

31 July 2013

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

Dear Sir

Submission to the ALRC Discussion Paper, Copyright and the Digital Economy July 2013

The submission to the Australian Law Reform Commission discussion paper is made on behalf of the Association of Parliamentary Libraries of Australasia (APLA).

APLA is the representative association for Federal, State and Territory Parliamentary Libraries within Australia, New Zealand and Papua New Guinea. This submission is presented on behalf of all Australian Parliamentary Libraries. APLA as an organisation provides *support, encourages understanding of, and co-operation between, research and information services attached to National, State and Territory Legislatures and considers any matters affecting the common interests or operations of Parliamentary Libraries.*

Under the above mandate, APLA believes it is important to make a submission to the ALRC on the proposed changes to the *Copyright Act 1968*. The current position under ss 48A and 104A of the *Copyright Act 1968* is that Parliamentary Libraries have broad exemptions or exceptions to copyright infringement. Section 48A applies to the copying of 'works' and s 104A applies to copyright association to 'other than works', in particular sound recordings, cinematograph films, sound broadcasts or television broadcasts. Section 48A provides:

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.

These current exemptions apply immunity in broad terms, defined as 'by anything done' which would encompass printing, downloading, saving to disk, emailing and long-term electronic storage. Limitations apply as these exemptions can be exercised only 'by an authorized officer of a library' and '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'. Although it may appear to be wide-ranging immunity, it is in fact restricted to the immediate parliamentary context in which library officers assist members in the performance of their parliamentary duties. From this assertion, the financial implications arising from this immunity for copyright owners are very limited.

There is further immunity under s 50 of the *Copyright Act 1968*, which permits other libraries to supply (including by electronic means) Parliamentary Libraries with copies of published copyright works held by them when the copies are supplied for the purpose of assisting members of Parliament in performing their duties as members.

The rationale behind the exceptions granted to Parliamentary Libraries can be readily understood in terms of representative democracy across all Parliaments within Australia. The duties of members of Parliament require them to be informed so as to participate in the legislative process, to be able to inquire and question, and to provide assistance and support at the electorate and constituency level and to the wider public. It is imperative in a representative democracy that these duties be undertaken by parliamentarians in an informed manner and often on a confidential basis.

ALRC Discussion Paper

The ALRC Discussion Paper proposes to repeal these expressed immunities and exceptions as discussed above and, instead, introduce a broad, flexible exception which is to be based on 'fair use' to be determined on a case-by-case basis and by reference to the following non-exhaustive list of fairness factors in proposal 4-3:

- (a) the purpose and character of the use;
- (b) the nature of the copyright material used;
- (c) in a case where part only of the copyright material is used—the amount and substantiality of the part used, considered in relation to the whole of the copyright material; and
- (d) the effect of the use upon the potential market for, or value of, the copyright material.

Also, it is proposed that:

The fair use exception should contain a non-exhaustive list of illustrative uses or purposes of fair use. These may be thought of as examples of the broad types of uses that may be fair.

The discussion paper further notes:

The fact that a particular use falls into one of the categories of illustrative purposes does not necessarily mean that the use will be fair. Nor does this create a presumption that the use is fair.

The non-exhaustive list of illustrative purposes would include the following:

- (a) research or study;
- (b) criticism or review;
- (c) parody or satire;
- (d) reporting news;

- (e) non-consumptive;
- (f) private and domestic;
- (g) quotation;
- (h) education; and
- (i) public administration.

The repeal of the current specific exceptions for Parliamentary Libraries was discussed further as to the 'public administration' category of fair use. It is stated at paragraph 14.64, under the heading "Use for judicial proceedings and for members of Parliament", that:

The ALRC proposes that these specific exceptions should be repealed, in the expectation that such uses would generally fall within the proposed fair use exception. These uses have a purpose and character that is non-commercial, are necessary for activities that are central to the operation of democratic government, and are not likely to have an impact on the market for the material.

APLA supports the clarification of the current legislation, which is long and complex. However, it does not support repealing the current exemptions for Parliamentary Libraries. We would like to see the exemption expanded to include digitised works and copies.

