



Office of the *Special Investigations Monitor*

Annual Report

The Special Investigations Monitor | 2004-2005

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1 Introduction

This is the Annual Report for the financial year ending 30 June 2005 of the Special Investigations Monitor ("the SIM") pursuant to section 86ZL of the *Police Regulation Act 1958* (as amended) ("Police Regulation Act") and section 105L of the *Whistleblowers Protection Act 2001* (as amended) ("Whistleblowers Protection Act").

As required by section 86ZL of the Police Regulation Act and section 105L of the Whistleblowers Protection Act this Report relates to the performance of the SIM's functions under Part IVA of the Police Regulation Act and Part 9A of the Whistleblowers Protection Act.

As this is the first Report of the SIM, it is appropriate to set out the background and legislative history relating to the office and its function.

2 The Special Investigations Monitor

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

The SIM Act is one of the three Acts enacted by the Parliament in 2004 to address police corruption and organised crime. The other Acts are the *Major Crime Legislation (Office of Police Integrity) Act 2004* and the *Major Crime (Investigative Powers) Act 2004*.

David Anthony Talbot Jones was appointed SIM by the Governor-in-Council on 14 December 2004 for a period of 3 years. Mr Jones is an Australian lawyer of 40 years standing and from 1986 to 2002 was a Judge of the County Court of Victoria and until 13 December 2004 a Reserve Judge of that Court.

3 The Major Crime Legislation (Office of Police Integrity) ACT 2004

The *Major Crime Legislation (Office of Police Integrity) Act 2004* ("the OPI Act") established a new Office of Police Integrity ("OPI"), headed by a Director. The provisions establishing the Director and the OPI were inserted into the Police Regulation Act, alongside the existing provisions dealing with the relevant functions and powers. These provisions commenced operation on 16 November 2004.

The OPI Act provides that the Director, Police Integrity ("DPI") is to be the same person as the person who holds office as Ombudsman. However, the DPI employs his own staff and has an office that is separate to that of the Ombudsman. His functions are clearly delineated and independent from those of the Ombudsman.

A position of Police Ombudsman, replacing the position of Deputy Ombudsman (Police Complaints) was previously established by the *Ombudsman Legislation (Police Ombudsman) Act 2004*. That Act enabled the Police Ombudsman to initiate investigations on his/her own motion and also gave that person powers that are comparable to those that can be exercised by a Royal Commission including obtaining search warrants, requiring people to provide information and demanding answers from witnesses. It commenced operation on 2 June 2004.

The DPI has all the powers that the Police Ombudsman had. In addition he has been granted a range of new powers by the OPI Act. These powers relate to the use of: surveillance devices; assumed identities; controlled operations; and telecommunications interception.

3.1 Surveillance devices

The OPI Act amends the *Surveillance Devices Act 1999* to include the OPI as a law enforcement agency which can therefore apply to the Courts for a warrant to use electronic surveillance devices in the course of its investigations. This amendment came into operation on 16 November 2004. The OPI Act also provides for the OPI to be a law enforcement agency under the *Surveillance Devices (Amendment) Act 2004*. However, as at 30 June 2005 that provision and that Act had not commenced operation.

3.2 Assumed identities

The OPI Act amends the *Crimes (Assumed Identities) Act 2004* to include the OPI as a law enforcement agency and enable investigators from that office to assume identities. However, as at 30 June 2005 that amendment and that Act had not commenced operation.

3.3 Controlled operations

The OPI Act amends the *Crimes (Controlled Operations) Act 2004* to include the OPI as a law enforcement agency so that the Director can authorise his investigators to commit offences as part of an investigation. However, as at 30 June 2005 that amendment and that Act had not commenced operation.

3.4 Interception of telecommunications

The OPI Act amends the Victorian *Telecommunications (Interception) (State Provisions) Act 1988* to establish a record-keeping, reporting and monitoring regime in relation to the interception of telecommunications by the OPI. However, as at 30 June 2005 the Commonwealth Government had not agreed to amend the *Commonwealth Telecommunications (Interception) Act 1979* to make the OPI a law enforcement agency under that Act and consequently the amendment had not commenced operation.

The *Surveillance Devices (Amendment) Act 2004*, the *Crimes (Controlled Operations) Act 2004* and the *Telecommunications (Interception) (State Provisions) Act 1988* all require that law enforcement agencies which exercise powers under those Acts be overseen by an independent body.

The OPI Act provides that the oversight body for the OPI is the SIM who exercises the oversight requirements that apply to the OPI as a law enforcement agency under those Acts.

However, this Report does not cover that oversight as it had not commenced as at 30 June 2005. As the relevant legislative provisions had not come into effect the information is provided in this Report by way of background.

4 Major Crime (Investigative Powers) Act 2004

This Act confers further powers on the Victoria Police and on the DPI. As at 30 June 2005, the provisions conferring further powers on the Victoria Police had not commenced operation and were therefore not the subject of monitoring during the period under review and are not the subject of review in this Report.

The provisions amending the Police Regulation Act and the Whistleblowers Protection Act to confer further powers on the DPI commenced operation on 16 November 2004 and therefore were the subject of monitoring during the period under review and are the subject of review in this Report.

This Act provides that the objects of the DPI are to ensure that the highest ethical and professional standards are maintained in the Victoria Police Force and that police corruption and serious misconduct is detected, investigated and prevented.

The Act extends the DPI's 'own motion' power to commence an investigation into police corruption or suspected police corruption. The DPI's powers to conduct investigations are extended to enable the DPI to also investigate the policies, practices and procedures of Victoria Police members. It was noted by the Minister when introducing this legislation into Parliament, that the extension of the DPI's powers would entail on occasions questioning of persons outside the police force.

5 Director, Police Integrity – Coercive Questioning Powers

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

The *Major Crime (Investigative Powers) Act 2004* extends those powers considerably:

- The DPI is empowered to prohibit disclosure of the contents of any summons issued by the DPI other than for limited specific purposes.
- The DPI is empowered to certify failure to produce a document or thing, refusal to be sworn, refusal or failure to answer a question as contempt of the DPI.
- The DPI is empowered to certify in writing the commission of contempt to the Supreme Court in such cases. The DPI has the power to issue a warrant for a person alleged to be in contempt to be brought by the police before the Supreme Court.
- If the Court is satisfied that the person is guilty of contempt it may imprison the person for an indefinite period which may involve the person being held in custody until the contempt is purged.
- The DPI is empowered to apply to the Magistrates' Court to issue a warrant for apprehension of a witness who has failed to answer a summons.
- The Act empowers the DPI to continue an investigation notwithstanding that criminal proceedings are on foot with respect to the same matter provided the DPI takes all reasonable steps not to prejudice those proceedings on account of the investigation.
- The Act empowers the DPI, his staff and persons engaged by him to enter any premises occupied or used by Victoria Police, a government department, public statutory body or municipal council. The DPI may search such premises and copy documents.

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

This role is set out in section 86ZA of the Police Regulation Act. It is to:

- Monitor compliance with the Act by the DPI and members of staff of OPI and other persons engaged by the DPI.
- Assess the questioning of persons attending the DPI in the course of an investigation under Part IVA of the Act concerning the relevance of the questioning and its appropriateness in relation to the purpose of the investigation.
- Assess requirements made by the DPI for persons to produce documents or other things in the course of an investigation under Part IVA concerning the relevance of the requirements and their appropriateness in relation to the purpose of the investigation.
- Investigate any complaints made to the SIM under Division 4 of Part IVA of the Act.
- Formulate recommendations and make reports as a result of performing the above functions.

