Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan,

I am writing in relation to the *Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009* (**the Bill**). I make the following submissions on the Bill.

Unexplained Wealth
New South Wales is considering the introduction of unexplained wealth provisions to bolster the existing criminal assets confiscation regime. In doing so consideration will be given to providing adequate safeguards, judicial oversight and appropriate thresholds for triggering restraint and confiscation. Such consideration is necessary given that unexplained wealth provisions reverse the usual onus of proof and do not rely on a conviction for a criminal offence.

Without providing specific comment on the proposed unexplained wealth provisions in the Bill, I wish to draw the Committee's attention to the preliminary range of issues being considered by New South Wales in relation to unexplained wealth provisions:

- The risk that common law protections against the wrongful forfeiture of property are being removed, effectively removing the presumption of innocence and exposing legally acquired assets to Government appropriation without sufficient evidence that particular property is associated with criminal activity.
- The extent of judicial oversight of any unexplained wealth scheme, including an appropriate appeal mechanism.
- Potential impacts on innocent parties (such as family members) and whether a court has the discretion to exclude assets from forfeiture, either on its own initiative or following objection raised by an innocent party.
- The extent to which existing asset confiscation mechanisms can be used to confiscate assets derived from criminal activity and evidence that such mechanisms are ineffective.
- The difficulty in proving that past assets have been lawfully acquired. For instance, tax records are only required to be kept for five years. There may be few, if any people, with records beyond that.
- The risk of arbitrary application of unexplained wealth provisions given there does not need to be a criminal conviction or charge.
- An examination of the extent to which seeking unexplained wealth orders may interfere with existing criminal investigations.
- The extent to which any provisions impinge upon the right to silence and the privilege against self-incrimination.

Joint criminal enterprise

It is noted that the NSW Law Reform Commission is currently conducting a review of the common law of complicity in NSW, and its work is well advanced. It has also been agreed that the Model Criminal Law Officers Committee ('MCLOC') will await the findings of the Law Reform Commission's report before finalising its review of Chapter 2 of the Model Criminal Code. It may therefore be beneficial to await the findings of the Law Reform Commission and MCLOC before attempting to codify the principle of joint criminal enterprise.

Telecommunications

In recent months, the NSW Attorney General has sent two letters to the Commonwealth Attorney General requesting amendments to the *Telecommunications (Interception and Access) Act 1979* ('TIA Act'). They requested that offences of under s.93T of the *Crimes Act 1900* (NSW) and ss.26 and 26A of the *Crimes (Criminal Organisations Control) Act 2009* be included in the list of serious offences under s.5D of the TIA Act, and that the TIA Act be further amended to enable the use of telecommunications interception material in applications for the declaration of organisations and the making of control orders under Part 3 of the *Crimes (Criminal Organisations Control) Act 2009*.

Section 93T of the *Crimes Act 1900 (NSW)* makes it an offence to knowingly participate in a criminal gang, with a maximum penalty of five years imprisonment. Part 3 of the *Crimes (Criminal Organisations Control) Act 2009* allows an eligible judge of the Supreme Court of NSW to make a declaration in respect of a criminal organisation, and allows the court to make control orders in respect of members of that organisation. Sections 26 and 26A makes it an offence for controlled members to associate with each other, and for controlled members to recruit other persons to become a member of the organisation. These offences carry penalties of two to five years imprisonment.

The Bill contains a number of amendments to the TIA Act, which will broaden the scope for the use of telecommunications warrants in the investigation of organised crime. The effect of the proposed amendments will be that for the purposes of obtaining an interception warrant, all 'prescribed offences' that are committed in association with a 'criminal organisation' will automatically be treated as 'serious offences' under s.5D of the Act. There are two problems with the approach adopted in the bill.

First, the expanded telecommunications interception powers hinge on the existence of a 'criminal organisation'. 'Criminal organisation' is defined in the Bill by reference to declarations in respect of organisations under state and territory legislation, such as under Part 3 of the *Crimes (Criminal Organisations Control) Act 2009*. The effect of this is that the proposed, widened, scope for the use of interception warrants is limited to those organisations that have already been declared, and offers no assistance in investigations against organised criminal activity where a declaration has yet to be made against the organisation in question. Further, under the proposed model, interception warrants could not be obtained for the investigation of all the offences referred to in the NSW Attorney General's earlier correspondence even where a declaration was in place. The offence of knowingly participating in a criminal group, and the recruitment offence would both qualify as 'prescribed offences', as they carry maximum penalties in excess of three years imprisonment. However, the offence of associating with another controlled member carries only two years imprisonment for a first offence.

Secondly, the TIA Act recognises the right to privacy by imposing a blanket prohibition on interceptions, with some exceptions, such as when an interception occurs under a warrant. The 'serious offence' provisions exist in order to protect the right to privacy while balancing it against the utility of intercepted material in investigating crimes. The proposed amendments, which treat all 'prescribed offences' associated with criminal organisations as 'serious offences', skews this balance further away from the interests of privacy than requested, but despite this, fails to meet the needs identified by NSW.

While the inclusion of s.93T offences, association offences, and recruitment offences in the definition of 'serious offence' as previously requested would also have involved some

weakening of the threshold, the inclusion of these discrete offences would have represented a lesser imposition on the right to privacy than the proposed amendments. The approach adopted by the bill provides extremely broad telecommunications intercept powers against a very narrow category of people. The amendments requested by NSW would have involved more moderate powers, with greater utility in combating criminal gangs, not just declared organisations.

Yours faithfully

Laurie Glanfield
Director General