House of Representatives Standing Committee on
Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
By email: spla.reps@aph.gov.au

19 April 2013

Dear sirs

Re: Comments on '*Public Interest Disclosure Bill 2013* (Cth) (Government Bill)

Thank you for the opportunity to provide comments on the Government Bill. We note that we have previously provided a submission dated 17 December 2012 in respect of the '*Public Interest Disclosure (Whistleblower Protection) Bill 2012* (**Wilkie Bill**) and this submission is made in furtherance of these comments.

Blueprint for Free Speech (**Blueprint**) is an Australian based, internationally focused not-for-profit concentrating on research into 'freedoms' law. Our areas of research include public interest disclosure (whistleblowing), defamation, censorship, right to publish, shield laws, media law, Internet freedom (net neutrality), intellectual property and freedom of information. We have significant expertise in whistleblowing legislation around the world, with a database of analyses of more than 20 countries' whistleblowing laws, protections and gaps.

1 Legislative History

Until Andrew Wilkie MP introduced the Wilkie Bill in November 2012, protection afforded to whistleblowers in the Commonwealth public sector was contained in section 16 of the *Public Service Act 1999* (Cth). This protection is completely out of step with the recommendations of the Report of the Inquiry into Whistleblowing Protection within the Australian Government Public Sector (**Dreyfus Committee / Dreyfus Report**), progress made in various states and territories around Australia and international best practice.

Concurrently, the current Federal Government was preparing the Government Bill released a draft copy in March 2013. Whilst Blueprint for Free Speech (**Blueprint**) wholeheartedly encourages the current government to increase protections for whistleblowers, we have some serious reservations about the Government Bill as presently drafted on the basis that it is out of step with the recommendations of the Dreyfus Report and progress made in Australian state legislation to date. We detail these reservations and consequent recommendations below.

2 Disclosure to third parties

As we stated in our previous submission to this committee:

"Blueprint considers it paramount to the effective operation of public interest disclosure legislation that a whistleblower has the option to disclose wrongdoing in the public interest to third parties and the media if it is inappropriate to do so through internal channels."

It is a reality of public interest disclosure that there will be certain circumstances where it will not be appropriate to disclose through internal channels. As is currently drafted, the Government Bill allows only for disclosure to third parties where a disclosure is 'not adequately dealt with by the recipient' or in circumstances where there exists an 'imminent danger to public health and safety'.

Clause 26(2) sets out the circumstances in which it is appropriate to make an 'external disclosure'. There are several issues with the substance and drafting of this provision.

(a) Subjective test for external whistleblowing needed

The current test set out in Clauses 37 – 39 of the Government Bill establish an objective standard for a discloser when determining whether or not the investigation into the wrongdoing they exposed was handled properly before they choose to take their disclosure externally. Recommendation 21 of the Dreyfus Committee Report indicated that this test should instead be a subjective test. In other words, that the discloser has a 'reasonable belief that the response was not adequate or appropriate'. It is important to frame this test subjectively because if the objective test is to be determined later by a court after the fact, it leaves the discloser in the precarious position of trying to work out the probability that their disclosure will fall into that category. Put simply, this will discourage a discloser from making the disclosure in the first place, even in situation where they hold a reasonable belief that the investigation is not being properly conducted. In any case research in this area shows that it remains the strong preference of a discloser to disclose internally at first instance[1]. This is demonstrated in many countries, but for example empirical research of employees in Norway suggests this to be at around 80%.[2] Correcting the problem area of the bill that is identified will not change this, however it will fix a fundamental problem with the Bill in that potential whistleblowers must believe they are standing on solid legal ground.

