	18	34	25	38	9	155
Police witnesses not legally represented during examination	**9**	5	5	2	8	1	9	1	40
Former police members legally represented during examination	**3**	1	0	0	4	1	0	0	9
Former police members not legally represented during examination	**1**	0	0	0	0	0	2	0	3
Civilian witnesses represented during examination	**9**	7	1	18	12	3	2	2	54
Civilian witnesses not represented during examination	**1**	6	2	10	4	2	8	3	36

26 Mental Impairment

Where a witness is believed to have a mental impairment, the measures to be taken by the DPI or his delegate under s. 64(4) of the Police Integrity Act, were discussed in the 2005-2006 Annual Report (para. 29). The information required by reg. 22(g) of Police Integrity Regulations 2009 (formerly reg. 4(g) of the Police (Amendment) Regulations 2005), must be included in the s.117 report given to the SIM.

In relation to one examination reviewed, the SIM noted an issue which concerned the possible 'mental impairment' of a witness. Although 'mental impairment' is defined in s. 3 of the Police Integrity Act to include impairment because of '*mental illness, intellectual disability, dementia or brain injury*', the requirement for an independent person to be present during the examination hearing is only enlivened if the witness is '*believed by the Director to have a mental impairment*' (s. 64(4)). Accordingly, whether a witness is believed to be impaired (as defined), is a matter solely for the DPI.

However, whilst the SIM does not (nor can he) 'second guess' that which is the sole province of the DPI, in the examination under report he did consider that the nature of the oral evidence adduced during the hearing was such as to reasonably expect the delegate to have made *some* enquiry in relation to this important issue.

Accordingly, the SIM wrote to the Acting DPI and, having invited his response, received a reply in writing advising him that in addition to that aired at the examination, the hearing delegate also had access to additional material, the detail of which was not consistent with any suggestion that the witness was suffering from a 'mental impairment'.

The SIM is grateful to the Acting DPI for this advice and, given the circumstances, is satisfied with the delegate's management and handling of the matter.

27 Witnesses In Custody

The power of the DPI under s. 57(2) of the Police Integrity Act, to give a written direction requiring 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 (para. 30).

In the period under review, no witnesses were examined pursuant to such a direction.

28 Explanation Of The Complaints Procedure

As referred to in para. 31 of the 2005-2006 Annual Report, the previous SIM considered that persons subject to coercive examination 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 also recommended, the provision allows for witnesses to receive written notification of their rights and obligations prior to and in lieu of most of the oral advice which otherwise must be given, but only if 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 closely monitored by the SIM. Where appropriate, the DPI follows the practice of providing written notification in advance. Subject to the observations concerning unrepresented witnesses (see para. 33.1 of this report), the SIM is satisfied of the compliance with the s. 62 preliminary requirements 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).

8 This is explained in para. 32 of the 2007-2008 Annual Report.

29 The Use Of Derivative Information

It was stated in para. 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' (s. 69(3)).

Whilst the SIM previously proceeded on the basis that the s.69(3) 'use immunity' did not extend to the use of derivative information, it was noted in the 2008-2009 Annual Report (para. 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[9]. 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 paras. 30 and 64 and 2009-2010 at para. 64).

30 Certificates

In addition to the observations made (in para. 29 above), the certification procedure under the earlier s. 86PA of the Police Regulation Act and its operation has been discussed previously (e.g. paras. 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/her 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/her delegate.[10] A complaint can be oral or written. If the complaint is made orally, the SIM may require the person making it to confirm the complaint in writing.

The SIM is not required to investigate every complaint received. Section 119 of the Police Integrity Act provides the SIM with the discretion to refuse to investigate complaints considered to be trivial, frivolous, vexatious or not made in good faith.

9 2009 VSC 381.

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

In reporting that a total of six complaints were received during the year under review, the SIM notes that three (including one seemingly misdirected matter), were sent by post, two via electronic mail and one by telephone.

However, that the SIM was unable to formally consider any of these matters is the result of what has been and still remains a very narrow 'complaints jurisdiction'.

In the circumstances, the SIM wrote to the complainants and, in the course of informing them (or, in one instance, again advising) of the jurisdictional constraints, highlighted the possibility of some of the issues raised being forwarded to a different statutory body for its consideration e.g. Ombudsman, Victoria.

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 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 were identified by the SIM following his review of examinations conducted during the current reporting period.

33.1 Preliminary requirements

Section 62 of the Police Integrity Act provides that before any question is asked of a witness at an examination, or a witness produces a document or other thing, the DPI must:

- inform him/her (whether represented or not), of the general scope and purpose of the investigation to which the examination relates (s.62(1)(c)); (except if the DPI considers that to do so might prejudice the investigation or be otherwise contrary to the public interest (s.62(2))
- explain to all legally unrepresented witnesses, the matters set out in s. 62(1)(d) – (i) (e.g. abrogation of the privilege against self-incrimination, legal professional privilege, confidentiality requirements).

However, except for the general scope and purpose of the investigation, the DPI is not required to inform a witness of anything else if:

(a) before the examination, a document explaining these other matters (e.g. abrogation of the privilege against self-incrimination, legal professional privilege, confidentiality requirements etc), was given to him/her; and
(b) the witness is legally represented at the examination; and
(c) he/she informs the DPI that these 'other' matters have been explained by his/her legal representative.

Unrepresented witnesses

In the year under report, the SIM reviewed a number of examinations in which unrepresented witnesses received either incomplete or inadequate preliminary directions. The SIM wrote to the Acting DPI to express his concern in having to highlight issues of non-compliance with an otherwise clear and unambiguous legislative requirement.

In his written reply, the Acting DPI acknowledged the SIM's concern and in noting that members of OPI personnel had been briefed accordingly, advised that steps were being taken which would enhance OPI's compliance with its legislative obligations.

The SIM is grateful to the Acting DPI for his positive response and assurances concerning this important matter.

33.2 Legal professional privilege

Section 70 of the Police Integrity Act deals with the matter of Legal Professional Privilege (LPP). Very broadly, LPP attaches to and protects communications between a lawyer and his/her client for the purposes of seeking legal advice or of litigation. However, whether LPP applies to witnesses summoned to appear at OPI for examination, depends on whether the witness is deemed to be a 'public officer' (which is defined under the Police Integrity Act to include all public authority employees and members of Victoria Police).

In the result, 'public officers' are not entitled to claim LPP when appearing as witnesses before OPI. The only exception (i.e. when they can lawfully object to answering/producing on the ground of LPP), is if the question asked at the examination is in *'[r]elation to a criminal proceeding to which the...officer is a party.'* This is in contrast to other (i.e. non public officer) witnesses, who are entitled to rely on the 'broader' LPP grounds described above.

33.2.1 (a) Public officer

The SIM notes that in a number of examinations reviewed in the year under report, witnesses were informed by the delegate (or, in one case, by the (then) DPI), that they could object to answering any question on the ground of LPP, notwithstanding that in each case the witness was a member of Victoria Police and, therefore, deemed to be a 'public officer' pursuant to the provisions of the Police Integrity Act.

In considering these directions to be in conflict with s. 70 of the Police Integrity Act, the SIM wrote to the Acting DPI and invited his comment. In reply and whilst conceding that these directions were *'[n]ot a legislative exception'*, the Acting DPI referred the SIM to a directive from the (then) DPI that *'[o]ut of fairness'* LPP (as broadly defined above) was to be made available to these witnesses.

In response, the SIM again wrote to the Acting DPI and, in noting that the wording of s. 70(3) of the Police Integrity Act is clear in excluding the entitlement of a 'public officer' to claim LLP (except as provided in subsection 70(4)), reiterated his view.

In the circumstances, the SIM is obliged to again state his opinion that it is beyond the lawful authority of the DPI to attempt to extend the privilege to these witnesses.

