11 March 2004

The Executive Director
The Australia Law Reform Commission
GPO Box 3708
Sydney NSW 2001

*By facsimile: 02 8238 6363*

Dear Sir/Madam

**Submission in response to Discussion Paper 67**
**"Protecting Classified and Security Sensitive Information"**

This submission is on behalf of the New South Wales Council for Civil Liberties. The Council remains very concerned about the use of secret evidence in any proceedings, the whole concept of secret evidence strikes at the basic principles of justice and a fair trial. (By secret evidence we mean evidence which is not only not disclosed to the public but is not disclosed to one of the parties and/or their legal representative.)

The Council is of the view that such secret evidence should never be used in criminal trials, where consequences of conviction could carry a term of imprisonment or other heavy penalty. Such evidence should only be used when absolutely necessary in civil and administrative cases.

The council is aware of secret evidence being used in Administrative Appeals Tribunal cases involving refusal of security clearances and refusal of passports. In both these cases the secret evidence that was heard by the tribunal was not provided in any form to the party who had been adversely affected by the security assessment. It was not even provided to their lawyer. In effect the evidence was presented to the Tribunal without being tested in any of the ways the evidence should be forensically tested before it should be accepted by any court of tribunal.

These scenarios illustrate the basic problem with secret evidence. Often some activity, which might by itself appear suspicious, can be shown to be completely innocent by the supplying of a reasonable and verified explanation. But such a reasonable and verified explanation can only be supplied if details of the allegation are supplied to the person adversely affected and/or legal representative. Anything less is a denial of the very basic tenets of justice.

We are also concerned with the classification of information that is already in the public domain being classified as security sensitive information. We understand in respect of one case, the evidence that was kept secret from the person

adversely affected and their legal representatives largely consisted of public information such as newspaper clipping and media reports. Often of course such reports contain errors or could be taken out of context. Only the person referred to in those reports would be in a position to give an explanation as to what was actually said and in what context and circumstances it was said. Also there seems to be no public interest in keeping secret information which is already in the public domain. The Council proposes therefore that there be a rule that information that is already in the public domain should never be classified.

Classification of security sensitive information should no longer be carried by the government or Attorney-General alone. The onus should be on the Government to prove to an independent body or tribunal that information to be used in proceedings should be kept classified. The present situation where the Attorney-General issues a certificate regarding certain information is entirely unsatisfactory. It effectively places the onus upon the person adversely affected to seek redress in the Federal Court or elsewhere whereas the onus should in fact be on the government to seek from an independent body that the information be classified.

The Council also believes an overriding principle in respect of all legislation in this area should be a defence of public interest. Legislation should be carefully drafted to ensure that “whistle-blowers” are protected, this is an essential feature of democracy and should be recognised in any legislation.

Appeals from adverse security clearances are usually heard by the Administrative Appeals Tribunal which is bound by a certificate of theAttorney-General in respect of secret evidence. The Council is of the view that the Tribunal and all tribunals and courts should be given a discretion to allow the party adversely affected and/or legal representative to use such information on the hearing of the matter.

The Council is also concerned that any proposal to vet lawyers for security clearances strikes at the right of parties to choose their lawyer. The vetting procedures are suspected to discriminate against persons on various grounds including religious and ethnic background and sexual orientation. The legal professional bodies enforce strict codes against their members and this is the best approach to prevent a lawyer breaching any order or undertaking to limit release of information.

The Council would be happy to expand upon the above points if required in further oral or written submissions for the Commission.

Yours faithfully
David Bernie
Vice President
New South Wales Council for Civil Liberties