(b) Requirement for internal disclosure

The Government Bill requires that an internal disclosure be made as a prerequisite in any circumstance before an external disclosure is to be made. Whilst the Government Bill is correct in encouraging internal disclosure wherever possible, there will always be circumstances where internal disclosure is either not possible or inappropriate. For example, such circumstances might

[1] See, for example, Brown, AJ, Mazurski, E and Olsen J, (2008) "The incidence and significance of whistleblowing', in 'Whistleblowing in the Australian Public Sector - Enhancing the theory and practice of internal witness management in public sector organisations', extracted from http://epress.anu.edu.au/anzsog/whistleblowing/pdf/whole_book.pdf

[2] Brita Bjørkelo , Ståle Einarsen , Morten Birkeland Nielsen & Stig Berge Matthiesen (2011): "Silence is golden? Characteristics and experiences of self- reported whistleblowers", European Journal of Work and Organizational Psychology, 20:2, 206-238 at 209

include where there is endemic corruption through the discloser's line management, where the person receiving the disclosure is involved in the wrongdoing, where time is a pressing factor, where the discloser believes internal disclosure will assist in a 'cover-up' of the wrongdoing or where the discloser fears imminent reprisal. In a practical sense, the history of corruption in Australia clearly shows instances where reporting internally can lead to risk of life or limb by reason of a disclosure, particularly in closed and sometimes secretive organisations such as law enforcement agencies. This argument is to be compared and contrasted to the often-relied-upon argument by the law enforcement community that the release of its information can put the safety of others in jeopardy. It is not intended that the law enforcement community's argument be diminished, but rather illustrate that sometimes the requirement to disclose internally may equally pose a risk to the health and safety of the discloser.

Moreover, the Bill requires that the internal disclosure must be made to an authorised disclosure officer, which in most cases will not be the discloser's direct line manager. This creates a situation where if a person raises concerns with their direct line manager and as a result of this the person faces reprisal against them, they will not be afforded the protections of this Bill.

The drafting in the ACT Act[3] more adequately deals with the realities of internal versus external disclosure and creates the right balance between the competing need for internal disclosure and serving circumstances where such a method is not appropriate. Clause 27(2) of the ACT Act, in addition to the allowance for external disclosure where internal disclosure fails under Clause 27(1) provides the following:

> *Clause 27(2) This Section also applies if a person honestly believes on reasonable grounds that:*
> *(a) the person has information that tends to show disclosable conduct; and*
> *(b) there is a significant risk of detrimental action or victimisation to the person or someone else if a disclosure is made to a person mentioned in section 15; and*
> *(c) it would be unreasonable in all the circumstances for the public official to make a disclosure to a person mentioned in section 15.*

Blueprint strongly supports this wording as better striking the balance that the Government intends to achieve in its external disclosure provisions.

Blueprint again relies on a paragraph from its submission dated 17 December 2012:

> *"Importantly, the legislation should be as clear as possible and empower a whistleblower acting in good faith to make a public interest disclosure in a manner to which they see fit. This means that if the whistleblower thinks it appropriate or necessary in whatever circumstances to disclose to a third party then they should be afforded the protections of the Bill. The current draft, whilst it should encourage internal disclosure in the first instance,*

[3] *Public Interest Disclosure Act 2012* (ACT)

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should create no practical barrier to a whistleblower seeking protections under the Bill where they believe it is necessary to disclose to a third party at first instance."

(c) Investigation adequately dealt with – meaning and timing

The drafting of the provisions concerning whether or not an investigation is adequately dealt with is confusing and creates a situation where a whistleblower cannot easily keep track of, and take any further necessary steps, in the event they believe their disclosure is not adequately dealt with either in substance or timing. The only requirement for the investigating authority is that a final report is provided to the disclosers. There are no requirements to provide continuous or progress reports or in any other manner update the discloser. The provisions are contained over four disparate clauses and it is difficult to appreciate when a disclosure is adequate, when time periods might lapse, how they might be extended and whether they apply at all.

Clause 31(1) of the Wilkie Bill effectively sets out in clear terms when it is appropriate to disclosure to third parties following a failure to investigate internally or a failure to communicate such investigation. Blueprint firmly supports such wording and stresses the importance of drafting legislation so that the whistleblower can appreciate their legal risk before embarking on the perilous path of public interest disclosure.

(d) Disclosure not contrary to public interest

To our knowledge, the test contained in sub-clause 26(2)(e) does not emanate from any public interest disclosure legislation in any country in world. It provides that an external disclosure can only be made where:

"The disclosure is not, on balance, contrary to the public interest."