33.2.1 (b) Other witnesses

The SIM also reviewed examination transcript involving 'non public officer' witnesses, each of whom received preliminary directions intended to inform them of their rights and responsibilities, but which the SIM considered confusing. This was because the directions given to each mistakenly considered their representational status (i.e. whether or not they had chosen to be represented by a lawyer at the hearing), was relevant to their right to claim LPP.

In the circumstances, the SIM wrote to the Acting DPI who, in acknowledging the concerns raised, confirmed that steps were being taken by OPI to ensure the delivery of a clearer statement of preliminary directions in the future.

33.3 Confidentiality

In looking to the various statutory functions performed by the SIM, monitoring compliance with the confidentiality provisions of the Police Integrity Act is clearly amongst the most significant. This is not only because a serious breach can, or has the potential to, jeopardise or irreparably damage the integrity or effectiveness of the investigation, but that when confidentiality is, or is perceived to be, compromised, the ability to ensure the physical security, safety and well being of witnesses and others is significantly diminished.

Further to the matters discussed (at para. 33.4 ff) in the 2010-2011 Annual Report, that 'confidentiality' and related issues should again be highlighted by the SIM, underscores its importance in furthering the public interest; whether through the sanctioned investigative use of extraordinary powers to detect and prevent police corruption or in safeguarding individual safety and well-being.

The issue is best understood when set against the observations made by the previous SIM in the first Annual Report and which the current SIM considers still resonates today:

> Concern was raised by a police witness that the witness's attendance at a hearing had become known amongst members of the police force. The witness was particularly concerned about the fact that [his/her] colleagues had this information within a few days [of the witness attending the examination].
>
> The issues raised by the witness relating to the examination are legitimate and a cause for concern. The difficulty for the DPI ... is that a witness is often required to inform his/her employer of why he/she requires time away from work. A breach of confidentiality may occur at that instance and tracking whether this information is further disseminated can be very difficult, if not impossible.
>
> Related to this concern is the safety of witnesses. The mere fact of an attendance before the DPI may place certain witnesses in positions of danger...[t]hese witnesses may be compromised due to pressure or threats placed upon them by persons who are aware of their pending attendance at a compulsory examination. For example, a civilian witness disclosed... during an examination (of having known) that [he/she] would have to give evidence two weeks before being served with a summons. In this instance the witness felt compelled to discuss the summons with a third party because (of a concern) about...safety if [he/she] gave evidence. The witness advised (of threats)...that family members and the witness (himself/herself) would be hurt if [he/she] did not give false evidence.
>
> **[2004-2005 Annual Report (para. 21 at p.16)]**

In this regard, the Acting DPI has informed the SIM that he has determined that OPI undertake a review into certain key aspects of the processes and documentation presently used to manage and promote awareness of 'confidentiality.' It is understood that this will include examining current practice in identifying and managing confidentiality issues prior to the issuance of a summons.

In welcoming the decision of the Acting DPI to proceed with this important initiative, the SIM awaits its consideration and final outcomes.

33.3.1 'Permitted disclosure'

Division 4 of Part 2 of the Police Integrity Act deals with the circumstances in which the disclosure of otherwise confidential information is permissible. 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.

33.3.2 'Restricted matter'

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 lawfully disclose it in the course of carrying out the functions of the DPI or for the other limited purposes referred to in the Police Integrity Act (s.22(1)). Otherwise, it is unlawful for a person to disclose what is referred to in the legislation as 'restricted matter'. Examples of 'restricted matter' include disclosing 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 s. 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 2011-2012 one penalty unit equated to $122.14.
12 Sections 22(2) and 23(1) of the Police Integrity Act.

In the period under review, the SIM identified the issue of 'restricted matter' as one which precipitated (and in some instances, ensured a continued) dialogue with the Acting DPI and which involved an exchange of views concerning confidentiality obligations, dissemination of information, delegation of authority and matters of like importance. In the result, discussions focused on two issues of considerable significance to the investigative use of coercive power. The first posed the question 'Does a delegate of the DPI have unfettered power to permit disclosure of 'restricted matter'? The second examined some of the rulings made by the DPI and delegates to permit disclosure of 'restricted matter' during a coercive examination hearing.

33.3.3 The coercive examination powers of a delegate

Section 21 of the Police Integrity Act permits the DPI to delegate certain powers. The extent to which this is possible, is determined by the 'status' of the intended recipient. For example, the DPI has 'scope' to delegate far more significant and wide ranging powers to a 'senior relevant person' (as defined) than to a 'relevant person.'

That the SIM considers the issue of 'delegable authority' to be most apparent when reviewing relevant examination transcript is because, more often than not, the coercive hearings are conducted before the DPI's delegate (i.e. representative).

Reference was made in the 2010-2011 Annual Report to correspondence forwarded by the SIM to the (then) DPI:

> [i]nvolving 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)
>
> **[2010-2011 Annual Report - para.33.4.2. at p.32]**

Further to the extract above, it is noted that during the year under report the SIM continued to review the relevant examination transcript with a view to identifying not only the necessary link between a delegate's exercise of discretionary power and the 'restricted matter' subsequently disclosed, but also cognisant of the need to more fully consider the link between the DPI's Instrument of Delegation and the coercive powers exercised by a delegate in an examination hearing.

Following careful examination of this issue, the SIM identified certain discrete matters which he considered ought be brought to the attention of OPI. Accordingly, he wrote to the Acting DPI and invited his consideration of the matters raised. In response, the Acting DPI made it clear that OPI did not share the SIM's view which is that when conducting a coercive examination on behalf of the DPI, the discretion of a lawfully authorised delegate is still subject to certain constraints.

In the circumstances, despite ongoing discussion, correspondence and the receipt of independent legal opinion, the matter of 'delegable authority' remains one characterised by a clear division of opinion.

However, notwithstanding the current impasse, the SIM is actively considering a number of further options and, together with the Acting DPI, is committed to securing a satisfactory and workable outcome.

33.3.4 The decision to permit disclosure of 'restricted matter'

In relation to the permitted disclosure of 'restricted matter', the SIM's view, as previously conveyed to the (then) DPI and to the Acting DPI, is unequivocal:

> [A] matter of the highest importance, the disclosure of otherwise confidential 'restricted matter' in the course of a coercive examination hearing ought...only be considered in the most exceptional circumstances.'
>
> **[2010-2011 Annual Report para. 33.4.2 at p.32]**

Following ongoing dialogue, the SIM had also understood this to be the position of the (then) DPI and OPI. However, given what was said to be an *'occasional'* need to disclose 'restricted matter' in the course of a coercive hearing (and, then, a decision *'[o]nly ever made after careful consideration, including risk analysis...'*), it must be said that the SIM's perception of OPI's increasing preparedness to allow disclosure of this information is contrary to his expectation. In this regard, the SIM considers that there has been a troubling increase in the level and particularity of detail disclosed when dealing with what is otherwise highly protected confidential and extremely sensitive material and information.

OPI has often said that one of the most compelling reasons for allowing highly confidential information to be disclosed during coercive examinations is the need to accord 'natural justice.' So that the issue can be properly understood, it is necessary to set out the substance of a letter from the SIM to the Acting DPI on point:

> [T]he SIM considers it necessary to restate his firmly held view that the *audi alteram partem* rule (the notice-hearing rule) of natural justice, is not relevant to a compulsory examination hearing in which the DPI is observed to preside over a tribunal whose exercise of coercive power is for an investigative, preliminary and non-determinative purpose. The powers given to it are specific powers, none of which involve the resolution of disputes between parties or which determine the rights of those appearing before it. In this regard, the SIM's limited reference to what is an abundance of relevant case law, readily supports the proposition that the rule of 'natural justice' is only (and even then, not necessarily) enlivened when considered conjunctively with an adjudicative tribunal whose decision(s) affect individual 'rights or interests' (as defined by the common law).
>
> As *Gillard, J* said in Lednar v Magistrates' Court [2000] VSC 549:
>
> > It is trite law, that courts of law are bound by the rules of natural justice. That observation is true when the court is acting as a court of law adjudicating disputes between parties. But courts sometimes are required by statute to exercise a different power or jurisdiction which does not involve it in a dispute resolution process.Different considerations apply and the inference that the fair hearing rule applies is weaker than in the court context.
> >
> > The notice-hearing rule applies to a court in the usual case before a court where there are two parties contesting an issue and a decision is made. The procedures adopted by the courts have developed to give effect to the objective of dispute resolution by a process of an impartial adjudicator honestly and fairly hearing the dispute. The presence of a *lis* inter parties necessarily involves the obligation to accord natural justice' (emphasis added).