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

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

- to report the issue of summonses to the SIM – section 86ZB.
- to report the issue of arrest warrants to the SIM – section 86ZC.
- to report matters relating to the coercive questioning by the DPI or the obtaining of information or documents from a person in the course of an investigation under Part IVA of the Act – section 86ZD.

The Act provides for complaints to be made to the SIM and procedures to be followed by the SIM with respect to such complaints – section 86ZE, section 86ZF and section 86ZG.

The Act empowers the SIM to make recommendations to the DPI, requires the DPI to provide assistance, gives the SIM powers of entry and access to offices and records of OPI and empowers the SIM to require the DPI and his staff to answer questions and produce documents – section 86ZH, section 86ZI, section 86ZJ and section 86ZK.

8 Annual Report Of The Special Investigations Monitor To Parliament

Section 86ZL of the Police Regulation Act provides that as soon as practicable after the end of each financial year, the SIM must cause a report to be laid before each House of the Parliament in relation to the performance of the SIM's functions under Part IVA of the Act.

This Annual Report is made pursuant to that provision.

Briefly, the Report must include details of the following:

- Compliance with the Act during the financial year by the DPI and members of his staff.
- The extent to which questions asked of persons summoned and requirements to produce documents or other things under a summons were relevant to the investigation in relation to which the questions were asked or the requirements made.
- The comprehensiveness and adequacy of reports made to the SIM by the DPI during the financial year.
- The extent to which the DPI has taken action which has been recommended by the SIM.

The Report must not contain any information that identifies or is likely to identify a person who has attended the DPI in the course of an investigation under this part or the nature of any ongoing investigation under Part IVA of the Police Regulation Act or by the Victoria Police Force or members of the Victoria Police Force.

Section 105L of the Whistleblowers Protection Act imposes the same requirements as section 86ZL of the Police Regulation Act.

9 The Whistleblowers Protection Act 2001 (As Amended)

The purposes of this Act are: –

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

10 Office Of The Special Investigations Monitor

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

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

Under section 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 Major Crime (Investigative Powers) Act 2004 amended the Whistleblowers Protection Act to extend the DPI's coercive questioning powers under that Act in the same way that they were extended under the Police Regulation Act. (See paragraph 5 of this Report).

The role of the SIM with respect to the DPI and his staff under the Whistleblowers Protection Act is the same as the SIM's role under the Police Regulation Act. (See paragraph 6 of this Report).

The obligations of the DPI to the SIM under the Whistleblowers Protection Act are the same as the obligations under the Police Regulation Act (see paragraph 7 of this Report).

The reporting obligations of the SIM under the Whistleblowers Protection Act are the same as those applicable under the Police Regulation Act - section 105L. (See paragraph 8 of this Report).

Consequently, it is considered appropriate and convenient to combine reports under section 86ZL of the Police Regulation Act and under section 105L of the Whistleblowers Protection Act in the one Report.

This is a new statutory office. Consequently, arrangements needed to be made for the engagement of staff and the establishment of premises. Mr Jones acts as SIM on a part time not full time basis.

Consultation took place with the Secretary and other officers of the Department of Justice ("DoJ") in relation to these matters.

It was decided that the office of the SIM should be located at suitable premises in the Melbourne central business district. An important matter would be the security of the premises.

It was also decided that initially the staff of the office of the SIM should consist of an Executive Assistant and a Senior Legal Policy Officer.

Officers of DoJ in consultation with the SIM then proceeded with the necessary action to locate and establish offices and fill the positions.

As this would inevitably take some time, an interim office had to be found. The Victorian Civil and Administrative Tribunal ("VCAT") made available a room for the SIM at its premises. This was used from 23 February 2005. The SIM also had the use of the VCAT safe for the storage of sensitive documents and other material.

The assistance of VCAT is much appreciated. The President and senior staff went out of their way to help during the time that their premises were being utilised.

Vacant premises were fitted out to meet the needs of the office of the SIM at a building within the central business district of Melbourne. The office commenced operation there on 20 June 2005.

Interviews took place for the staff positions. Lisa Farrell was appointed to the position of Executive Assistant and commenced duties on 21 June 2005. Jaklin Trajkovski was appointed to the position of Senior Legal Policy Officer and commenced duties on 20 June 2005. Both have extensive experience within their respective areas and will be of invaluable assistance to the SIM.

The assistance of officers of DoJ, particularly Sarah Harvey, in the establishment of the premises and recruitment of staff is much appreciated.

11 The Exercise Of Coercive Powers By The Director, Police Integrity

As already stated, the OPI was established in response to the increasing problem of police corruption and misconduct in the State of Victoria. The Government introduced a package of Bills designed to ensure that, "Victorian law enforcement agencies have unprecedented powers to detect, investigate, resolve and prevent organised crime and corruption".¹

As discussed previously, the DPI was equipped with the power to conduct own motion investigations in addition to retaining his power to investigate complaints.

The coercive power enables the DPI to require the compulsory attendance of a witness at an examination or the production of information, documents or things by a witness.

In the year the subject of this Report the DPI exercised only his coercive powers under the Police Regulation Act. He did not exercise any of those powers under the Whistleblowers Protection Act. Consequently, this Report only reviews the use of powers under the Police Regulation Act.

11.1 Accountability for the use of coercive and covert powers

The DPI compels the attendance of a witness and/or the production of information, a document or thing through the issue of a summons. The common law privilege against self-incrimination has been specifically overridden by section 86PA of the Police Regulation Act. Therefore, a witness summoned for either of these purposes must answer the questions asked and/or produce the information, document or thing required, if a certificate is issued under that section.

The limitation of common law rights through the use of the coercive powers created a need for a system of accountability that was independent from the body exercising the powers. Compliance monitoring is particularly crucial in a system where hearings are conducted in private and hidden from the usual methods of scrutiny that exist in judicial proceedings. This is particularly the case where witnesses are compulsorily examined.

The Government recognised that, "It would not be appropriate for the Victorian Ombudsman to be responsible for overseeing himself (in his capacity as the DPI) when the DPI and the office exercise power under the three Acts just mentioned".² For this reason, the Government resolved to establish an independent oversight body for the OPI that would fulfil the function of a watchdog in the new crime and corruption fighting regime. It was for this oversight purpose that the office of the SIM was created.

Concerns were raised by a number of legal bodies³ regarding the model proposed by the Government. For example, the Law Institute of Victoria expressed concern about the ability of the DPI to maintain his independence from the police and also from his role as Victoria's Ombudsman.

The Criminal Law Section of the Law Institute prepared a submission to the Government outlining its concerns with the crime fighting bills.⁴ The coercive powers were described as draconian and invasive⁵ and the Law Institute was sceptical about the independence of the OPI and its ability to deal with police corruption.

Essentially, the issues raised related to investing the role of scrutinising the exercise of far-reaching powers in the person exercising those powers. The submission stated specifically that:

"there are potential conflict of interest issues and the proposal that the ombudsman now hold two separate offices combined with extending his or her powers is convoluted and confusing and fails to instil public confidence in the office".⁶

The Law Institute viewed the creation of the office of the SIM as an added complication to the new system and recommended that a simpler and clearer system be put in place by appointing two separate and independent people to the roles of the Ombudsman and the DPI.⁷

Maintenance of separation and independence is fundamental to the viability of the new model. The Government responded to the issues raised by the Law Institute by highlighting that the role of the SIM is identical to that of the Ombudsman when he oversees the use of coercive powers by Victoria Police.⁸ The oversight body is independent of the body being scrutinised and is equipped with the powers to monitor the use of these powers.

¹ Major Crime Legislation (Office of Police Integrity) Bill, Hansard, Second Reading, Assembly (25 August 2004) page 106.

