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New South Wales Council for Civil Liberties

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The Executive Director
Australian Law Reform Commission
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Dear Dr. Kirkland,

The New South Wales Council for Civil Liberties wishes to thank the Commission for its invitation to make a submission to its inquiry into legal professional privilege. We wish to comment only on one matter: the implications of changing the definition of 'legal professional privilege'.

I apologise for the fact that this submission is two days late.

Yours sincerely,

Martin Bibby
Convenor, Civil Rights Subcommittee

**Client legal privilege and freedom of information**

The NSW Council for Civil Liberties wishes to alert the Commission to the potential for unexpected and unforeseen consequences for Freedom of Information legislation, in the event that the definition of 'legal professional privilege' is changed.

Section 42 of the *Freedom of Information Act 1982* (Cth) ('the FOI Act') provides an exemption for material that 'would be privileged from production in legal proceedings on the grounds of legal professional privilege'. Legal professional privilege is not defined in the FOI Act and so the common law definition applies.[1]

This means that in 1982, when the FOI Act was enacted, the sole purpose test of *Grant v Downs*[2] applied to section 42.

However in 1999, when the High Court effectively adopted into common law the definition of the *Evidence Act 1995* (Cth),[3] the *dominant* purpose test began to apply to section 42.

[1] *Cth v Dutton* (2000) 102 FCR 168, 169.
[2] *Grant v Downs* (1976) 135 CLR 674.
[3] *Esso v Commissioner of Taxation* (1999) 201 CLR 49.

The unforeseen consequence of this change was that more and more government documents became exempt under the FOI Act. CCL regularly encounters section 42 exemptions in its FOI applications to federal government departments and agencies.

CCL asks that the Commission, when recommending changes to legal professional privilege, be mindful of any consequences to FOI legislation. While a statutory change, to the Evidence Act for example, might not immediately affect the FOI Act, the High Court might again adopt into common law any new statutory definition.

CCL has long been concerned that section 42 of the FOI Act has been misinterpreted to exempt non-litigious legal advice to government. According to the report of the 1979 Senate freedom of information inquiry, this exemption was only meant to apply to material prepared for pending or future litigation.[4]

This over-broad interpretation of section 42, when combined with the dominant purpose definition of legal professional privilege, means that it is next to impossible for citizens to FOI non-litigious advice provided to government on matters as innocent as Australia's international obligations under human rights treaties. An even broader definition of legal professional privilege could reduce the public's access to government information even further.

Michael Walton, Committee member
NSW Council for Civil Liberties
May 28, 2007

[4] Senate Standing Committee on Legal and Constitutional Affairs, *Freedom of Information* (1979), [23.8]-[23.9], <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/pre1996/freedom/>: recommending a redraft exempting documents for 'impeding or liely legal proceedings in which Commonwealth or any agency is or may be a party'.