His Honour also cited with approval, a NSW case which involved the Independent Commission Against Corruption undertaking a particular enquiry and concerning which *Gleeson CJ* said:

> To a substantial extent, the courts, in requiring bodies over whom they exercise jurisdiction to observe procedural fairness, have been influenced in their ideas of what constitutes procedural fairness by the procedures adopted by courts. As was pointed out by Lord Shaw of Dunfermline in Local Government Board v Arlidge (1915) A.C. 120 at 138 , judges have tended to imitate methods of judicial procedure when enforcing requirements of procedural fairness. The authorities have repeatedly warned against making the uncritical assumption that what is required in a court is also necessary for an administrative body.
>
> **[ICAC v Chaffey (1992) 30 NSWLR 21 at 29]**

This is not to say there aren't circumstances in which the disclosure of 'restricted matter' may be considered permissible. For example, during the last reporting period the DPI informed the SIM:

> [i]f 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.[13]

Whilst the SIM noted that this could be a circumstance in which it was considered necessary and appropriate to do so, any agreement was in the expectation that this would be done sparingly and that:

> [t]he 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
>
> **[2010-2011 Annual Report para. 33.4.2 at p.32]**

However, it is noted that of the s.117 reports received by the SIM in the year under report, only two purported to document the information sought and neither provided the necessary factual basis upon which the decision to disclose 'restricted matter' had been made.

13 2010-2011 OSIM Annual Report para. 33.4.3 at p. 34.

33.4 Production of documents

Having made certain observations in the 2010-2011 Annual Report concerning OPI's use of electronic mail (email) to transmit confidential information, the SIM noted that he would continue to monitor the situation in the course of the following reporting period.[14] In this regard, the Acting DPI has informed the SIM that following a risk analysis undertaken by OPI's Information Technology Services Team, a number of recommendations have been made for further improvement. In having since sanctioned these recommendations, the Acting DPI further advised the SIM that implementation will lead to existing systems either being replaced or significantly enhanced. The product of these changes will result in even higher standards of security which, among other things, will enable the secure delivery of information in response to a summons for documents.

The SIM is grateful to the Acting DPI for this advice and, whilst welcoming the proposed changes, maintains his strongly held view that wherever practicable, the production of documents or other things to OPI is best met by 'safe-hand' delivery.

33.5 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 s. 56(3) requiring a witness summons to be served a 'reasonable time' before the return date, but also s. 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).

As was subsequently highlighted in the 2010-2011 Annual Report (para. 33.1), if the DPI believed, for example, that a delay in having a person attend would likely result in evidence being lost or destroyed or serious prejudice to the conduct of the investigation, ss. 56(4)(a) and (d) respectively permit a 'forthwith' (i.e. an 'immediate attendance') summons to be issued and served.

14 supra para. 33.4.2. at p. 33.

A legislative dichotomy

In relation to ss. 56(3) and 56(4) of the Police Integrity Act, the SIM holds to a previously stated view that s. 56(4) is only intended to apply when circumstances and operational exigencies are such as to lead the DPI to believe that the 'short service' of a 'forthwith' summons is justifiable.[15] 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 s. 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.
>
> **[2010-2011 Annual Report - para. 3.1 at p.28]**

The SIM wrote to the Acting DPI and, in restating his strong view about the importance of and distinction between ss. 56(3) and 56(4), observed that despite previous discussions, correspondence and comment in successive OSIM Annual Reports, the matter of service continues to remain an issue.

The Acting DPI responded by letter to the SIM and, having noted his comments, advised that '*[O]PI will endeavour to ensure that the 7-day period of notice is maintained unless the reasons provided for in the PI Act justify otherwise.*'

The SIM observes OPI's decision to treat '7 days' before the hearing as 'reasonable notice', accords with what is widely accepted to be the 'general rule.'

However, the SIM is concerned that OPI's approach is one which does not simply consider '7 days' as a relevant, albeit very important, factor in determining the reasonableness or otherwise of the process served, but that which constitutes the very means by which ('short') service is measured and ultimately determined.

Accordingly, the SIM considers that what is needed is not an 'all or nothing' approach', but one which takes account of, refers to and carefully considers all relevant matters. As this will more often than not, encompass multiple factors, it can rarely be satisfied by a decision-maker focusing exclusively on a single issue; be it, for example, the preparedness of a witness agreeing to attend on limited notice, a witness (or his/her legal representative) neither requesting an adjournment or otherwise objecting to or complaining about the time between service and attendance etc. This is not to pass comment on the relevance and undoubted importance of these and other considerations; it is only to observe that each case must be approached, considered and determined on its own facts.

15 2009-2010 OSIM Annual Report at p. 25.

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 Acting DPI, as did their respective members of staff. The OSIM also followed earlier practice whereby reports and recordings relating to attendances by persons before 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 two exceptions) 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, or on behalf of, 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

Subject to the comments above, the SIM is satisfied that the overall questioning of persons and the requirement to produce documents or other things were 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

Subject to the comments above, 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's 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 and why the SIM's jurisdictional role is to monitor the use of these powers in the public interest. A significant 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 (paras. 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 MCIP 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 for a regime for the authorisation and oversight of the use of coercive powers to investigate organised crime offences*'.[16] 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.

Damien Brian Maguire was initially appointed to the statutory office of Chief Examiner by the Governor in Council on 25 January 2005 and reappointed on 25 January 2010 and 17 July 2012. Mr Maguire's background has been set out in previous Annual Reports. He is well qualified for the position. Pursuant to s. 21 of the MCIP Act, Mr Stephen McBurney was appointed as an Examiner by order of the Governor in Council on 18 December 2007.

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 s. 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.

The Chief Examiner's practice is to provide the SIM with a copy instrument pursuant to which the powers to be exercised by the Examiner when conducting relevant examination hearings are formally delegated.

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

16 Section 1(a) MCIP Act.

The provision of these unprecedented powers to Victoria Police raised many issues amongst various legal bodies[17] and academics concerned about the traditional rights of citizens being undermined.[18] A review of these concerns and the government's response is discussed in the 2005-2006 Annual Report (para. 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 having been 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.

In the year under report, the SIM received correspondence from a person who had earlier been examined pursuant to a witness summons issued by the Chief Examiner. The witness doubted that the matter about which he/she was summonsed could properly be regarded as an 'organised crime offence' within the meaning of the MCIP Act. The SIM responded in writing and noted that as the issue raised by the witness was outside the SIM's jurisdiction (as defined in the MCIP Act), he was unable to consider the matter.

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 which can grant a CPO. All applications for a CPO must be heard in closed court.[19] Section 7 of the MCIP Act prohibits the publication or reporting of an application for a CPO unless otherwise ordered by the Court.[20]

17 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.
18 Corns, C., 'Combating Organised Crime in Victoria: Old Problems and New Solutions', *Criminal Law Journal*, Vol. 29, 205, pp 154-168.
19 Section 5(8) MCIP Act.
20 The unauthorised publication of a report of a proceeding is an indictable offence under s. 7 of the Act with a penalty of level six imprisonment (five years maximum).