The experience of providing information and research services to members of Parliament falls into two categories. The first is when information is required at very short notice. This information can be journal articles, media sources or a chapter/section from a 'work'. This information can be required for a parliamentary question, a speech or part of the legislative debate, and the information can be required immediately or within very tight timeframes! Under the current copyright law, Parliamentary Library staff are able to respond to these requests with the knowledge that they are not breaking copyright law due to the current exemptions. Using the proposed 'fair use' test, there would always be a doubt and the need to seek advice at a time when information is required as quickly as possible, with the lack of certainty becoming a major concern to Parliamentary Library staff.

The second area in which the current exemptions provide certainty is in the Parliamentary Library's role in monitoring the media and creating databases that collect relevant information to assist members to perform their parliamentary duties with the knowledge of what is happening within the press and the news of the day. Members are able to access library media databases to be able to respond to daily events, to be informed of electorate issues and to pre-empt issues within electorates by raising questions and being part of the parliamentary debate. Parliamentary Libraries are able to respond to confidential information requests within expected timelines under the current copyright exemptions.

The reasoning behind the current exemptions is still relevant today. Acknowledging that there are differing interests involved between creators and users of copyright, there is an overriding public interest that must be applied to Parliament and there is an imperative need to retain the exemptions. These exceptions have operated without controversy over many decades and have been guarded by Parliamentary Library officers as a privileged exception.

It is essential that Parliamentary Libraries have certainty and clarity in respect to copyright law for the ongoing delivery of services to members of Parliament. The necessity for Parliaments, as democratic institutions, and members of those Parliaments to have unimpeded access to information as is currently provided by the exceptions within the *Copyright Act 1968* is ongoing. The repeal of the current exception as proposed in the ALRC discussion paper is *strongly opposed* by APLA and is not supported.

Proposal 11-7 (ALRC Discussion Paper)

Provision of material in electronic format

APLA is concerned with proposal 11.7 for dealing with copyrighted materials in electronic formats as the requirements would be too onerous on Libraries and Archives and would be difficult to administer and enforce. A more appropriate approach would be to provide similar advice to users of copyrighted material on the need to comply with the *Copyright Act 1968*. This information can be displayed in appropriate places throughout the library to ensure that library users are aware of their copyright obligations.

Amendment of the existing exceptions in ss 48A and 104A

As stated above, APLA would like to see the existing exceptions in ss 48A and 104A extended to capture digital formats.

APLA proposes that the existing Parliamentary Libraries' exceptions be retained and extended to include the capture of digital formats. This could be achieved by retaining both ss 48A and 104A or combining them under one overarching exemption.

Responding to the pressures of their jobs Parliamentarians are demanding immediate access to information in full-text digital form. The existing exceptions should be extended to apply equally in the digital environment to information born digitally and in digital copy, as well as the print and audio-visual environments. This is essential for effective delivery of comprehensive information to support an informed democratic process.

The other issue which arises with the exception in section 48A is the difficulty in a digital environment as the copyright infringement exception does not extend to dealing 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.

Parliamentary Libraries are increasingly accessing an ever-growing number of electronic journals and electronic newspapers either via subscription or available free on the web. In doing so, this highlights the difficulties in determining how the restrictions 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. With the ongoing frequency at which this occurs, APLA considers that it would be appropriate for section 48A to be redrafted to extend the exception to enable ‘copies’ of ‘works’ to be included in the Parliamentary Library copyright infringement exemptions. 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.

Chapter 14 — Government Use (ALRC Discussion Paper)

The ALRC has used chapter 14, Government Use, to bundle parliamentary proceedings with administrative government into a general list of illustrative factors under the heading ‘public administration’ and has applied to it a very general ‘fair use’ exception to copyright infringement. The existing exceptions for both judicial proceedings and Parliamentary Libraries are not discussed in any significant detail before a recommendation to repeal the relevant sections of exemption for Parliamentary Libraries is proposed, as indicated above.

It appears that the ALRC seems to have adopted the position, with little supporting argument, for judicial proceedings and Parliamentary Libraries not to have a blanket exception from copyright infringement. No specific examples or arguments have been put forward as to how this exception has been abused in the past or is likely to be abused in the future; neither does the discussion paper consider the impact of introducing a broad ‘fair use’ exception for judicial proceedings, nor for Parliamentary Libraries, other than a general statement that the bulk of the activities in those two areas are generally non-commercial and would readily fall within the ‘fair use’ exception. The discussion paper, however, does make it quite clear that not all aspects of public administration would qualify as ‘fair use’, and envisages that these matters would need to be clarified by the courts.