² Ibid page 108. The three Acts referred to by Mr Haermeyer, the then Minister for Police and Emergency Services are the *Surveillance Devices Act 1999* (Vic); the *Crimes (Controlled Operations) Act 2004* (Vic) and the *Telecommunications (Interception) (State Provisions) Act 1988* (Vic).

³ Joint media release on 29 October 2004 from the Criminal Bar Association, the Law Institute of Victoria, Liberty Victoria and the Victorian Bar.

⁴ Submission on the Major Crime Legislation currently before the Victorian Parliament, Criminal Law Section, Law Institute of Victoria, 11 October 2004.

⁵ Ibid p. 10

⁶ Ibid p. 10

⁷ Ibid p. 10.

⁸ Letter from Mr Andre Haermeyer, Minister for Police and Emergency Services to the President of the Law Institute of Victoria dated 24 January 2005.

11.2 The role of the office of the Special Investigations Monitor

As already stated, the Office of the SIM was created to oversee the use of coercive and covert powers by the DPI.

The implementation of a rigorous oversighting system ensures that safeguards are introduced to balance the exercise of extraordinary powers in the pursuit of investigations in the public interest against the abrogation of rights of the individual which are central to the criminal justice system.

11.3 Understanding relevance

Of central importance to the work of the SIM is understanding relevance when it is applied to an investigative process.

The Police Regulation Act gives to the DPI the power to regulate the procedure by which he conducts an investigation "as he thinks fit".⁹ This includes the power to obtain information from any person and in any manner he thinks appropriate and whether or not to hold any hearing. The DPI also has the power to determine whether a person may have legal representation.¹⁰

The rules of evidence and procedure that apply in a court of law do not apply to an investigative body such as the OPI. This is because the function of an investigation is not to prove an allegation but to elucidate facts or matters that may assist an investigation.

For this reason, relevance has to be understood in a far broader context than when applied in a court of law. When applied to an inquisitorial process relevance should not be narrowly defined¹¹ and includes information which can be directly and indirectly relevant to the investigation.¹² 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).¹³ The Court in that case stated, "We should add that "relevance" may not strictly be the appropriate term. What the Commissioner can look to is what he bona fide believes will assist his inquiry".

Therefore, as a starting point, relevance can be measured by comparing the nature of the evidence given or the document or thing to be produced against the stated purpose of an investigation. What was not apparent as a line of inquiry at the commencement of an investigation may become so as an investigation progresses. Expanding the lines of inquiry in this manner is a legitimate exercise of the power conferred on an investigative body by the legislature.

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

In undertaking his function as a watchdog, the SIM is mindful of the fact that the progress of an investigation should not be unnecessarily fettered by interpreting relevance and appropriateness too strictly. After all, the provision of these extraordinary powers occurred in an environment where it was considered that the conferment of such powers was necessary in the public interest.

However, as equally important is the SIM's duty to scrutinise the exercise of such powers. Such scrutiny protects against an investigative body "going on a frolic of its own".¹⁴ Such a situation may arise where coercive questioning is used as a means of fishing for information not related to the investigation at hand. In other words, to further another agenda not the subject of the investigation.

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

⁹ *Police Regulation Act 1958* (Vic) section 86P(1)(d).

¹⁰ *Ibid* section 86P(1)(a) – (c).

¹¹ *Melbourne Home of Ford Pty Ltd v Trade Practices Commission* (No. 3) (1980) 47 FLR 163 at 173.

¹² *Ross and Anor v Costigan* (1982) 41 ALR 319 at 335 per Ellicott J.

¹³ (1982) 41 ALR 337 at 351 per Fox, Toohey and Morling JJ.

¹⁴ *Ross and Anor v Costigan* (1982) 41 ALR 319 at 335 per Ellicott J.

12 Section 86ZB Reports

Section 86ZB of the Police Regulation Act requires the DPI to provide the SIM with a written report within 3 days following the issue of a summons.

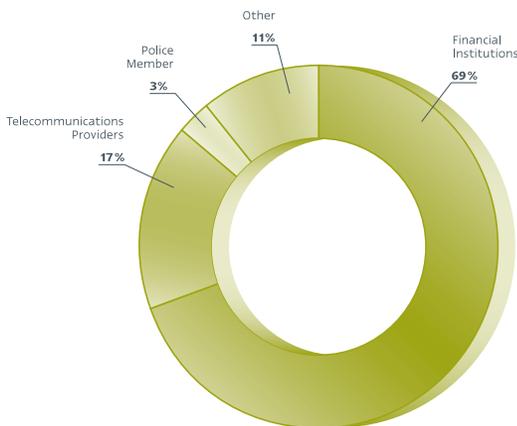
This requirement has enabled the SIM to keep track of the number and nature of summonses issued.

12.1 Overview of written reports

- A total of 84 written reports, (pursuant to section 86ZB) were received by the Office of the Special Investigations Monitor in the year the subject of this Report.
- A written report must be provided to the Office of the Special Investigations Monitor when the DPI issues a summons for the attendance of a person, or production of a document or both (section 86ZB).
- The DPI summoned 18 witnesses to attend for the purpose of giving evidence.
- Of the witnesses summoned by the DPI to give evidence, 8 were also served with a summons to produce a document or thing.
- The remaining 66 summonses were issued specifically for the production of a document or thing material to the subject-matter of the inquiry.

12.2 Summonses to produce information, a document or thing

Witness Type	Number issued
Financial institution	46
Telecommunications Providers	11
Police Member	2
Other	7
Total	66



12.3 Financial Institutions

Summonses to produce a document or thing served on financial institutions outnumbered all other types of summonses issued. This category of summonses comprised 69% of the overall total of documents sought by the OPI in the year the subject of this Report.

Financial records that were sought and produced included bank accounts evidencing transactions, bank statements, bank vouchers, share portfolios and loans. Financial records belonging to investigation targets, spouses and family members were all required to be produced.

In the majority of cases where a summons was served on a financial institution, the investigation involved an allegation of unexplained betterment on the part of a police member. A central focus of these allegations is any connection between the betterment and the person's position as a serving member of Victoria Police.

Some of the alleged activities being investigated by the OPI include theft of money, money laundering, money-making enterprises with convicted criminals, malfeasance, purchasing of properties and serious misconduct.

Tracking and analysing financial activities related to alleged corrupt activity is an integral part of the investigatory procedure. Obtaining documents from financial institutions allows for the best evidence to be obtained by which to establish unexplained wealth. This is because the evidence is in documentary or electronic form and does not necessarily rely on the truthfulness of answers given by a witness.

The summonses served on financial institutions by the OPI in the year the subject of this Report evidence an appropriate use of the DPI's power to require the production of documents. Obtaining documents in the first instance reduces the need by the DPI to summon a witness for the giving of evidence unless there is no other avenue by which to obtain the necessary information.

Summonses detailing the financial activities of persons additional to the investigation target are appropriate and necessary when investigating unexplained wealth by a police member. In particular, the use of this power is a significant step in determining the direction that an investigation may take and as such falls within the objects of the legislation. It is also an important preparatory tool where the coercive examination of an investigation target may be necessary.

12.4 Telecommunications Carriers

Subscriber information, call charge records and reverse call charge records were sought from telecommunications carriers in the year the subject of this Report.

The documents sought fit within the subject matter of the investigations to which they apply. Accordingly, they are relevant and appropriate documents for production pursuant to summons.

The information is used in relation to the identification of user(s) of a mobile telephone number, the revealing of contacts between a police member and other parties under investigation, the establishment of contact between a police member and known criminal(s) and the uncovering of the identity of person(s) suspected of leaking confidential information.