This sub-clause effectively turns the 'public interest' test on its head and serves only to instill fear and confusion in a whistleblower. Effectively, it assumes a malicious intent on the part of the discloser and places the burden of proof on that person to establish that the information not only is in the public interest (which in itself should be an objective test and the burden on the whistleblower should only be that he or she honestly believe it to be the case, on reasonable grounds) but also requires that they prove (on the basis of this drafting, on their own knowledge of an objective balancing act) that the information is not *contrary* to the public interest as well.

(e) Recommendation: Sub-clause 26(2)(e) should be deleted. Information consisting of, or including intelligence information.

Clause 26(2)(h) and Clause 41 effectively prohibits external disclosure of information that consists of, or includes, intelligence information. Whilst it is appropriate to maintain a high level of secrecy around some information pertaining especially to national security, it is too far to say that it should automatically render any protections to whistleblowers invalid by reason of a disclosure to a third

party. This is further expanded below in commentary regarding the 'carve outs' to intelligence information and intelligence agencies.

Recommendation: Blueprint recommends that the Government Bill delete all provisions concerned with external disclosure and replace each of them with the equivalent provisions in the Wilkie Bill. This will strike a fairer balance for whistleblowers and strengthen the intention of the Government Bill to protect whistleblowers and encourage transparency.

3 Inappropriate exclusion of politicians and policy matters

The Government Bill per Clause 31 excludes information as disclosable conduct if it relates only to (a) a policy proposed by the government, (b) action that has been taken, is being, or is proposed to be taken by a Minister, Speaker of the House of Representatives or President of the Senate or (c) relates to expenditure taken or proposed to be taken in relation to such policy if the person disagrees with it.

The intention of this paragraph is summarised in the explanatory memorandum (**EM**) accompanying the Government Bill at page 17 as follows:

> *"The scheme is intended to provide a framework for identifying and addressing wrongdoing in the Commonwealth public sector. It is not the scheme's purpose to investigate or review government policy decisions."*

Whilst Blueprint agrees in principle with the intention of this paragraph, it adds nothing to the rights and protections of public interest disclosure and has potentially damaging consequences. The EM rightly precludes abuse of this Government Bill to criticise legitimate public policy. However, the question that should be asked is whether or not the omission of this section would have any impact on the potential for a claimant under the Bill to bring an action to criticise government policy. As a public interest disclosure under this Bill, and rightly under any sensible public interest disclosure bill requires that any disclosure be made *in the public interest*, this test should preclude in and of itself any potential abuse this Clause 31 is attempting to cure. It is a superfluous addition to an otherwise functioning regime.

Worryingly, this Clause is potentially susceptible to being used in its inverse manner by the government or government departments to classify information as 'public policy' that should otherwise be exposed and thus attract the exception in this Bill. It is an unnecessary provision and is prone to abuse.

Considering that publicly elected officials are in charge of the 'purse strings' and may simultaneously be involved in the administration of the policy otherwise excluded by the Bill, it is imperative that the Bill catches this class of persons and a person who comes forward to expose wrongdoing by such class is afforded protection. Further, it offends the Australian notion of fairness whereby all are to be treated equally under the law. This should apply equally to ministers, ordinary members of parliament and public servants alike.

Recommendation: Clause 31 should be deleted in its entirety.

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4 Civil remedies – removal of compensation caps and costs protections under the *Fair Work Act 2009* (Cth)

Blueprint re-affirms the position taken in its submission dated 17 December 2012 in relation to the importance of the removal of compensation caps from this Government Bill. For the sake of convenience, the relevant paragraphs have been extracted here. Importantly, this Government Bill must be very clear about two matters –

(a) a discloser who brings an action under this Government Bill should not have capped any compensation to which they are otherwise entitled; and

(b) a discloser should have available to them the costs protections of section 570 of the *Fair Work Act 2009* (Cth) (**FWA**), whereby they are not forced to pay the Respondent's costs.