An application to the Supreme Court for a CPO can only be made by a member of the police force and then only with the approval the Chief Commissioner or his/her delegate.[21] The application may be made if the member '*suspects on reasonable grounds that an organised crime offence has been, is being or is likely to be committed*'.[22]

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 duration period sought for 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 s. 5(6) in which 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 to provide an affidavit 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.[23]

41.1 The circumstances under which a CPO can be granted

The invasive and unprecedented nature of the powers authorised under the MCIP Act are, however, subject to the scrutiny of the Supreme Court which ensures that 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 of 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.

21 Section 5(2) MCIP Act.
22 ibid., s. 5(1).
23 ibid., s. 6.

This second requirement adds a further protection for the community in that only investigations considered to be in the public interest benefit from the making of a CPO.

The legislation is clear in requiring both tests to be met before the Court can make such an order. The legislature has clearly stated that a well-founded suspicion on its own is insufficient to allow the use of these intrusive powers.

Only when the Supreme Court is satisfied that an application meets each criterion specified under ss. 8(a) and (b) can it make 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.[24]

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 the order revoked. The decision of the Court is considered in detail in the SIM's s. 62 Report (pp 91-96).

In addition, reference was made in the 2009-2010 Annual Report to the **Major Crime Legislation Amendment Act 2009** (MCLA Act) 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 CPO (para. 41.1.1). The amending legislation came into effect on 1 February 2010[25] 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, 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.

24 ibid., ss. 10, 11 and 13.
25 Section 4 of the MCLA Act.

In the year under report, there was one instance where a CPO was revoked in circumstances in which it was considered by the Chief Commissioner of Police to be no longer required for the purpose for which it was originally made.[26]

41.1.2 Extension of CPOs

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

The SIM notes that during the current reporting period, one application for an extension of a CPO was refused.

41.1.3 Issuance of CPOs

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 a monitoring function which is activated consequent upon the exercise of coercive power 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 relevant order. The table below displays a breakdown of CPOs for the current and previous reporting periods.

Coercive Power Orders	11-12	10-11	09-10	08-09	07-08	06-07	05-06	Total
Number of CPOs Issued by the Supreme Court	**1**[27]	7	5	2	1	6	4	26
Duration of Orders	**12 months**	12 months	12 months	6 months	6 months	6 months	6 months	–
Number of Orders with Conditions Attached	**1**[28]	7	5	2	1	6	4	26

41.2 Summary of organised crime offences

A very general summary of organised crime offences investigated pursuant to CPOs in the year under report is attached as Appendix A to this report.

26 Section 11 MCIP Act.

27 There were also three extensions granted by the Supreme Court in this reporting period, in respect of two CPOs. One CPO was extended for a period of six months, having been previously extended on three occasions. Another CPO was extended for a period of six months, and subsequently for a period of three months.

28 In addition, the CPO which was twice extended during this reporting period had a condition attached to each extension. Another CPO was varied during this reporting period to include a special condition.

42 The Role Of The Special Investigations Monitor

The SIM plays an important role in oversighting the exercise of coercive power 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 very similar to that exercised in relation to the DPI. These functions, as set out in s. 51 of the MCIP Act, have been referred to earlier in this report (para. 11).

43 Reporting Requirements Of The Chief Examiner

43.1 Section 52 reports

The reporting requirements of the Chief Examiner are also similar to those that apply to the DPI. Section 52 of the MCIP Act requires that the Chief Examiner 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 specified information required under s. 15(10) of the MCIP Act.

Although not required under the Act, the Chief Examiner has implemented a practice of video recording all applications made under s. 15 of the MCIP Act for the issue of a summons or the making of a custody order under s. 18. As an accompaniment to the s. 52 report, the Chief Examiner has provided a copy of the video recording to the SIM in relation to all applications made in the period under review.

During the current reporting period there were no substantive issues raised by the SIM concerning 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 56 s. 52 reports were received for the 2011-2012 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 Major Crime (Investigative Powers) Regulations 2005 (the Regulations).

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 the examination, further information about any witness aged under 18 years, those believed to be suffering from 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, (if prepared), transcript. In this context, it is noted that during the period under report the Chief Examiner ensured that every s.53 report included transcript referable to the relevant coercive examination.

In relation to confidentiality notices[29] 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 60 s. 53 reports during the 2011-2012 reporting period.

All but one s. 53 report provided to the SIM was prepared and signed by the Chief Examiner or Mr McBurney as Examiner as soon as practicable after the person had been excused from attendance. The one outstanding matter arose as a result of the SIM having contacted the Chief Examiner to note the absence of a s. 53 report following (what was the presumed) completion of the coercive examination some months before. In subsequently providing the report, the Chief Examiner informed the SIM that the delay had been noted and discussed and that measures had been put in place to prevent future occurrence.

This matter is noted only by way of exception.

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.

29 See paras. 52 and 53 of this Report.

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

MCIP Act	11-12	10-11	09-10	08-09	07-08	06-07	05-06	Total
s. 52 - Chief Examiner must report witness summonses	**56**	82	55	73	36	10[30]	14	326
s. 53 - Chief Examiner must report other matters	**60**	49	59	50	25	50	16	309

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.

30 Some reports included information for two or more witnesses.

Actions that may be recommended by the SIM include, but are not limited to, the taking of any steps to prevent conduct from continuing or occurring in the future and/or taking action to remedy any harm or loss arising from any conduct.

Upon making a recommendation, the SIM may require 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.[31]

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 which he considers 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.[32] 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.[33]

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.

31 Section 58 MCIP Act.
32 ibid., s. 60.
33 The penalty for breach of these requirements is level six imprisonment (five years maximum) (s. 60(4) of the MCIP Act).

47 Annual Report

Under s. 61 of the MCIP Act the SIM is required to provide an annual report to each House of Parliament, as soon as practicable after the end of each financial year, in relation to the performance of the SIM's functions under Part 5 of the Act. This report has been prepared by the SIM in compliance with this requirement.

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

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

48 The Power To Summons Witnesses

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

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

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

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

(4) a summons to attend for any of the above purposes but concerning which attendance is required immediately (a summons requiring the immediate attendance of a person before the Chief Examiner can only be issued if the Court or the Chief Examiner reasonably believes that a delay may result in any one or more of the following situations: 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).[34]

48.1 Types of summonses issued

In the current reporting period, a total of 56 summonses (including s. 18 orders) were issued.[35] Of these, 48 summonses were to give evidence, two were to give evidence and to produce documents or other things and six were to produce specified documents or other things. There were no summonses requiring immediate attendance during this period.

34 Sections 14(10) and 15(9) MCIP Act.

35 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.

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

Types of Summonses Issued	11-12	10-11	09-10	08-09	07-08	06-07	05-06	Total
To produce a specified document or other thing	**6**	17	3	7	3	1	0	37
To give evidence	**48**	64	58	63	20	46	17	316
To give evidence & produce documents or other things	**2**	1	2	9	5	4	1	24

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.[36]

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.[37]

Every application to the Supreme Court must be in writing and must include the information specified in ss. 14(a)-(f) of the MCIP Act and any additional information required by the Court.

The Chief Examiner can issue a summons at any time whilst a CPO is in force, either on the application of a police member or on his/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.[38] 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 was 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.

36 Section 16 of the MCIP Act.
37 ibid., s. 14(3).
38 ibid., s. 15(3).

48.2 Summons issue procedure

As noted, the SIM is provided a video recording of each application made by a police member to the Chief Examiner for the issue of a summons or s. 18 order.

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

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

- the connection between the witness and the organised crime offence
- the nature and relevance of the evidence that the witness can give
- confirmation of the materials provided to the Chief Examiner about the investigation including affidavits and briefs of evidence
- whether normal service or immediate service is required and the reasons for the need for immediate service where applicable
- 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 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.