12.5 Police witnesses

Two police witnesses attending a compulsory examination were also served with a summons to produce day books, diary entries and other documents relevant to the subject matter and period under investigation.

The documents produced are relevant to the investigation as they were created as contemporaneous records and provide the basis for appropriate questioning of these witnesses by counsel assisting the DPI's delegate during the hearing.

12.6 Other

Documents and other items were also sought from the following persons and/or bodies to assist with investigations being conducted by the OPI:

- A registered informer for the production of documents which he would not supply without a summons being served.
- Corrections Victoria for copies of ARUNTA recorded telephone calls made to and from inmates within the Victorian prison system.
- Department of Immigration and Multicultural Affairs for the production of documents to assist in the identification of police officers involved in an arrest the subject of a complaint to the OPI.
- An Australian Federal Police agent for the production of documents containing evidence of serious misconduct by a member of Victoria Police.
- The provision of gaming records.
- The production of security camera video footage from an arcade in the central business district of Melbourne.

13 Summons Issue Procedures

OPI has formalised its procedures in relation to the issue of a summons in a Policy Statement entitled *Summons Issue Procedures* issued on 26 May 2005.

This is an important document and guides OPI officers in the use of this important coercive power.

It requires that a responsible officer before requesting the issue of a summons be satisfied that:

- the use of the coercive power is necessary to achieve the objectives of the investigation; and
- the use of this coercive power warrants the use of resources consumed by the reporting requirement which necessarily follows from the issue of a summons.

The document has only recently been received by the SIM in response to a request to the DPI and will be discussed with the DPI and his staff after it has been fully considered. However, some particular procedures need to be referred to.

14 Production Of Documents Without Attendance Before The Director, Police Integrity Or His Delegate

The Policy Statement deals with this situation.

In such cases, the covering letter accompanying the summons indicates that the person summoned will be excused from attendance if the required documents are provided prior to the return date and time and at the premises specified in the summons.

The Policy Statement states that if there is no attendance by the person summoned, there is no requirement to video-record the handing over of the documents or to complete a report under section 86ZD of the Act. However, further information is to be provided in the section 86ZB report to the SIM so that the SIM can apply section 86ZA(c) of the Act.

If the person summoned does not produce the documents by the specified date and time, their attendance is not excused and they are required to attend before the DPI or his delegate at a nominated date and time. Further, the attendance is to be video-recorded and a section 86ZD report to the SIM on the attendance completed.

Details were requested by the SIM from the DPI on the operation of this procedure, particularly where financial institutions were involved with records relating to a third party, such as a customer or client. Those details have been provided.

In those circumstances, after contact between an investigator of OPI and the financial institution relating to documents sought, a summons is prepared identifying the information that has been sought.

The place of compliance with the summons is stated to be the institution and its address. The covering letter to the summons advises the person that if they comply by the due date, they will not be required to attend and they may provide the information by facsimile.

The investigator serves the summons and receives the relevant documents at the time of service. A receipt is completed. The handover of the documents is not video-taped and the provider does not give any evidence.

A special form of section 86ZB report is prepared which contains the additional information required to be provided in a section 86ZD report. A separate section 86ZD report is not prepared.

The additional information provided in the section 86ZB report is as follows:

- Purpose of summons
- Place and time for compliance with summons
- Relevance of requirement to produce documents and its appropriateness in relation to the purpose of the investigation. In particular:
 - Matters under investigation
 - Documents required to be produced
 - Reason for requiring production of the documents specified in the summons – that is, an explanation of how the documents will assist in the investigation.

It is the view of the DPI that a separate report under section 86ZD and a video-recording of the obtaining of the documents in these circumstances is not required and consequently has not been carried out.

The DPI is of the view that in these circumstances a person has not attended the DPI in answer to a summons within the meaning of section 86ZD(1)(a) of the Police Regulation Act. A different interpretation of the provision would make the reporting requirements unduly onerous and very difficult to comply with at a practical level.

It is considered that the procedure followed by the DPI in these circumstances is reasonable, appropriate and complies with the legislation. In essence, the procedure involves a co-operative and consensual arrangement between the DPI and the institution. It is not considered that the provision was intended to catch such an arrangement.

A report is provided as to the issue of a summons and the additional information provided enables the SIM to carry out his monitoring role as provided in section 86ZA(c):

“to assess requirements made by the DPI for persons to produce documents or other things in the course of an investigation... concerning the relevance of the requirements and their appropriateness in relation to the purpose of the investigation”.

If there is concern that this procedure fails to comply with the legislation consideration could be given to an appropriate amendment.

15 Persons Attending The Director To Produce Documents

Persons falling into this category are:-

- Persons who had been summoned to give evidence in addition to receiving a summons to produce; or
- Persons who object to comply with the summons.

In such cases the attendance is video-recorded. That is a video-recording is made of the person attending the OPI office and providing the documents specified or stating the grounds upon which objection is made. Persons falling into these categories are usually police members providing documents such as day books or diaries.

16 Coercive Examinations Reported To Special Investigations Monitor

The DPI provided the SIM with 23 section 86ZD reports relating to 8 investigations.

Each report, except one, was accompanied by a video-recording of the examination and for certain examinations transcript was also provided. In one case where video facilities were not available an audio tape and transcript were provided.

The examinations were conducted as part of an own motion investigation, a complaint investigation or an examination under section 86Q of the Police Regulation Act.

In addition to the requirement to provide a video-recording of any examination, the legislation sets out certain matters that the report must contain. These can be summarised as follows:

- The reasons for the attendance.
- The time and place of the attendance.
- The name of the person being examined.
- The names of any other persons present during the examination.
- The relevance of the person to the purpose of the investigation.
- Where a certificate under section 86PA was granted, the reasons why the certificate was granted and the relevance of the certificate to the purpose of the investigation.

17 Warrants To Arrest

A witness who has been served with a summons and has failed to attend in answer to the summons can be arrested under warrant to enforce his/her attendance on the DPI.

The DPI may apply to a Magistrate for the issue of a warrant to arrest. A warrant can be issued if the DPI believes on reasonable grounds, that there was proper service of the summons on the witness and that the witness has failed to attend before the DPI in answer to the summons.¹⁵

A Magistrate hearing an application can only issue a warrant if he or she is satisfied by evidence on oath that there are reasonable grounds for the DPI's belief described above. The evidence can be either oral or by affidavit.¹⁶

However, once a person has been arrested he or she must be brought before the DPI as soon as possible and may be detained in police custody until such time as he or she is excused from attendance.¹⁷ If the DPI is of the view that a person may escape from police custody, he can direct that the person be detained in a prison or a police gaol so that his/her attendance at the hearing can be ensured.¹⁸ A person who can not be brought before the DPI as soon practicable after his/her arrest can apply for bail.

Certain safeguards were introduced to offer a measure of protection to a person arrested under warrant for an attendance on the DPI. *The Police (Amendment) Regulations 2005* (Vic)¹⁹ ("the Regulations") prescribe that the DPI must also provide a section 86ZD report to the SIM following an attendance under warrant and where a certificate has been granted under section 86ZD(1)(c).

The Regulations stipulate a number of matters that the DPI must report on following the arrest of a recalcitrant witness. These matters include, inter alia, the place and length of detention, whether the person made an application for bail and the duration of the attendance on the DPI.

This function empowers the SIM with the ability to determine whether the detention of a person was justified in the circumstances and if so, whether the detention was carried out in accordance with the requirements set out by the Act and the Regulations.

It is important to note that a person is not exonerated from liability for non-compliance with the summons due to the fact that he or she has attended on the DPI after the issue of a warrant or following arrest.²⁰

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

17.2 Young person(s) or person(s) with mental impairment

In relation to persons aged under 18 years and/or those believed to have a mental impairment at the time of the attendance, the Regulations require additional information to be provided to the SIM in the section 86ZD report where section 86ZD(1) applies to such a person.