The extract from the 17 December 2012 submission as follows:

> *"A whistleblower may take on serious risk to their financial position, reputation and personal safety when disclosing wrongdoing in the public interest. After making a disclosure, a whistleblower may be subject to reprisal from their employer, fellow employees or another person as a result of that disclosure. Accordingly, it is appropriate to have not simply protective measures for that whistleblower, but also to allow for effective compensatory remedies to return them to a position they would otherwise have been in but for the making of the disclosure and any resulting reprisal taken against them.*
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> *The PID Bill and the CA Bill allow a whistleblower, who has been unfairly dismissed or has had detrimental action taken against them, access to the compensation provisions triggered by Part 3-1 (Adverse Action) and Part 3-2 (Unfair Dismissal) of the FWA. By amending the definition of workplace law in the FWA, a whistleblower has standing in Fair Work Australia, the Federal Court or the Federal Magistrates' Court to seek effective and uncapped compensation. This is congruent with the Dreyfus Report's recommendations and essentially mirrors the largely successful system in the United Kingdom under the Employment Rights Act 1996 (UK).*
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> *Additionally, the ability to seek compensation under the FWA provisions has two important cost implications for a whistleblower. Firstly, it allows a whistleblower to bring an action in Fair Work Australia, which is a less formal forum with fewer evidentiary rules and other administrative processes for a whistleblower applicant. Consequently, it creates a much less expensive method for an applicant whistleblower to assert their rights. Second, if a whistleblower brings an action under the FWA provisions, section 570 of the FWA applies, meaning that a whistleblower will only have to pay the respondent's costs (irrespective of the success of their action) in very limited circumstances. This of course means that there is less risk for a whistleblower seeking to enforce their civil rights and protections.*
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> *Public interest disclosure should be underpinned by an acknowledgement that it is often very difficult and risky for a whistleblower to come forward and expose wrongdoing.*

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Effective compensation and favourable costs provisions only seek to encourage the exposure of wrongdoing by making the path to such disclosure easier for a whistleblower."

Recommendation: The consequential amendments to this Bill, in which the definition of '*workplace law*' in the FWA should be amended to include this Bill, should also account for the above protections. This will ensure that the Bill is in line with best practice worldwide and provide adequate and appropriate compensation for disclosers.

5 Civil remedies – introduction of *qui tam* remedy and creation of a self-sustaining legal aid fund – the '*PID Fund*'

One of the major issues for a whistleblower in enforcing their rights and protections under a public interest disclosure bill is the cost of bringing proceedings to recover compensation or defend themselves against reprisal or an action founded on the basis that they should not have made the disclosure in the first place.

A further method for protecting such disclosers is the creation of a legal aid type fund to support whistleblowers through an expensive court process. **Such a model could be self-funded**.

In the US, there have existed for many years across several pieces of legislation (most prominently, the *False Claims Act*), which establish *qui tam* remedies encouraging whistleblowers to come forward and expose wrongdoing. In the process they are rewarded with a percentage (up to 30%) of the money saved due to the exposure of the corruption.

Similar concepts could be used for the creation of a self-sustaining fund to support future whistleblower protection litigation. For example, for each case where a whistleblower exposes corruption, a percentage of the money recovered as a result of exposing the corruption (to borrow from best practice this percentage would be fixed at 30%) could be returned to an independent fund separate from regular legal aid funding and used solely for the purpose of funding whistleblowers' cases where they are enforcing their rights in litigious disputes. This would be done in the public interest as funded cases would have a larger question of law or protection or wrongdoing at their heart.

This idea could support whistleblowers, create a net-zero cost for the government and further avoids any criticism that whistleblowers become bounty hunters as has sometimes been the case in the US.

Recommendation: the committee should consider the applicability of *qui tam* remedies in the Australian context and how they might be used to create a self-sustaining legal aid fund for important whistleblower cases in the broader public interest. In determining what might be classified as an 'important' case, regard among other factors should be given to:

(a) the number of people potentially affected by the wrongdoing; or
(b) the amount of financial damage caused by the wrongdoing; or

(c) the seriousness of the potential impact to the health or safety of the general public.

6 Mechanics of disclosure too complicated and have little regard for discloser

There are several further issues with the Bill which may conveniently be grouped as 'mechanics' that make a disclosure more complicated than is necessary for the discloser. These are detailed as following:

(a) Disclosure Officers

An internal disclosure may only be made to 'disclosure officers' (Clause 36), which means that the most common method of disclosing information (through one's line manager) is not allowed unless that person happens to be a disclosure officer. It creates an absurd anomaly whereby a discloser is potentially left unprotected if the person to whom they reveal the wrongdoing is not a 'disclosure officer'.