It is APLA’s opinion that there are obvious risks in simply bundling judicial proceedings and Parliamentary Libraries in with the activities of executive

government in a general 'public administration' category. There are parts of the executive government which do have a commercial focus and which compete against private companies. Issues of copyright are more relevant for some government instrumentalities than others. Certain aspects of judicial proceedings attract absolute privilege, whilst certain aspects of the work of Parliamentary Libraries may attract parliamentary privilege or qualified privilege, and certain aspects of executive government may involve Crown immunity or executive privilege. The danger in bundling the three branches of government into a single 'public administration' illustrative factor is that the three distinct environments and sets of privileges may increase complexity and cause undue uncertainty when the inevitable series of cases of 'fair use' by public administration are decided.

Parliamentary privilege and its interplay with copyright law can vary significantly between Australian jurisdictions. The nature of parliamentary privilege in Australia as a body of law varies quite dramatically between jurisdictions, with the Commonwealth and some State Parliaments relying on an express definition of 'parliamentary privilege', whilst other State Parliaments, such as Western Australia, rely on a combination of statutory definition and common law definition of 'parliamentary privilege', and yet other Parliaments, such as New South Wales, rely for the most part on common law.

It may be that judicial proceedings and Parliamentary Libraries continue to be treated as distinct subsets within the 'public administration' exception, for the most part immune from copyright issues. However, there is also a real risk that, by including them in a category with government agencies that are more susceptible to copyright issues, the entire 'public administration' category will become more exposed, uncertain and reliant on a series of court determinations regarding the extent of 'fair use'.

The ALRC proposes to repeal the specific exceptions for Parliamentary Libraries from the *Copyright Act 1968*, but it is not clear what the replacement legislative provision will look like. It is assumed that perhaps the UK legislation will be used as a model. APLA is particularly concerned if the ALRC proposal is to follow the UK legislation whereby the express reference to Parliamentary Libraries copying material for members of Parliament is changed to a simple 'illustrative' reference to 'parliamentary proceedings' under the heading of 'public administration' within a fair use exception. 'Parliamentary proceedings' has a much narrower definition that is tied to specific activities conducted in the Chambers of the Houses of Parliament whilst they are in session and in parliamentary committee meetings and hearings. This narrow definition has its own issues of unclear boundaries and extent of application, but, most importantly, the various activities that fall within this narrow definition are already exempt from all copyright issues to a great degree by parliamentary privilege. It would therefore not make sense to limit the 'fair use'

exception to 'parliamentary proceedings' only. Parliamentary Libraries would arguably not be automatically covered by the definition of 'parliamentary proceedings'—a grey area that the UK House of Commons Library has operated under for some time. It is therefore important that if the fair use exception is adopted, the specific wording of 'copying by Parliamentary libraries for members of Parliament' remain, as this will continue to give some degree of protection to Parliamentary Library staff and to activities related to a member's constituency work, party political work or interactions with government agencies that would not normally attract the protection of parliamentary privilege.

APLA does not support this recommendation as the proposal has little justification and does not take into account the role of Parliamentary libraries in meeting the timely and complex needs of Members of Parliament in their roles as Parliamentarians.

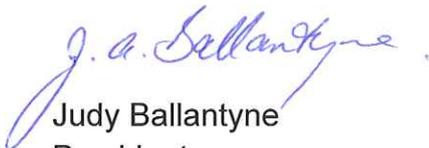
Proposal 17-1 (ALRC Discussion Paper)

Contracting Out

Previously this issue was raised by the Commonwealth Parliamentary Library in response to a submission made to the ALRC Issues Paper No 42. The Commonwealth Parliamentary Library raised concerns about the trend in the digital environment for private contracts to override the Parliamentary Library exceptions. It was argued that this trend compromises the intended function of the exceptions in providing members of Parliament with unimpeded access to quality information.

APLA supports the submission made by the CPL that the issue of proposal 17-1 be broadened to a much greater range of copyright exceptions to provide protection from contracting out. In particular, it requests that the *Copyright Act 1968* be amended to prevent contracting out of the Parliamentary Library exceptions. Although specifically excluded from the terms of reference for the ALRC's inquiry, APLA supports the point raised by the CPL that the increasing potential for technological protection mechanisms to impact on the utility of legislated exceptions should be considered properly in any future recommendations.

Kind regards



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Association of Parliamentary Libraries of Australasia

Thanks are given to all Parliamentary Libraries for providing support and input into APLA's submission.