The Regulations in conjunction with the Police Regulation Act ensure that the SIM is provided with detailed information from which to scrutinise the circumstances surrounding the attendance or examination of such a person. This oversight is critical when young or mentally impaired persons are involved.

The DPI did not summon or examine any person under the age of 18 years or believed by the DPI to have a mental impairment in the year under review.

¹⁵ *Police Regulation Act 1958* (Vic) section 86PD(1).

¹⁶ *Police Regulation Act 1958* (Vic) section 86PD(2).

¹⁷ *Police Regulation Act 1958* (Vic) section 86PD(4).

¹⁸ *Police Regulation Act 1958* (Vic) section 86PD(5).

¹⁹ *The Police (Amendment) Regulations 2005* (Vic) came into force on 28 June 2005.

²⁰ *Police Regulation Act 1958* (Vic) section 86PD(10).

18 Types Of Investigations Conducted By The Director, Police Integrity Subject To Coercive Examinations

Own motion investigations dominated the investigations conducted by the DPI in this category in the year the subject of this Report. They outnumbered by 4:1 the investigations initiated by a complaint made under section 86L of the Police Regulation Act. Investigations that involved the use of section 86Q are referred to separately later in this Report.

Investigation Type	Number
Own motion investigation	4
Complaint generated investigation	1
Section 86Q	7

Whereas a complaint made by a person or a police member focuses upon specific actions or conduct of a police member, own motion investigations may capture broader categories of conduct and police practices that require review or investigation.

The Police Regulation Act sets out the following categories of own motion investigations that may be conducted under section 86NA:

- An investigation into the conduct of a member of the force; or
- An investigation into police corruption or serious misconduct generally; or
- An investigation into any of the policies, practices or procedures of the police force or of a member of the force or the failure of those policies, practices or procedures.

19 Descriptions Of The Investigations Where Coercive Examinations Were Conducted

Compulsory examinations were conducted where information gathering using other techniques could not further the investigation or had been exhausted. A description of the investigations utilising the compulsory power are described in broad terms below. This does not include investigations that involved the use of section 86Q. The descriptions provided are intentionally general to ensure compliance with section 86ZL of the Act. That is, to ensure that persons or investigations are not identified.

19.1 The leaking of a confidential Victoria Police document

The DPI conducted an investigation into the leak of a confidential Victoria Police document.

Among other things, witnesses were asked questions about whether Victoria Police policies, procedures or practices in place at the time of the disclosure were adequate to safeguard against such a disclosure and whether the current policies, procedures or practices are adequate to prevent similar disclosures in the future.

19.2 Informer management by Victoria Police

Policies, procedures and practices in relation to informer management and registration were the focus of this investigation. In particular, the investigation examined the informer registration procedures employed by the police members whilst they were conducting an operation.

Police witnesses and a civilian witness were examined as part of the investigation. The questioning covered matters relating to informer management.

19.3 Approach to a witness under cross-examination

The DPI received a complaint alleging that two police members and other persons approached a witness whilst the witness was still under cross-examination during committal proceedings.

Once the investigation got underway it became apparent that the behaviour complained about involved broader matters relating to police policies and practices and also intimidation of the witness by the complainant. As a result the complaint was subsumed into an own motion investigation.

19.4 Perjury by a police member

This investigation was commenced following a complaint that alleged that the police member involved laid false charges against the complainant. Furthermore the complainant alleged that the same member gave false evidence during a court proceeding.

19.5 Publication of a book containing Victoria Police information

An own motion investigation was conducted into the publication by a police member of a book containing confidential Victoria Police information including information that may identify registered informers. There were two editions of the book released.

The investigation examined the process by which the book came to be published and why the publication of the book was not prevented by Victoria Police. Information and informer management by Victoria Police were also investigated.

20 Issues Arising Out Of Examinations

20.1 Confidentiality

Section 86KA of the Police Regulation Act makes it an offence for a witness to disclose to any person the existence of a summons or the investigation to which the summons relates where the DPI has given a written confidentiality notice. Notices were given to all witnesses the subject of examinations and reports during the year the subject of this Report.

The only exception contained in the legislation is where the witness has a reasonable excuse. Examples of excuses given and accepted in the examinations reported to the SIM include:

- notifying an employer of the summons so that the witness could be excused from work;
- for the purposes of seeking legal advice, legal representation or both;
- telling a friend who drove the witness to the place of the hearing;
- leave was granted to allow a witness to speak to their psychologist about the matters raised in the hearing;
- informing a prison officer about the summons.

Prior to the commencement of questioning, the delegate of the DPI confirmed with every witness that he/she understood that confidentiality applied to all matters arising from the examination including the fact of the attendance itself. The consequences of disclosing any information in breach of the confidentiality notice were also explained to the witnesses.²¹

20.2 Exclusion and non-publications orders

The DPI further protected the confidentiality of an investigation, and by implication the witness, by excluding the public and any other persons who the DPI specified from an examination.²²

A corollary to the above power is the ability of the DPI to make an order prohibiting the publication of a report of the whole or any part of the proceedings of a hearing.²³

Exclusion and non-publication orders were made for all 16 compulsory examinations conducted by the DPI in the year the subject of this Report. The orders were made first, because they were considered necessary in the public interest and second, because they would facilitate the inquiry by making the witness feel more confident that his/her evidence was protected from being publicly disclosed.

21 Breach Of Confidentiality

Concern was raised by a police witness that the witness' attendance at a hearing had become known amongst members of the police force. The witness was particularly concerned about the fact that the witness' colleagues had this information within a few days of the witness' attendance at the examination.

The issues raised by the witness relating to the examination are legitimate and a cause for concern. The difficulty for the DPI in such a situation 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. Furthermore, these 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 to a delegate of the DPI during an examination that the witness had known that the witness 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 the witness was concerned about the witness' safety if the witness gave evidence. The witness advised that the witness was threatened that family members and the witness would be hurt if the witness did not give false evidence.

²¹ The penalty for such a disclosure where the person has not provided a reasonable excuse is 120 penalty units or imprisonment for 12 months or both.

²² Section 86PA stipulates that section 19B of the Evidence Act 1958 (Vic) applies to and in relation to an investigation conducted by the Director. Section 19B(1) empowers the Director to exclude the public or persons specified from all or part of the hearing.

²³ Section 19B(2) empowers the Director to make an order for non-publication of the whole or any part of a hearing.

22 Certificates And The Privilege Against Self-incrimination

The procedures and protections in place for maintaining confidentiality and the safety of witnesses need to be examined closely. The effectiveness of the procedure of witness examination depends upon the truthfulness and quality of the evidence elicited during an examination. For example, a witness may decide that the punishment under the legislation is preferable to the potential risk to his/her safety or that of his/her family by giving evidence. A witness may decide to give incomplete or untruthful evidence in such a situation.

There is also potential for the investigation itself to be jeopardised where a witness decides to give perjured evidence rather than risk his/her reputation or safety by telling the truth.

Preventative measures are necessary to protect against such outcomes. These measures may include:

- Closely examining the merits of a complaint prior to commencing an investigation. Connections between the complainant and the person(s) being complained about should be examined to uncover mischievous complaints or those designed to cause harm to another person.
- Running education campaigns with stakeholders and in particular police members about the need to maintain the privacy and confidentiality of a member if the person is in receipt of information concerning a compulsory examination.
- Providing support to civilian witnesses prior to an attendance so that any concerns or difficulties can be addressed. The witness seeking such support must feel confident enough to discuss threats or pressure received to give false evidence. Such matters must then be acted upon.
- Working with senior Victoria Police members to develop a system whereby members served with a summons can make confidential arrangements for their attendance at a hearing. Such a system must limit the number of persons to whom such information can be revealed thereby making it easier to maintain the confidentiality of the attendance and also quicker to track any breaches.