Recommendation: The definition of 'disclosure officer' should be amended as follows:

Disclosure officer means -

(a) a nominated disclosure officer; or
(b) a person that the discloser honestly believes on reasonable grounds is appropriate to handle the disclosure; or
(c) a person who may be able to act on the wrongdoing in the organisation, including someone who may be able to take the contents of the disclosure to a higher official.

(b) Progress reporting

The Bill only contains minimal progress reporting of the investigations into wrongdoing and this undermines a discloser's autonomy over their disclosure, potentially making them feel as though they are 'left out in the cold'. There is no ongoing obligation to update the discloser as to the progress of the investigation or the rectification of wrongdoing. The only obligation is to provide a report at the conclusion of the investigation. Apart from this being plainly disrespectful, it also makes managing the internal / external disclosure decision for a discloser very difficult and dangerous.

Recommendation: Further progress reporting should be built into the Bill so that the discloser is better informed of the status of their disclosure. We recommend an initial progress report (Stage 1 report) be provided (to the whistleblower, and possibly others) within 30 days of the disclosure and a further update be provided (Stage 2 report) within 60 days of the disclosure.

(c) Source protection

Source protection is not guaranteed for disclosers (see for example Clause 44(1)(d) where the identity of a discloser is to be revealed when a disclosure is allocated). This is very dangerous and creates a risk of reprisal against a discloser where they might otherwise have the preference to remain anonymous. This is also vastly out of step with international best practice. Consider, as only one example that in Sweden, Article 4 of Chapter 3 of its Freedom of the Press Act provides:

> *"No public authority or other public body may inquire into the identity of the author of material inserted, or intended for insertion, in printed matter, a person who has published, or who intends to publish, material in such matter, or a person who has communicated information…"*

Currently, there is a debate in Sweden about further increasing whistleblower and source protection. On 14 February 2013 it was decided at a government Cabinet meeting to appoint a special investigator (Per Virdesten, Justice of the Swedish Supreme Court) that will "review the existing protection for employees who blow the whistle about the various forms of abuse, misconduct or criminal behavior and propose measures to strengthen the protection and establish a clearer regulatory framework."[4]

Recommendation: A discloser's identity should only be revealed in circumstances where they have consented.

(d) Definition of public official

The temporal definition of 'public official' (Clause 69) precludes former public officials from making a disclosure. It is unclear whether this is the intention of the Bill (EM is silent on this) but the drafting defines a public official to be someone who is currently a 'public official'. Consider, for example, circumstances where a public official resigns as a result of reprisal and then seeks to enforce their rights under the Bill, or where their conscience illuminates a year after they have left their position and then decide to reveal the wrongdoing? This definition needs to be rectified to remedy this. Compare this with the Wilkie Bill by its Clause 11, which provides that a public official is someone who "*is or has been*", removing the temporal requirement.

Recommendation: The definition of a 'public official' be amended to include someone who 'is or has been' a public official.

7 Politicians should be appropriate internal recipients of disclosures

Blueprint relies on the following paragraph from its submission dated 17 December 2012 and makes the following recommendation in respect of classifying parliamentarians as appropriate internal recipients of disclosures:

[4] For example, see Kommittédirektiv, Stärkt skydd för arbetstagare som slår larm, dir. 2013:16. Retrieved at: http://www.regeringen.se/content/1/c6/20/92/42/967aef41.pdf.

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> "Second, the…(Government) Bill does not expressly allow for disclosure to members of parliament. Parliamentarians have historically been an important recipient for public interest disclosures and this should be reflected in the Bill. As Bronwyn Bishop MP noted in the first public hearing for the Bill[5]:
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> *"I do not think enough is made of the power of a member of parliament to represent and get justice for individuals. It is hugely powerful. Without disclosing a current case that I am dealing with, there is a real need for a remedy for a particular constituent that I have. As (a) member of parliament, I get access to people that an ordinary person cannot, and I really can put the case strongly and really can get outcomes. Far from trying to paint members of parliament, as is popularly done, as pariahs in some way, I think that the ability of members of parliament to represent and get justice for their people and to use the sort of reach that we have needs to be more broadly known."*

A path to make a public interest disclosure to a member of parliament is easily created by amending clause 34 of the Bill "to whom may a public interest disclosure be made?" Accordingly, Blueprint makes the following recommendation:

Recommendation: Clause 34 of the Government Bill is amended to include "a member of the Commonwealth House of Representatives or the Senate" under each item of the table therein and thus classified as an 'authorised internal recipient'.