In the matters reviewed by the SIM in the current reporting period, a summons or s. 18 order was issued by the Chief Examiner only after he was satisfied that it was reasonable in the circumstances to do so.

In one matter reviewed by SIM, it was in the course of hearing a s.15 application that the Chief Examiner noted that three days earlier, members of the police force had executed a search warrant in the presence of the proposed witness. Recognising its potential relevance to the proceedings, the Chief Examiner enquired of the police applicant why such an operation was carried out when the witness's attendance at a coercive examination was in anticipation. Whilst the police applicant provided an explanation, the Chief Examiner directed that further enquiries be undertaken.

In this regard, having sought and received from the Chief Examiner the results of the further police enquiry, the SIM notes the Chief Examiner's thoroughness in ensuring he was satisfied that it was reasonable, in the circumstances, for a witness summons to be issued.

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

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 s. 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 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 s. 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 (para. 64).

48.4 Procedure relating to summonses issued by the Supreme Court

As the Supreme Court is not required to notify the SIM when a summons has been issued, 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 the discrepancies which can arise in the compilation of statistics if 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 the Chief Examiner notify the SIM of the issue of a summons by the Supreme Court, has been adopted and continues to be followed. This ensures that the statistics and information kept by the OSIM are complete and can be reconciled 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 reporting accuracy.

49 Reasonable And Personal Service Requirements

Sections 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.[39] 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 considers that all summonses issued by the Chief Examiner within this reporting period were served within a reasonable time.[40] That said, the SIM acknowledges that despite (sometimes repeated) attempts to ensure that service of a witness summons is effected within reasonable time before the examination hearing, this is not always possible e.g. a witness who intentionally seeks to avoid service by changing his/her address. Accordingly, as noted in earlier Annual Reports, whether service is 'reasonable' is not something capable of a comprehensive answer, but is a question of fact which requires consideration and assessment by the SIM on a case by case basis.

50 Contents Of Each Summons

The Act and the Regulations are specific about the contents of a summons. In combination, ss. 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.[41]

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

39 This requirement does not apply to s. 18 orders – see ss. 18(3) and (4) which effectively exclude the reasonable service requirement.

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

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

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 20 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.

As with the DPI, both the Supreme Court and the Chief Examiner may issue a confidentiality notice which can be served with a witness summons or s. 18 order. A written notice can be given to the summoned person, a person the subject of a s. 18 order or the person executing a s. 18 order.

A confidentiality notice must state the following matters:

- that the summons or order is a confidential document
- it is an offence to disclose the existence of the summons or order and the subject-matter of the summons or order unless the person has a reasonable excuse;[42] the circumstances under which disclosure may occur must be specified in the notice itself.

A reasonable excuse under s. 20(6) 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 refers the person named in the summons or s. 18 order to the provisions of s. 20(6) of the MCIP Act.

42 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 in subsection (9).

The inclusion of this explanation is very helpful to witnesses who are unfamiliar with the Act and the powers contained in it. Without it, 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.

With one exception, 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.

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

52.1 Confidentiality notice – reasonable excuse

In one matter reviewed by the SIM, the person concerned had been served with both a witness summons and a confidentiality notice. However, the witness did not attend the subsequent coercive examination alone, but in company with his/her father, who waited outside the examination room.

Concerned about protecting the confidentiality of the hearing, the Chief Examiner queried the circumstances of the father's attendance. The witness stated that it was his/her father who had answered the door of the family home when the police attended to serve the summons. Worried by this, the witness's parents enquired why the police wanted to speak to their son/daughter.

In then directing the witness's father be brought into the examination room, the Chief Examiner determined not only that he would require the services of an interpreter, but that the witness would also benefit from being legally represented. The hearing was adjourned accordingly.

Upon resuming, the Chief Examiner considered that it was arguable that the witness had a reasonable excuse for revealing to his/her father that which the confidentiality notice otherwise prohibited. In the interim, however, the witness's father had physically left the premises of the Office of Chief Examiner to attend a family member who was in ill health. In the result, this precluded the Chief Examiner from following his intended course, which had been to make a s. 43 non-publication direction in the presence of the father. Such a direction would have operated to prohibit the witness's father from publishing or communicating what had taken place, including the fact that his son/daughter had been required to attend pursuant to a witness summons.

Concerned to preserve confidentiality and considering it to be the only viable option, the Chief Examiner proceeded to make a s. 43 non-publication direction before then requesting that the witness inform his/her father of both the direction and its attendant legal obligations.

The SIM observes that at a subsequent hearing, the witness confirmed with the Chief Examiner that his/her father had not only been so advised, but that he also understood the requirements of s. 43.

The issue of preserving confidentiality when a family member unexpectedly accompanies a witness to an examination is further discussed at para. 67.4 of this Report.

53 When Confidentiality Notices May Or Must Be Issued

The Chief Examiner must issue a confidentiality notice under s. 20(2) of the MCIP Act if he/she 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.

Subsection 20(3) of the MCIP Act also empowers the Supreme Court and 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(3)(a)(i) and (iii).

The 2008-2009 and 2009-2010 Annual Reports discussed the s. 62 Report recommendations made by the previous SIM concerning the operation of confidentiality notices (see para. 53 of both reports). 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.[43]

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 to 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.

43 Section 6 of the MCLA Act.

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[44]
- commence or continue an examination of a person despite the fact that proceedings are on foot or are instituted in relation to the organised crime offence being investigated
- issue a written certificate of charge and issue an arrest warrant for contempt of the Chief Examiner;[45] this situation arises if a person has failed to comply with the requirements of a summons and is discussed further below (at para. 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, then fails without reasonable excuse to attend an examination as required or refuses or fails to answer a question as required or refuses or fails to produce a document or thing as required.[46] 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 highlighted immediately below (Contempt of the Chief Examiner) and discussed further at para. 55.1.

44 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 (para. 56.11). During the last reporting period and consequent upon passage of the **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 call for documents in the possession of a witness who had not been summoned, but who was 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).

45 Section 49 MCIP Act.

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

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.

55.1 Certificate of charge and arrest warrant for contempt

In one matter reviewed by the SIM, the witness attended at the Office of Chief Examiner and, having initially responded to the questions put, later refused when required to do so. Considered to be in contempt, a written certificate of charge and a warrant to arrest were then issued pursuant to s. 49(2) of the MCIP Act and, in the result, the witness was then dealt with by the Supreme Court of Victoria.

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/she 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's age 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;[47] (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 reviewed during this reporting period. The matters set out in s. 31 provide every witness with important information about his or her rights and any requirements made of him or her during an examination. It also provides the witness with the opportunity to ask for further clarification of any matters before evidence is given. This is of great importance given that the witness may not be aware of the use which can be made of evidence given by him or her at a later stage.

As noted in previous Annual Reports, the explanations of the privilege against self-incrimination and legal professional privilege given to witnesses by the Chief Examiner have been very detailed and thorough. Examples are used by the Chief Examiner to illustrate to witnesses the application of these privileges. These are important matters and every witness should be in a position to understand the ramifications of the privileges before 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.

47 See para. 59 of this report.

56.1 Preliminary requirements when coercive examination does not proceed

That the Chief Examiner attaches considerable importance to complying with the s. 31 'preliminary requirements' was evident to the SIM in his consideration of the examinations conducted during this reporting period.

By way of example, in one matter reviewed it was noted that in attending the Office of Chief Examiner pursuant to a summons, it was made clear at the commencement of proceedings that the witness wished to make a (voluntary) statement to police. In acknowledging that this was a course properly open to the witness, the Examiner nevertheless proceeded to provide the witness with an informative overview of some of the s. 31 preliminary requirements which otherwise would have applied to the coercive examination, including information in respect of the privilege against self-incrimination, confidentiality, legal representation and the right of complaint (to the SIM). The Examiner indicated that he would address the remaining s. 31 requirements on the adjourned date, if required (i.e. in the event that the examination ultimately proceeded).