These matters have been raised with the DPI and his staff. The SIM has been informed that they are being addressed with the establishment of appropriate procedures and systems. The SIM will monitor developments in this important area and is confident that the DPI will appropriately act upon the matters raised.

The potential for a witness to incriminate him/herself by providing information, producing a document or thing or giving evidence does not necessarily constitute a reasonable excuse under section 86PA of the Police Regulation Act. The risk of incriminating oneself is insufficient reason for failing to produce a document or thing or give evidence if the DPI or his delegate certifies in writing that in his opinion such provision or the giving of such evidence is necessary in the public interest.

However, a witness objecting to production or the giving of evidence on the ground that the information, document, thing or evidence may tend to incriminate can apply for a certificate from the DPI or his delegate. This section does not apply to examinations conducted under section 86Q. The provisions relating to interviews involving section 86Q are discussed below.

A witness must be given a copy of the certificate prior to producing information, a document or thing and prior to giving any evidence.

A certificate issued to a witness provides a statutory immunity against the use of such material or evidence in any civil or criminal court proceedings against the witness. The material or evidence is not admissible in evidence against the person before any court or person acting judicially.

The immunity does not apply in the following circumstances:²⁴

- perjury or giving false information; or
- a breach of discipline under section 69; or
- failure to comply with a direction under section 86Q; or
- an offence against section 19 of the *Evidence Act 1958*²⁵; or
- a contempt of the DPI under section 86KB.

23 Certificates Issued

A total²⁶ of 15 witnesses were compulsorily examined in the year the subject of this Report. Of these witnesses, 10 are or were members of the Victoria Police Force at the time of questioning. The remaining 5 persons are civilian witnesses.

²⁴ Section 86PA(8).

²⁵ Section 19 provides that non-attendance, refusing to give evidence is an offence.

²⁶ This total is exclusive of section 86Q examinations.

Overall 10 witnesses objected to giving evidence without a certificate. The delegates of the DPI considered the arguments advanced and granted 9 police witnesses and 2 civilian witnesses certificates during the year the subject of this Report.

All examinations were conducted by a delegate of the DPI. In nearly all cases counsel was engaged by the DPI to assist with examination of the witness.

24 Objections And Reasons For The Granting Of A Certificate

Whilst section 86PA(5B) states that the DPI is not required to give reasons for the granting of a certificate at the time that it is granted, he may take into account, amongst other things, whether:

- (a) the investigation involves the review of established policies, practices or procedures of the force; and
- (b) it is unlikely that the information, document, thing or evidence could be obtained by other means.

Although reasons for the granting of a certificate do not need to be provided to a witness, this is not the case when reporting to the SIM. Section 86ZD(2)(d) requires the DPI to include certain information in a report where a certificate has been issued. In particular, the DPI must inform the SIM of the reasons why the certificate was issued and the relevance of the evidence to the purpose of the investigation. Further information may also be required where other reporting matters are prescribed in the Regulations.²⁷

In all cases where a witness objected to production or the giving of evidence on the ground of self-incrimination a certificate was granted by the delegate of the DPI. All of these witnesses had a legal representative make the application on their behalf. It was determined by the delegate of the DPI considering these applications that the evidence to be received from the witnesses was necessary in the public interest.

In the majority of cases, certificates were granted because it was considered there were no other means of obtaining the information. This was usually the case where there were differing accounts given by witnesses of the same event or matters leading up to an event. Furthermore, where there is lack of documentary evidence to support one version of events over another the delegate of the DPI issued a certificate on the

basis that it would be a matter for the investigators to gauge the credibility, reliability and veracity of a witness' account from his/her evidence.

Certificates in the public interest were also granted in those investigations focusing upon practices, policies and procedures of the force. Such investigations relied on examinations to obtain evidence from a member's personal experience regarding the level of understanding, application and compliance with certain practices, policies and procedures in operation within the force at given times.

It was noted that in some of the earlier section 86ZD reports where certificates were granted the reasons for the grant were very brief. This was raised by the SIM with the DPI and more detailed reasons were requested. The DPI agreed and more detail is being provided in these reports.

25 The Use Of Derivative Information

Whilst a certificate may protect a witness against the direct use of evidence given, it does not extend the protection to cover the use of derived material by investigators.

The potential for this eventuality was raised by counsel attending with his client during an examination. Counsel was concerned that the transcript of the evidence given by the witness could seep out and be used to the detriment of the witness.

The position was discussed by counsel with the delegate of the DPI conducting the examination who acknowledged the matters raised and referred to protections that apply.

This issue also arose in an examination where a police witness objected to answering questions on the ground that the witness was the subject of an inquiry for which the witness had been interviewed but not charged. The witness stated that the witness was a person of suspicion and the witness' answers may re-enliven the investigation.

A certificate was granted to this witness in general terms because the delegate of the DPI accepted the objections given by the witness. However, the statutory immunity applies only to the direct evidence given by a witness and does not cover the derivative use of such information.

²⁷ Police (Amendment) Regulations 2005 (Vic) regulation 4.

A concomitant consideration is the derivative use of material, be it documentary or testimonial, by the witness or his/her legal representatives for their own purposes. That situation can give rise to issues relating to confidentiality and fairness.

The SIM in monitoring, endeavours to be alert to issues such as these so that they can be brought to the attention of the DPI. Matters involving such issues referred to above have been brought to the attention of the DPI and his staff for their consideration in the context of the exercise of the coercive powers and the requirement of confidentiality. Their importance has been acknowledged by the DPI. The SIM will monitor action taken and further developments.

26 Legal Representation

Leave was granted on 11 occasions for a legal representative to attend an examination of a witness.

Section 86P(1)(c) of the Police Regulation Act gives the DPI the discretion to determine whether a witness can have a legal representative in attendance during the examination. The delegate of the DPI did not object to the presence of the legal representative during the examinations. The representatives were invited to raise any matters arising from the evidence at the conclusion of the examinations and the procedure followed at the examinations appeared to be appropriate.

26.1 Who was represented and who was not?

Legal Representation	Numbers
Police witnesses legally represented during examination	9
Police witnesses not legally represented during examination	1
Civilian witnesses legally represented during examination	2
Civilian witnesses not legally represented during examination	3

Civilian witnesses who were not legally represented at their examinations did not seek legal advice prior to attending their examination. The reason for this in some cases may be that civilian witnesses do not have access to legal assistance for these matters. The cost of obtaining legal advice and representation may be prohibitive for these people. In contrast, it appears that most police witnesses can access a lawyer through the Police Association. It is the SIM's

understanding that the legal costs incurred are usually paid by the Association.

The impact on a witness in such a situation may be considerable. Effects may include:

- Apprehension upon being served with a summons to give evidence. This is because the witness may assume that he/she will be attending a court hearing and will be cross-examined and exposed to risk and/or penalty.
- Fear of breaching confidentiality. The summons has a confidentiality notice attached to it which clearly states that if the witness discusses the summons with any person other than a legal advisor they may be prosecuted. A witness in this situation may feel concerned that he/she can not speak to anybody about their pending examination.
- Confusion about why the attendance is necessary. The witness often does not know about the existence of the investigation.
- Fear of prosecution. Some unrepresented witnesses examined were clearly not familiar with the existence of the OPI and its functions. They were fearful of giving answers that may incriminate them or another person. This fear is compounded by the fact that some of these examinations were held in closed courts and in settings analogous to a court hearing. Following discussion with the DPI, it was confirmed that the delegate of the DPI was satisfied, in this situation, that the witness was not at risk of prosecution arising from evidence given at the examination.
- The quality of the answers given by a witness may be compromised. A witness may tailor his/her evidence or may not be forthcoming about a matter if he/she feels at risk by attending the examination.