8 Inappropriate exclusion of intelligence information / agencies

The Government Bill establishes a two-pronged system for internal disclosures – where the information relates to a regular public official in a regular public department, the channel is through the internal mechanisms of that department and then to the Commonwealth Ombudsman. Where the information relates to an intelligence agency and the public official works within that agency, the internal channels apply through the relevant department and then to the Inspector General of Intelligence and Security.

Section 33 excludes from external disclosure 'intelligence conduct'. This is problematic because although the conduct might constitute wrongdoing within the meaning of the Bill, it may be lawful or otherwise authorized. Not only should wrongdoing be exposed, this disincentives a whistleblower to come forward.

Section 41 excludes 'intelligence information' in making external disclosures. Again, this is problematic because it has no connection to the need to expose wrongdoing. Any information that 'has originated with, or has been received from an intelligence agency' is precluded. There is no distinction made between information that would cause harm to the public or endanger national security and other information. It is far too broad. Again, it disincentives disclosure and prevents the exposure of wrongdoing.

[5] Transcript of Standing Committee on Social Policy and Legal Affairs - 30/11/2012 - Public Interest Disclosure (Whistleblower Protection) Bill 2012 Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012

Not only are external disclosures flatly prohibited for intelligence information, a disclosure to a lawyer (for the purpose of receiving advice in respect of the disclosure) is only permitted if the lawyer has the appropriate security clearance relative to the intelligence information.

The above system creates a very restrictive regime in which information that in any way relates to the conduct of an intelligence agency or to intelligence information may only be dealt with by that agency or interests associated with it. As described above, there are and will always be situations where it is not appropriate to disclose information through internal channels whether by reason of a danger to the safety of the discloser themselves or an honest belief that the wrongdoing will not be cured by disclosing the information internally. Further, such exception only encourages the over-classification of material and information so as to attract the exclusion under this Bill.

This is essentially a battle of the public interest. Whilst Blueprint in no way wishes to diminish the importance of secrecy in certain situations and the need for confidentiality in intelligence information, there are certain circumstances in which the public interest is better served by the exposure of certain wrongdoing than the maintenance of secrecy. The tilt in this direction is more properly reflective of the free and open society that Australia both is and seeks to remain.

In any event, the making of such disclosure should not compromise the protection of the discloser. The Wilkie Bill addresses these concerns in a very sensible manner in its Clause 33. Importantly, it allows for the discloser to disclose intelligence information in rare but appropriate situations. In having regard to the sensitivity of the intelligence information the discloser must (per Clause 33(2)(b)):

> *"if the proposed disclosure includes such information, satisfy themselves, on reasonable grounds, that the public interest in disclosure of the particular disclosable conduct outweighs the public interest in protection of the particular sensitive defence, intelligence or law enforcement information."*

Further, comparison should again be made with the Wilkie Bill by its Clause 15, which creates the causal element of the information harming ongoing operations:

> *"Clause 15 - For the purposes of this Act, sensitive defence, intelligence or law enforcement information is information:*
>
> *…*
>
> *(c) where the disclosure of the information to that person, or any person, could:*
> *(i) adversely affect a person's safety (other than an enemy combatant); or*
> *(ii) jeopardise the proper planning, execution, conduct or future conduct of a lawful defence, intelligence or law enforcement activity or operation, in such a way as may adversely affect a person's safety, whether directly or indirectly, including the safety of the general public.*

This is a sensible solution that achieves a balance between maintaining the secrecy of information whilst still allowing for its release in appropriate circumstances and ensuring the protection of whistleblowers.

Recommendation: The exclusion to intelligence information in the Government Bill should be amended to include the appropriate balance achieved in Clauses 15 and 33 of the Wilkie Bill.

We hope that these suggestions are useful and we would be happy to discuss them further should the committee require.

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