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The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Executive Director

Submission to the ALRC Issues paper, *Copyright and the Digital Economy*, August 2012

The Parliamentary Library welcomes the opportunity to provide a submission to the Australian Law Reform Commission's Issues Paper, *Copyright and the Digital Economy*, August 2012 ('ALRC Issues Paper').

Role of the Parliamentary Library

The Parliamentary Library (or 'Library'), within the Department of Parliamentary Services, is established under the statutory office of the Parliamentary Librarian. The Parliamentary Librarian's key function is to provide high quality information, analysis and advice to Senators and Members of the House of Representatives in support of their parliamentary and representational roles.

The Parliamentary Library and the Copyright Act 1968

The importance of unimpeded access to information by parliaments and parliamentarians is recognised by the copyright infringement exceptions in place under sections 48A and 104A of the *Copyright Act 1968* (the Act). Without these exceptions, parliamentary libraries would be compromised in their capacity to respond to confidential, time critical requests, to provide access to critical information and to monitor developments in the print and electronic media.

Section 48A of the Act provides that:

the copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorized officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.

Section 104A of the Act provides an equivalent exception for subject matter other than works, such as sound recordings, films, television and radio broadcasts.

Further protection is provided by section 50 of the Act, which permits other libraries to supply (including in electronic form) parliamentary libraries with copies of published copyright works held by them, when the copies are supplied for the purpose of assisting members of a parliament in performing their duties as a member.

These exceptions are critical for the provision of affordable and timely services to parliament and parliamentarians. In practical terms they mean that parliamentary libraries are not required to keep extensive document copying records, seek signed declarations from clients, or seek permission from copyright owners prior to copying.

The Parliamentary Library welcomes this review of copyright and the digital economy, noting its own heavy reliance on digital materials. The Library's clients increasingly access Library services through digital media – between July 2006 and July 2012, the percentage of the Library's collection available in digital form increased from 15 per cent to 33 per cent. The Library also extensively archives selected digital material for the library and media datasets in ParInfo Search, the Parliament of Australia's in-house database, and access to this content is restricted.

As the demand by parliamentarians for access to information in digital form grows, these technological changes have also had a significant and increasing impact on the ability of the Parliamentary Librarian to perform her statutory duties (as facilitated by sections 48A and 104A of the Act). The rapid pace of technological developments has enabled rights holders to place restrictions on the Library's ability to copy works for inclusion in its databases. This, the Library submits, frustrates public policy as reflected in copyright legislation which until recently has facilitated unimpeded access to information for members of parliament. The Library believes that the copyright exceptions for parliamentary libraries should not be restricted to applying in the print environment. Consistent with the objectives of the digital agenda reforms of 2001, the exceptions to infringement must equally apply to the digital environment.

While the ALRC Issues Paper contains important questions of broader interest to the Library community as a whole, the Parliamentary Library's submission focuses only on the parliamentary library exceptions and how these are operating in the digital environment. Accordingly, the submission addresses questions 48, 54 and 55 in the Issues Paper.

Question 48

What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?

The Parliamentary Library submits that the operation of the parliamentary library copyright infringement exception in section 48A of the Act has become problematic in the digital environment. This is due in large part to the fact that the technological developments of the Internet and digital publishing were not envisaged in 1984 when the provision was first included in the Act. As a result, the provision no longer provides the level of exception that it provided in an essentially print environment.

More specifically, the parliamentary library exception in section 48A of the Act allows the Library, when providing a library service for members of parliament, to do anything with a 'work'— a work meaning a literary, dramatic, musical or artistic work within the meaning of the Act. In other words, the Library may copy, scan, store and communicate original printed material for the purpose of assisting members of parliament. This can all be done without gaining the permission of the copyright owner.

However, the difficulty with section 48A in a digital environment arises because the copyright infringement exception does not extend to dealings with *copies* of a work. As electronic journals and electronic newspapers are often *copies* of original works, it is generally considered that the exception may not apply when for example, the Library wishes to archive these electronic documents for inclusion in its in-house database.