57 Legal Representation

As discussed later in this Report,[48] s. 34(1) allows a witness to be legally represented when giving evidence before the Chief Examiner.

The procedure regulating the role of legal practitioners is set out in s. 36(1) of the MCIP Act. This 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.[49] 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 (para. 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 in order that the witness understands the confidentiality requirements which apply and how certain rights are abrogated.

Where unrepresented, 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 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.

48 Paragraph 61.
49 These procedural guidelines form part of a detailed document prepared by the Chief Examiner.

58 Mental Impairment

Subsection 34(3) of the MCIP Act deals with the examination of a person who is believed to have a mental impairment (as defined in s. 3). 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 2010-2011 Annual Report (para. 58), 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.

58.1 Determining the question of mental impairment

In addition to examining the relevant examination transcript, one matter reviewed during this reporting period also required the SIM to carefully consider the earlier, pre-hearing proceedings in which a member of Victoria Police applied for the issuance of a witness summons concerning a witness who was possibly suffering from a mental impairment. In this regard, the Chief Examiner determined that arrangements be made for an independent person to be present (at the examination) and for all relevant material to be made available to the Examiner (who was scheduled to conduct the examination hearing).

At the examination, the Examiner specifically asked about, but the witness denied suffering from, any mental impairment. The issue was not pursued further.

In this regard and possessing neither the legal right nor the want to 'second guess' the Chief Examiner's belief concerning the issue of mental impairment, that the SIM wrote to him in this matter arose from a combination of factors, including the information referred to in the s. 15 application for the witness summons, the information received after but before commencement of the coercive examination and other related matters.

The SIM is grateful for the Chief Examiner's response in providing further information (including the Examiner's detailed reasoning on the issue) and which the SIM considers supported the Examiner's management and handling of the matter.

59 Privilege Against Self-Incrimination

This matter is reviewed in the 2005-2006 Annual Report (at para. 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 a 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, s. 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 s. 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 para. 66 of the 2005-2006 Annual Report, the practice of the Chief Examiner is to confirm with every witness that he/she has understood the explanation of the privilege and its application. This step enables the Chief Examiner to satisfy himself that a witness understands his/her rights in such a hearing. Where a witness is still uncertain, the Chief Examiner provides a further explanation until such time as he is satisfied that the witness has a clear understanding. This practice is followed by the Chief Examiner in all cases regardless of whether a witness is represented.

In the view of the SIM, this step ensures that a witness understands that there are certain protections in place which prevent evidence given by him/her at an examination from being used against that person in subsequent proceedings. A witness can then be free, as far as is possible, to give full and frank evidence to the Chief Examiner.

The SIM is satisfied that the procedure followed by the Chief Examiner in explaining the privilege and how it applies in examinations complies with the requirements of the Act and is thorough, detailed and clear.

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 46 examinations were reported to the SIM. Ten s. 53 reports received during the year under review relate to examinations conducted in the 2010-2011 reporting period. Of the 46 witnesses examined, 36 were legally represented.

In all cases the Chief Examiner explained to the witness his/her right to receive legal advice or to 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	11-12	10-11	09-10	08-09	07-08	06-07	05-06	Total
Witnesses examined	**46**	47	59	49	24	50	15	290
Witnesses legally represented	**36**[50]	23	36	19	12	30	9	165

61 Legal Representation – Right To A Particular Practitioner

Although s. 34(1) of the MCIP Act provides that a witness giving evidence at an examination may be represented by a legal practitioner, this provision is qualified by s. 35 to the extent that no person is entitled to be present at an examination hearing unless he/she is directed or has otherwise been authorised by the Chief Examiner. Considered together, these statutory provisions therefore provide a witness at an examination hearing with the right to be legally represented, but not with the right to insist on 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 (para. 62).

61.1 Legal representation – potential conflict of interest

It is in this context that during the period under report, the SIM reviewed an examination hearing which he considers illustrates 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.

The SIM notes that before the coercive examination commenced and in the presence of the witness's legal representative (but not the witness), the Chief Examiner expressed his concern that he/she had previously represented another witness at an earlier examination hearing. That he was troubled by a potential conflict of interest (i.e. the current and previous witness both being clients of the same legal representative), the Chief Examiner and the legal representative discussed the matter at length.

Further to the submission from the Victoria Police representative and in listening to the views of (and having received assurances from) the legal representative, the Chief Examiner did not ultimately rule against him/her, which meant that he/she could appear on behalf of the current witness at the scheduled examination hearing.

As has been seen previously, the SIM considers that the exclusion of a particular legal practitioner may, where necessary, be an appropriate safeguard to preserving confidentiality and investigative integrity.[51]

50 This number includes witness who were legally represented for only part of their examination hearing, for example where they were represented on one hearing day but not another, or where they commenced an examination unrepresented but chose to be legally represented for the remainder of the examination.

51 2010-2011 OSIM Annual Report at p. 62.

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 (non-publication directions).

Pursuant to s. 43(1) 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.

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.[52]

A direction given by the Chief Examiner may be overridden by a court pursuant to s. 43(4). This subsection applies where a person has been charged with an offence before a court and the court is of the opinion that it is desirable in the 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 s. 43(4) of the MCIP Act expressly provides that the issuance of a 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).[53]

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

53 The SIM recommendation was implemented as part of the MCLA Act 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 directions in all examinations conducted by him in this reporting period. The SIM is satisfied that all directions were justified in the circumstances of each examination and that, where relevant, the requirement stipulated by s. 43(2) was met.

62.1 Non-publication directions – use of evidence for the purpose of a prosecution

The operation of s. 43 has been considered by the Supreme Court on four occasions (the four relevant cases). Each case involved a witness whose evidence at an earlier coercive examination had been the subject of a non-publication direction and who was seeking to prevent that evidence being made available for the purpose of a subsequent prosecution.

In the first case, *James v DPP* [54] (*James*), the prosecution had requested the Chief Examiner rescind an earlier non-publication direction which he had made with respect to the witness's evidence. The request was made necessary because the Director of Public Prosecutions intended to provide the legal representatives of an accused with copy transcript of the witness's earlier evidence. In the circumstances, the Chief Examiner rescinded the non-publication direction. However, concerned that release of this evidence would imperil his/her safety, the witness applied to the Supreme Court for an order to set aside the decision of the Chief Examiner. The witness submitted that the Chief Examiner did not have the power to rescind the non-publication direction. However, this argument was rejected by Mr Justice Morris of the Supreme Court.

Nearly four years later, in *E v Chief Examiner*, [55] Mr Justice Coghlan of the Supreme Court followed the decision in *James* and held that the Chief Examiner did have the power to rescind a non-publication direction, even if the circumstances which required the direction under s. 43(2) had not changed. However, His Honour considered that '*[s]uch a power would be discretionary and would have to be exercised reasonably*'.[56]

The remaining two Supreme Court decisions were both delivered during the year under report (October 2011).

The first was *AJH v Chief Examiner*,[57] in which Mr Justice Beach also followed *James* and found the Chief Examiner had power to rescind a non-publication direction, although this was '*not at large*',[58] because '*such power as there is to rescind a non-publication direction [it] cannot be exercised contrary to the provisions in s 43 of the Act*'.[59] This is to say, that His Honour did not consider the legislation permitted the Chief Examiner to rescind a non-publication direction in circumstances in which the provisions of s. 43 had previously required that such a direction be given.

54 [2006] VSC 384.
55 [2010] VSC 353.
56 At 10 [27].
57 [2011] VSC 499. This case also considered the Chief Examiner's power to rescind a s. 20 confidentiality notice.
58 At 9 [20].
59 At 10 [22].