Legal assistance for such witnesses has been discussed with the DPI and his staff. It was suggested by the SIM that OPI bring to the attention of Victoria Legal Aid ("VLA") the process whereby civilian witnesses may be compelled to attend before the Director and may require legal assistance. Further reference is made to this matter later in the Report. The DPI agreed that OPI would contact VLA with a view to setting up a protocol for certain witnesses and possibly a contact person at VLA who will be able to provide assistance. The SIM will monitor progress with this matter. The pro bono witness advice service provided by the Victorian Bar for criminal trials is a good example of what can be done to assist witnesses.

Alternatively, the provision of legal assistance through some other means should be considered if it was not practicable to provide it through VLA.

27 Relevance Of The Questioning In The Examinations Overseen By The Special Investigations Monitor

The SIM is satisfied that in all examinations reported and reviewed in the year the subject of this Report, there was sufficient nexus between the questions asked of a witness and the subject matter of the investigation. As previously stated, in nearly all cases the questioning was carried out by counsel engaged to assist the delegate conducting the examination. On occasions it was senior counsel. It is not for the SIM to judge the forensic style or approach of counsel. However, in the SIM's view, none of the examinations were oppressive, fishing, improper or inappropriate. The interviews conducted pursuant to section 86Q are considered separately.

Further materials that were of assistance in making a determination as to the appropriateness of information, documents or things sought or the relevance of questioning were as follows:

- Transcripts of examinations
- Determinations

Objections to lines of questioning were raised in two matters. In both instances the delegate determined that there was sufficient connection between the questions asked or proposed to be asked and the subject matter of the investigation.

27.1 Examination 1

The witness objected through the witness' legal representative, to answering questions relating to the witness' relationship with an informer. It was argued that such a line of questioning was irrelevant to the subject matter of the investigation.

In this instance the legal representative making the objection applied a very narrow interpretation to the matters under consideration in the investigation. Furthermore, the way in which the objection was framed may have been appropriate in a judicial forum but not in the context of an inquiry. The questioning fell within the scope of the inquiry and in fact cast light on opportunity and motive on the part of the witness.

27.2 Examination 2

The witness in this examination made two objections. First, the witness objected to the questioning on the ground that the questions were beyond the scope of the subject matters set out in the summons. Second, and more importantly, the witness objected to the presence of members of the Victoria Police Ethical Standards Department during the examination.

On the issue of relevance, the delegate of the DPI was satisfied that the questions were relevant to the subject-matter of the investigation. In regard to the witness' second concern, the delegate confirmed the prohibition order in relation to all or any of the evidence derived from the hearing or part of it. The delegate of the DPI specifically mentioned to the police investigators present during the hearing that the prohibition extends to them. He further reminded the witness that the prohibition also applies to the witness but an exception was made for the witness' legal advisors.

As in examination 1 described above, the objections took a narrow view of the matters stated in the summons. The questioning was appropriate in the circumstances given the subject-matter.

The delegate of the DPI was satisfied prior to the commencement of questioning, that the presence of the police investigators was necessary. He therefore granted leave to these persons to remain for the duration of the hearing. It is important to note that the police members were seconded to OPI at the relevant time rather than being present in their capacity as employees of Victoria Police. The SIM has no criticism of the action taken by the delegate in the circumstances. However, the matter illustrates the difficulties that can arise and the balancing judgements that have to be made. The SIM will continue to monitor these situations.

Legislative prohibitions on the disclosure of evidence only go part of the way in preventing leaks. Vigilance in screening persons employed by OPI and persons requesting leave to be present during an examination is fundamental to the role of the DPI and his delegates. This imports a secondary safeguard to ensure that all persons present have a legitimate reason to be there and further eliminates any potential conflicts of interest. Section 86ZD reports are required to provide details of the persons present at an examination.

Whilst this is not a fail proof method, the SIM also monitors the conduct of a hearing. The SIM can do this by inquiring about the presence of persons at an examination where potential conflict or difficulty is possible or apparent. The SIM can then raise the matter with the DPI and make recommendations if it is considered that the presence of person(s) was inappropriate.

The timing of coercive examinations is monitored. The SIM will raise with the DPI any problems or unfairness that may result from the timing of an examination.

28 Complaints To The Special Investigations Monitor

Section 86ZE of the Police Regulation Act provides a mechanism by which a person, having attended the DPI in the course of an investigation, can make a complaint to the SIM.²⁸ However, sub-section (2) limits the subject matter of the complaint to a complaint that he or she was not afforded adequate opportunity to convey his/ her appreciation of the relevant facts to the DPI.

A person must make the complaint within 3 days after having been excused from attendance by the DPI or his delegate. The complaint can be made orally or in writing.

Every complaint received by the SIM does not need to be investigated. The SIM can refuse to investigate complaints that are trivial, frivolous, vexatious or not made in good faith.²⁹

The SIM did not receive any complaints in the year the subject of this Report.

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

Section 86ZD reports were also received for interviews conducted under section 86Q of the Act. A total of 7 reports were received relating to 3 investigations. The reports relate to 7 police members. Six were interviewed and 1 produced documents. Five of the interviews were

video-recorded and 1 audio-recorded because video facilities were not available. Transcripts were provided of 5 interviews. The production of the documents was not video-recorded.

An interview conducted under section 86Q is limited in its scope in that it can only relate to a complaint concerning a possible breach of discipline. A police member can be directed to furnish any relevant information, produce any document or answer any relevant question.

In all of the interviews reviewed by the SIM the police member asked for a direction before answering any questions. In the case where only the production of documents was involved a direction was given to produce the documents.

The DPI considers it a necessary part of his reporting obligations to provide reports where a direction is given to a member. The reason for this is that whilst the attendance by the member at the interview may be considered voluntary, any answers given or production of documents are under direction and could not therefore be categorised as voluntary. Section 86ZD requires a report to be provided where a summons has been issued, where a certificate has been issued or where the person attends the DPI voluntarily and is required to answer a question or produce a document.

The SIM is satisfied that the questioning at the interviews was relevant to the investigations concerned as was the production of documents. It was not inappropriate or improper.

30 The Utility Of Section 86Q To The Director, Police Integrity

Consideration has been given by the SIM to the need for section 86ZD reports in such situations when the member could be examined under the new powers. Specifically, this was considered in light of the power contained in section 86PA(4) where the DPI can compel production or evidence from a witness upon the granting of a certificate.

There is no doubt that section 86Q is an important investigative tool for the Chief Commissioner of Police in disciplinary matters. However, the ongoing usefulness of the section to investigators at the OPI was considered.

²⁸ The complaint can arise from an attendance to provide information, produce a document or thing or the giving of evidence.

²⁹ Police Regulation Act 1958 (Vic) section 86ZF.

Following discussions with the DPI and other senior staff members at the OPI, it is considered that section 86Q still serves a useful purpose for the DPI albeit in restricted situations.

Investigators utilising this section when investigating complaints find it useful in that it gives them flexibility and provides a useful tool where police members refuse to give voluntary interviews. The new powers pursuant to section 86PA act as a back-up if section 86Q is rendered ineffective due to a refusal by a police member to answer questions upon direction. In such a situation it is open to an investigator to issue a summons whereby the member is compelled to answer questions put to him/her during a hearing. However, there is a much greater sanction applicable under section 86PA than under section 86Q. This is regarded as a final measure as section 86Q fosters a co-operative approach to investigating disciplinary matters.