The Library now accesses an increasing number of electronic journals and electronic newspapers (both via subscription and free web access) which contain restrictions on how they may be used. As these documents may not strictly be 'works' within the meaning of the Act, the Library must make individual requests to the relevant publisher for permission if it wishes to archive these e-documents in its database. This is time-consuming and costly. Despite giving an assurance that the particular e-journals will be made available only to members of parliament and their staff, these requests to copyright holders are often refused or only granted at significant cost to the Library. For example, quite recently a copyright owner quoted around \$200 for the Library to purchase the right to archive just one journal article which is currently freely accessible via the web. Another offered a monthly subscription fee of \$200 to archive a freely available web-based journal.

These problems are further complicated because of the legal uncertainty of how these parliamentary library statutory exceptions interact with contracts and agreements, a matter discussed in more detail below.

Based on the increased frequency with which this issue is arising, the Library considers it appropriate that section 48A of the Act be re-drafted to enable *copies* of 'works' to be included in the parliament library copyright infringement exception. This would ensure that the intention behind section 48A of the Act (that is, the facilitation of free access by parliamentarians to published information) is not compromised.

Questions 54 and 55

Question 54. Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?

Question 55. Should the Copyright Act 1968 (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?

These two questions are interrelated and therefore dealt with together in this submission.

For some years the Parliamentary Library has noted an increasing trend in the digital environment for contracts with publishers/copyright holders to limit or negate the parliamentary library copyright infringement exceptions. The Library has sought legal advice as to the validity of these contracts and been advised that the question of whether a provision in a contract may limit or exclude the operation of the parliamentary library exceptions in the Act is unclear. The advice concluded that because of this uncertainty, the best option is for the Library to negotiate with any service provider so that any contract specifically permits the Library to exercise its full rights as permitted under the Act. However, the Library submits that such negotiations are not always successful. Furthermore in the current environment of online mass-market agreements, such negotiations are often not practically possible.

The Parliamentary Library supports the Copyright Law Review Committee (CLRC) conclusion in its 2002 report, *Copyright and Contract*, that agreements/contracts are being used to exclude or limit copyright exceptions and that this practice undermines the copyright balance established by the Act. The Library also supports the CLRC recommendation that the parliamentary library exceptions (amongst others) be made mandatory.

It is the Library's experience that since the 2002 report, the problems identified by the CLRC relating to contracts and copyright exceptions have become more widespread. The Library believes that in an ever-increasing digital environment the parliamentary library copyright infringement exceptions are at risk of becoming redundant in their function of providing members of parliament with unimpeded access to quality information.

The Library therefore considers that the Act should be amended to prevent contracting out of the parliamentary library exceptions. In addition or alternatively, amendments should be made so that provisions in contracts which purport to override these exceptions should not be enforceable.

Principle 7: Reducing the complexity of copyright law

As a final comment, the Parliamentary Library notes that a guiding principle of the ALRC inquiry is aimed at making the Act simpler and more coherent. In this regard, the Library wishes to highlight that the three provisions dealing with parliamentary library exceptions (sections 48A, 104A and paragraph 50(1)(aa)) are spread across the Act without the assistance of interconnecting sign posts or notes.

To improve the coherence of these provisions, the Library supports a recommendation made in the CLRC report, *Simplification of the Copyright Act 1968 Part 1*, that sections 48A and 104A of the Act be amalgamated. The Library also points to section 50 of the Act dealing with inter-library loans, which is a long and complex provision and would benefit from being re-written according to a more modern drafting style and language. In relation to the Library's specific interest in this provision, consideration could be given to moving the paragraph dealing with inter-library copying for members of parliament (paragraph 50(1)(aa)) into a single parliamentary library exception provision or alternatively providing a link between the two provisions.

Yours sincerely



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