The most recent decision is that of Mr Justice Macaulay in *REG v Chief Examiner*[60] (*REG*). Here the power of the Chief Examiner to rescind a non-publication direction was not directly in issue, nor was His Honour required to finally resolve the question concerning the scope of that power (assuming such a power existed). However, rather than relying on the revocation of a non-publication direction, His Honour essentially considered that:

> ...the use of the exception power in s 43(1) is the preferable (if not proper) mechanism for preserving the opportunity to use coercively obtained evidence for a prosecution notwithstanding the existence of any safety concern which mandates the making of a general non-publication direction.[61]

The SIM observes the Chief Examiner to have followed the approach outlined by Mr Justice Macaulay in *REG*.

62.2 Non-publication direction - exceptions

In one matter reviewed by the SIM, a non-publication direction was made by the Examiner at the commencement of the examination. The direction was subject to certain exceptions, two of which (dealing with the use of evidence for the purpose of a prosecution) became the focus of discussion between the Examiner and the witness's legal representative.

In the circumstances and having arranged for the legal representative to be provided with the four relevant cases, the Examiner adjourned the matter for two weeks to allow the legal representative sufficient time to consider the authorities and to make further written or oral submissions on whether the existing non-publication direction should be varied. In the interim, the Examiner directed that Victoria Police not use the exceptions to publish or communicate the witness's evidence.

Following his review of the relevant examination transcript, the SIM wrote to the Chief Examiner to enquire if anything further had been received from the witness's legal representative and, if so, whether there had been any variation to the existing non-publication direction.

In responding to the SIM's request, the Chief Examiner provided copies of the correspondence which had been exchanged between the Office of the Chief Examiner and the witness's legal representative.

The SIM observes that, in the result the legal representative was provided the time and opportunity needed to consider the issue(s) and to advise the witness accordingly

62.3 Non-publication direction – s. 43(2)

Where the issuing of a non-publication direction is founded on both discretionary (s.43(1)) and non-discretionary (s.43(2)) grounds, the SIM notes it is the Chief Examiner's view that the direction need only be made on the basis of s. 43(2).

60 [2011] VSC 532. This case also considered the Chief Examiner's power to rescind a s. 20 confidentiality notice.
61 At 15 [50] (footnotes omitted).

63 The Use Of Derivative Information

The intersection between s. 25(2)(k) of the Charter, 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 para. 30 and 64 and 2009-2010 at para. 64).

64 Legal Professional Privilege

This privilege was reviewed at para. 69 of the 2005-2006 Annual Report.

Legal professional privilege (LPP) applies to answers and documents given at examinations conducted by the Chief Examiner. Under s. 40 of the MCIP Act, a person cannot be compelled to answer a question or produce a document if LPP attaches to the answer or document.

In the case where LPP is claimed in respect of an answer to a question, the Chief Examiner can determine whether the claim is made out at the time.

It is important to note that s. 40(2) 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.

Where LPP is claimed in respect of a document or thing which is required to be produced 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.[62] With the acceptance and implementation of the SIM's recommendation as part of the MCLA Act, 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.

62 Section 65 at p. 75.

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 no other means exist to scrutinise the determination. The SIM considers this to be part of his compliance monitoring function.

One issue arose in this reporting period in respect of an LPP determination concerning oral evidence (see 64.1 below).

64.1 Legal professional privilege – claim by non-lawyer

In this examination hearing, the witness (a non-lawyer) asked the Examiner whether LPP extended to communications between himself/herself and a third party. The Examiner indicated that he would deal with that issue if and when the need arose.

The next day, the witness's legal representative raised s.120 of the **Evidence Act 2008** (Evidence Act) as being germane to the Examiner's consideration of the issue. As far as is relevant here, the SIM notes that in limited circumstances (including that the person objecting is not legally represented), s.120 can operate to prevent the introduction of evidence if the court considers that would result in disclosing a confidential communication between the party objecting and another. In then carefully analysing the relevant sections of both the Evidence Act and the MCIP Act, the Examiner ultimately declined to uphold the witness's claim to LPP.

The SIM agrees that not only s.120, but the entirety of the Evidence Act, has no application to proceedings involving the investigative use of coercive power pursuant to the MCIP Act.

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 s. 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 MCLA Act and commenced operation on 1 February 2010.[63]

66 Authorisation For The Retention Of Documents By A Police Member

This matter is reviewed at para. 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.

For the purposes of ss. 47(1)(a) – (c), the Chief Examiner may authorise retention of the document or other thing for a period not exceeding seven days. If required to be retained for a longer period for the purpose of s. 47(1)(d), s. 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.

67 The Conduct Of Examinations By The Chief Examiner

In addition to the issues identified within the specific categories above, the following issues were observed by the SIM to arise from coercive examinations conducted during the current reporting period.

67.1 Section 18 custody orders – delivering witness into custody of police member

As discussed (see para. 51 above),[64] if a CPO is in force, a person being held in prison or police gaol can be compelled to attend before the Chief Examiner (s. 18 of the MCIP Act).

63 Section 11 of the MCLA Act.
64 Also see 2007-2008 Annual Report (para. 57 at pp. 90ff).

In one matter reviewed by the SIM, it was noted that the police member named as the Applicant for the custody order was not the same member named and into whose custody the witness was to be delivered. In the circumstances, the SIM wrote to the Chief Examiner who, in a comprehensive written response, noted that the issue fell to be determined in light of the particular wording used in s.18(2) of the MCIP Act. In part, this provided that '*[a] member of the police force may apply…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*' (emphasis added).

In addition, the Chief Examiner also had cause to consider s. 18(5)(a) (i.e. a custody order made under s.18 '*must be in the prescribed form*') which, when read in conjunction with the wording in Reg. 7/Form 2 of the Regulations, means that the person concerned (i.e. the witness) must be *'[d]elivered into the custody* of (*insert name of member of police force who applies for the order'*).

Following his consideration of these provisions, the Chief Examiner found that a custodial witness produced pursuant to a custody order, must be delivered into the custody of the police member who applied for that order.

The SIM notes that notwithstanding that this inflexible procedural requirement may, on occasion, operate to inconvenience the Office of Chief Examiner, it is the responsibility of those concerned to ensure compliance with this statutory provision.

The SIM welcomes this cooperative approach which is key to ensuring that, as far as possible, the public interest is furthered by a process which is free of legal ambiguity.

67.2 Section 18 custody orders – identifying place where witness held in custody

Concerning a related issue, the SIM observed that in another matter reviewed a custody order had been issued in respect of a witness who was housed in a particular correctional facility, the particulars of which were noted and recorded on the custody order. However, on the date of the actual hearing, this witness was in fact collected from another correctional facility (i.e. different to that recorded on the original order) and from where he/she was delivered into police custody and then for questioning before the Chief Examiner.

Despite the place of detention having changed between the date of the custody order and the date of hearing, the Chief Examiner considered that the existing custody order remained valid and continued to operate at law.

However, for the avoidance of doubt, the SIM considers that where a police member and/or the Office of Chief Examiner is informed that the witness's place of custody has changed, the police, where practicable should apply and, if satisfied, the Chief Examiner should re-issue a 'fresh' custody order.

67.3 Section 45 – video-recoding of examination

The Chief Examiner must ensure that the examination of a witness is video-recorded (s. 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 (s. 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*' (s. 45(3)).

In one matter, the SIM was notified by the Office of Chief Examiner that the examination of a witness had been adjourned because of a video-recording equipment malfunction. The SIM notes that the hearing had not commenced and that the witness and his/her legal representative had been advised accordingly.

Following an exchange of correspondence, the SIM was advised by the Chief Examiner that having sought an explanation from Victoria Police, the problems experienced with the recording equipment stemmed from a technical failure which had since been rectified. In the result, system changes had been implemented and, as advised by Victoria Police, no future issues were anticipated.