It is the view of the SIM that on the basis that an interview conducted under section 86Q is subject to the same monitoring as section 86PA, section 86Q is both appropriate and useful. Subject to the appropriate safeguards, the section should remain part of the legislative powers held by the DPI.

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

The SIM has met on a number of occasions with the DPI and his staff. Since her appointment, the Senior Legal Policy Officer of the SIM has also attended such meetings.

Matters arising from the performance of the SIM's monitoring role have been discussed. The DPI and his staff have fully and freely co-operated with the SIM and his staff and have responded positively and constructively to matters raised.

Matters discussed at such meetings include: the types of investigations being carried out by the DPI; the procedures followed; the provision of more detailed section 86ZD reports on the issue of public interest certificates; the development by OPI of guidelines; the status and progress of investigations the subject of reports.

In particular, the following is referred to:

- The DPI has agreed to a request that a copy of a determination or terms of reference relating to an investigation be provided to the SIM at the time of the issue of the first summons in the matter and if later amended a copy of the amended document. This assists the consideration of the reports received from the DPI.
- As requested, a generic section 86PA(4) certificate has been provided and the DPI has agreed to provide copies of certificates issued under section 86PA(4) which are not in the generic form.
- As requested, various generic forms of orders, such as the exclusion of the public from a hearing, have been provided by the DPI.
- A procedure with respect to the inspection of exhibits referred to at an examination has been agreed.
- As requested, the DPI has agreed to notify the SIM of the finalisation of matters the subject of section 86ZB and section 86ZD reports. It is agreed that this will include some information about the outcome and the value of the use of coercive powers in the investigation which will assist the SIM in evaluating the effectiveness and utility of such powers.
- As requested, the DPI has provided a copy of the Policy Statement in relation to hearings and examinations of summoned witnesses which was completed on 19 August 2005. This is a detailed and comprehensive document which will be carefully considered and any issues arising from it discussed with the DPI and his staff.
- Reference has already been made to the provision of legal assistance to certain witnesses. The SIM will continue to consult with the DPI about this matter.

32 Compliance With The Act

32.1 Section 86ZB Reports

Section 86ZB provides that the DPI must give a written report to the SIM within 3 days after the issue of a summons.

All section 86ZB reports received during the period under review were prepared and signed by the DPI within 3 days of the issue of the summons.

There were 5 such reports for November (the legislation came into effect on 16 November) and 1 for December. These could not be delivered within 3 days to the SIM as he was not appointed until 14 December 2004. They were held by the DPI for delivery when that could take place. The DPI complied as far as it was possible for him to do so.

Following appointment, the SIM discussed the position with the DPI. The SIM requested the DPI to retain completed reports until the SIM was in a position to receive them and securely store them. This could not occur until the VCAT office and safe were available. On 23 February 2005, the November (5), December (1), January (8) and February (1) reports were given to the SIM at VCAT and held there.

However, as the SIM does not act on a full time basis and consequently could not always be available to receive a report when it was first ready to be delivered by the DPI, the SIM requested that he be notified by telephone when a report was ready to be delivered and he would then attend VCAT as soon as practicable to personally receive it. This procedure was followed from 23 February 2005 until 20 June 2005 when staff and premises for the SIM were in place. Since then reports have been able to be delivered to the SIM through his staff when ready for delivery.

During the interim period some reports were delivered later than 3 days because it was not practicable to receive them within the 3 day period. However, there had been earlier notification as discussed and the DPI complied as far as it was possible for him to do so.

32.2 Section 86ZD Reports

Leaving aside for the moment section 86Q matters, all section 86ZD reports were prepared and signed by the DPI as soon as practicable after the person had been excused from attendance. The same circumstances applied to them as to the section 86ZB reports with respect to delivery to the SIM. Two reports were completed in December 2004 and were delivered on 23 February 2005. The remaining reports were received after earlier notification as soon as it was practicable for the SIM to receive them. The DPI complied as far as it was possible for him to do so.

The section 86ZD reports relating to section 86Q were prepared and signed by the DPI on 22 June 2005 and then delivered to the SIM. The interviews the subject of the reports took place between 2 May and 27 May 2005. There was some delay with the compilation of those reports but it is accepted that this was due to the fact that it was not initially realised they would

be caught by section 86ZD. Once this was realised the SIM was informed and agreed that it would be appropriate to deliver the reports together because of their connection. The SIM is satisfied that any failure to comply with section 86ZD was inadvertent. One interview could not be video-recorded because such facilities were not available where it took place. However, it was audio-recorded. The SIM considers this to be a satisfactory explanation.

Section 86ZL requires the DPI to provide assistance to the SIM. The DPI and his staff have given the SIM all the assistance that the SIM has requested or required.

The SIM has not exercised any powers of entry or access pursuant to section 86ZJ.

The SIM has not made any written requirement to answer questions or produce documents pursuant to section 86ZK.

In summary, the SIM is satisfied with the DPI's compliance with the Police Regulation Act during the period the subject of this Report.

33 Relevance

This matter has already been referred to at some length.

In brief, the SIM is satisfied that the questions asked of persons summoned, or, although not summoned, were interviewed pursuant to section 86Q, during the year the subject of this Report were relevant and appropriate to the purpose of the investigation in relation to which the questions were asked or the interview conducted.

Further, the SIM is satisfied that any requirements to produce documents or other things under a summons, or pursuant to section 86Q, during the year the subject of this Report were relevant and appropriate to the purpose of the investigation in relation to which the requests were made.

34 Comprehensiveness And Adequacy Of Reports

This matter has already been referred to. The amount of information provided in reports received varied, and as stated has been the subject of discussion with the DPI and his staff.

34.1 Section 86ZB Reports

The section 86ZB reports, with the additional information referred to, were sufficiently comprehensive and adequate to enable a proper assessment to be made of the requests made by the DPI for the production of documents concerning the relevance of the requests and their appropriateness in relation to the purpose of the investigation. The provision of a copy of the determination or terms of reference relating to the summons will be of further assistance to this assessment. As stated the DPI has agreed to this request.

34.2 Section 86ZD Reports

Section 86ZD reports were sufficiently adequate and comprehensive when considered in conjunction with the video-recording and in some cases the transcript, to assess the questioning of persons concerning its relevance and appropriateness in relation to the purpose of the investigation. The provision of determinations or terms of reference as requested will assist that assessment.

As already mentioned, in some reports there has been a lack of detail in the reasons as to public interest. Those reports could have been more comprehensive in that area and as previously mentioned the matter has been raised with the DPI and addressed. Although more detail could have been provided, having considered all the material received the SIM does not consider the decision by the delegate in those cases to be inappropriate in the circumstances.

35 Recommendations

No formal recommendations were made during the year the subject of this Report to the DPI pursuant to section 86ZH.

However, as already stated, all requests made to the DPI and his staff have been agreed to and acted upon accordingly. Information and documents requested have been provided where available.

To reiterate, there has been full co-operation from the DPI and his staff which has been appreciated by the SIM and his staff. Inevitably, both offices are feeling their way to some extent as this is a new investigative model. The objective is to ensure that the spirit of the legislation is carried out.

36 Legal Assistance

Reference is made to the comments in this Report regarding legal assistance to witnesses. Should Victoria Legal Aid require additional funding to provide such assistance it is recommended that it be provided. Alternatively, if it was not practicable to involve VLA, funding should be provided for legal assistance to be available through some other means.



David Jones
Special Investigations Monitor

30 September 2005