While sharing the concern expressed by the Office of Chief Examiner, the SIM commends the Chief Examiner in having immediately notified the OSIM. This enabled a quick resolution to a matter about which all agree is of the utmost importance.

67.4 Confidentiality; service of process; mental impairment

The SIM observed that a number of diverse issues arose from his review of the transcript concerning one witness who was examined over a number of (non-consecutive) days. It is convenient to consider these issues together.

The first issue for consideration concerns confidentiality. The witness had attended the examination accompanied by his/her de facto partner who, the Chief Examiner was informed, already knew of the existence of the summons (having been present when it was served). In the circumstances, the Chief Examiner considered the witness had a reasonable excuse for otherwise disclosing confidential information about the summons to his/her partner. The Chief Examiner then explained to the partner the confidentiality obligations, before proceeding to make him/her subject to a s. 43 non-publication direction.

The SIM agrees with the course followed by the Chief Examiner and his use of a s. 43 direction as the most appropriate means of preserving the confidentiality and integrity of the investigation.

However, the SIM did query the circumstances in which the witness's partner was found to be present at the time of service. In this regard, the SIM was subsequently informed that at the relevant time the witness and his/her de facto partner refused to separate and that police members serving the summons were therefore unable to comply with an earlier directive which proscribed effecting service of legal process in close proximity to persons other than the witness. Given the unusual circumstances, the actions of the police members were not considered unreasonable.

The SIM noted a further confidentiality issue was raised when the witness alleged that a 'letter of recall' (the letter) had not been properly delivered, but simply thrown over a fence onto his/her property.

Whilst not a summons, the SIM observes the letter to be a document which must be handled with the utmost care. In this regard and having been invited to provide further detail concerning the witness's allegation, the Chief Examiner informed the SIM that an enquiry had been undertaken and that the police members not only denied the allegation, but stated the letter to have been carefully placed on the witness's property following his/her refusal to respond to police attempts to effect personal service at the front of the house.

Whilst it is open to accept that in all the circumstances the conduct of the police members was not unreasonable, the SIM is obliged to once again state a strongly held view that any process or other documentation relevant to the conduct of sensitive, highly protected and confidential hearings such as those conducted by the Chief Examiner should, unless for very good reason, be personally served.

The Chief Examiner in this matter was also required to deal with a situation in which he believed the witness to be suffering from a mental impairment. In this regard, the hearing was adjourned to allow the witness's legal representative an opportunity to seek a medical opinion to determine whether the witness could meaningfully participate in the examination hearing.

Although the medical report subsequently tendered did not preclude the examination from proceeding, the sudden collapse of the witness in what he/she described as a 'panic attack', did. While ambulance officers attended to the witness in the waiting room, the Chief Examiner arranged for the attendance of a forensic medical officer. However, before leaving the premises, the Chief Examiner exercised his discretionary power pursuant to s. 43 of the MCIP Act to make each emergency health care officer subject to a binding non-publication direction. Having carefully explained to them the confidentiality obligations attendant upon the direction, the Chief Examiner further requested that they exclude all information from their medical records which was likely to identify the witness as having attended a coercive examination.

In the SIM's view, the Chief Examiner's approach to this complex series of events ensured that the critical issues of confidentiality, witness safety and well-being and the ongoing integrity of the investigation were appropriately managed and safeguarded.

On the final day of the examination, the witness (having declined the opportunity to have an independent person present), requested that his/her de facto partner be allowed to act as a support person. As discussed in the 2008-2009 Annual Report (para. 56.6) and the 2009-2010 Annual Report (para. 56.1), the Chief Examiner's power to authorise the presence of a 'support person' is not dependent upon whether the witness is believed to have a mental impairment (unlike that of an independent person). The SIM noted that it was in response to the desire and the stated need of the witness to have his/her de facto partner present that the Chief Examiner took the unusual step of permitting this to occur. The SIM further notes that whilst, on occasion, the presence of the support person was mildly disruptive, the witness appeared more comfortable and willing to participate in the hearing.

The SIM considers these proceedings to be notable, not only for the Chief Examiner's response to a number of challenging issues, but also for the manner in which he conducted an examination which occupied four hearing days spread over more than a six week period.

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 Regulations 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 s. 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,[65] authorisation for the retention of the document or thing is given to a member following a successful application to the Chief Examiner.

Regulation 12 states that a computerised register must be kept of the following matters for the purpose of s. 66(b) 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 s. 47(1)(d) of the Act
- the reasons for the retention of the documents or other things
- the current location of all documents or other things
- whether any of the documents or other things were brought before the Magistrates' Court under s. 47(3) of the Act and, if so, the date on which this occurred and the details of any direction given by the Magistrates' Court in relation to the return of the document or thing to the person who produced it.

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

The register must be available for inspection by the SIM[66] and includes 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.

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.

65 Paragraph 66 of this Report.
66 Section 66(b) MCIP Act.

Regulation 13 states that for the purposes of s. 66(c) of the MCIP Act, the prescribed matters on which the Chief Commissioner must report in writing to the SIM are the matters prescribed by regulation 11 paragraphs (a) to (k).

In the current reporting period, the Chief Commissioner provided the SIM with two written reports which covered the period 1 July 2011 to 31 December 2011 and 1 January 2012 to 30 June 2012.

74 Secrecy Provision

This provision is reviewed at para. 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/her 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, s. 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 2007-2008 Annual Report (para. 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 MCLA Act and commenced operation on 1 February 2010.[67]

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

As described above (at 43.4), all s. 53 reports, except one, 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.

No substantial issues were raised 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.

Section 58 requires the Chief Examiner and the Chief Commissioner to provide assistance to the SIM. The Chief Examiner, the Chief Commissioner and their respective staff have responded promptly to all requests and have given the SIM all the assistance that the SIM has requested and required.

The SIM has not exercised any powers of entry or access pursuant to s. 59.

The SIM has not made any written requirement to answer questions or produce documents pursuant to s. 60.

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

76 Relevance

The SIM is satisfied that the questions asked of persons summoned during the year the subject of this report were relevant and appropriate to the purpose of the investigation of the organised crime offence.

67 Section 13 of the MCLA Act.

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
14 September 2012

Appendix A

80 Appendix A – Chief Examiner General Description Of Investigations Conducted Utilising Coercive Powers

A summary of the organised crime offences investigated pursuant to CPOs in this reporting period (1 July 2011 to 30 June 2012) is as follows:

1	On 3 February 2012 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of murder. The CPO included a special condition that except for 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.
2	The original CPO was issued by the Supreme Court on 16 September 2010 for a 12 month period in respect of the organised crime offence of bribery of a public official. The CPO was extended for a period of six months and varied on 14 September 2011, and extended further for a period of three months and varied on 9 March 2012. Each extension of the CPO included a special condition that applications for witness summonses in respect of certain named persons were to be made to the Supreme Court pursuant to s. 14 of the MCIP Act.
3	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 certain named persons, all applications for a witness summons must be brought before the Supreme Court pursuant to s. 14 of the MCIP Act. The CPO was revoked on 23 March 2012.
4	On 9 May 2011 the Supreme Court issued a CPO for a 12 month period in respect of the organised crime offence of murder. No extension application was sought.
5	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. No extension application was sought.
6	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. The CPO was extended for a period of approximately six months on 28 June 2011, and varied on 31 August 2011 to include a special condition that any application for a witness summons must be made to the Supreme Court pursuant to s. 14 of the MCIP Act.
7	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. On 13 July 2011 an application for extension of the CPO was refused.
8	The original CPO was issued by the Supreme Court on 13 February 2007 in respect of the organised crime offence of murder. The CPO was extended for a further period of six months on each of 7 August 2007, 5 February 2008, and 5 August 2008. The CPO was extended for a further period of 12 months on each of 28 January 2009, 24 January 2010 and 6 January 2011.